

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

WALTER F. SMITH,

Plaintiff-Appellant,

vs.

WILL DURDEN, DENISE DURDEN,  
WILLIAM A. DeVRIES, and  
MARION DeVRIES,

Defendants-Appellees.

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
**FILED**

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*Jan M. Martin*

**Court of Appeals No. 28,896  
Bernalillo County No. CV 2006-  
03288**

**CIVIL APPEAL FROM THE  
BERNALILLO COUNTY DISTRICT COURT  
HONORABLE NAN G. NASH**

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**BRIEF-IN-CHIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii, iii

SUMMARY OF PROCEEDINGS ..... 1

ARGUMENT.....3

Standard for Review .....3

Introduction To Argument.....4

1. Republication.....5

2. Belief That The Statement Is True Is Not Required.....6

3. Actual Injury.....8

CONCLUSION.....9

## TABLE OF AUTHORITIES

### NEW MEXICO CASES

<i>C &amp; H Constr. &amp; Paving Co. v. Citizens Bank,</i> 93 N.M. 150, 597 P.2d 1190 (Ct.App.1979) .....	4
<i>Fikes v. Furst,</i> 2003-NMCA-006, 133 N.M. 146, 61 P.3d 855.....	6
<i>Fikes v. Furst,</i> 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545 .....	6, 7
<i>Goodman v. Brock,</i> 83 N.M. 789, 498 P.2d 676 (1972) .....	4
<i>Hyden v. The Law Firm of McCormick, Forbes, Caraway &amp; Tabor,</i> 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993) .....	4
<i>Koenig v. Perez,</i> 104 N.M. 664, 726 P.2d 341(1986) .....	3
<i>Marchiondo v. Brown,</i> 98 N.M. 394, 649 P.2d 462 (1982) .....	8
<i>Paca v. K-Mart Corp.,</i> 108 N.M. 479, 775 P.2d 245 (1989) .....	3
<i>Pharmaseal Lab., Inc. v. Goffe,</i> 90 N.M. 753, 568 P.2d 589 (1977).....	3
<i>Poorbaugh, v. Mullen,</i> 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982) .....	9
<i>Sam v. Estate of Sam,</i> 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761 .....	4

<i>Savinsky v. Bromley Group, Ltd.</i> , 106 N.M. 175, 740 P.2d 1159 (Ct.App.1987) .....	3, 4
<i>Self v. United Parcel Serv., Inc.</i> , 1998- NMSC-046, 126 N.M. 396, 970 P.2d 582 .....	4
<i>Wisehart v. Mountain States Tel. &amp; Tel. Co.</i> , 80 N.M. 251, 453 P.2d 771 (Ct.App.1969) .....	4

## FEDERAL CASES

<i>Garcia v. Aerotherm Corp.</i> , 1999 U.S. App. LEXIS 33395 (10 <sup>th</sup> Cir. 1999) .....	6
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) .....	8

## JURY INSTRUCTION

U.J.I. CIV 13-1010 .....	9
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## MISCELLANEOUS AUTHORITIES

Restatement (Second) of Torts Section § 578 .....	6
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## SUMMARY OF PROCEEDINGS

Plaintiff Father Walter Smith brought this action for defamation alleging that on January 23, 2005, the defendants published an April 8, 2004, defamatory letter about him. The letter contained statements which were false, defamatory, and understood to be defamatory by persons receiving the communication. The defendants knew that the letter contained false and defamatory allegations but nevertheless distributed the letter to an unknown number of congregants in Father Smith's church. RP 1-2.

The defendants circulated a packet of materials to an unknown number of members of an Episcopal church congregation where plaintiff was the church leader. RP 156- 158. The packet contained an anonymous letter that had been sent to Father Smith and members of Vestry the previous year alleging that plaintiff had impregnated a teenage member of the congregation and had sexual relations with a young boy. RP 197-198. The defendants, by circulating the packet, republished these defamatory claims.

The parties agree that the allegations made in the letter were false. RP 158. The Defendants argued, in support of summary judgment, that notwithstanding the outrageous nature of the allegations, there was no actual injury as a result of the Defendants' publication of the letter because: (1) no witness was produced to state

that they believed the letter; and (2) Father Smith published parts of the letter himself and therefore any republication was not defamation. Defendants also, in their argument, but not in their statement of facts, contended that any personal humiliation, mental anguish or suffering was caused by the letter not the Defendants' publication. RP 155-159; 163-164.

The Plaintiff responded to Defendants' Motion for Summary Judgment as follows: First, belief in the statement is not an element of defamation, rather the question is whether the recipient could consider the words to have defamatory meaning. In fact, in this case, at least one defendant conceded that Father Smith could have suffered distress and anxiety as a result of the letter being distributed to persons in the congregation. Indeed, Father Smith will be able to show, at trial, that he suffered humiliation and anxiety as a result of the Defendants' conduct. Second, with respect to republication, the Defendants published a statement that had not previously been disclosed to the congregation. Specifically, the Defendants published the allegation, for the first time, that Father Smith had sexual relations with a young boy. And, defamation claims do arise from republication of defamatory material. Finally, the Defendants' statement of facts supporting their motion for summary judgment did not address the contention that any humiliation,

anguish, or suffering was only as a result of the letter and not the distribution of it by the Defendants. RP 196-204; 155-159.

On July 15, 2008, the district court granted Defendants' Motion for Summary Judgment. RP 360. Plaintiff timely filed the notice of appeal on August 6, 2008. RP 386.

### ARGUMENT

**SUMMARY JUDGMENT FOR DEFENDANTS SHOULD BE REVERSED BECAUSE PROOF THAT THE ALLEGED DEFAMATION WAS BELIEVED TO BE TRUE IS NOT A REQUIRED ELEMENT. RATHER, DEFENDANTS' CONDUCT CAUSED FATHER SMITH ACTUAL INJURY INCLUDING HUMILIATION AND ANXIETY.**

#### Standard for Review

The principles guiding the determination of whether summary judgment has been properly granted are well settled in this state. Summary judgment is a drastic remedy to be used with great caution. *Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). It is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, *Paca v. K-Mart Corp.*, 108 N.M. 479, 480, 775 P.2d 245, 246 (1989); *Koenig v. Perez*, 104 N.M. 664, 665, 726 P.2d 341, 342 (1986), or when the material facts are not in dispute and the only question to be resolved is the legal effect of the facts. *Savinsky v. Bromley Group, Ltd.*, 106 N.M. 175, 176, 740 P.2d 1159, 1160 (Ct.App.1987).

Thus, whether summary judgment was proper depends upon the peculiar facts of each case. See *Goodman v. Brock*, 83 N.M. 789, 793, 498 P.2d 676, 680 (1972).

The party moving for summary judgment bears the burden of making a prima facie showing that no genuine issue of material fact exists. *Savinsky*, 106 N.M. at 176, 740 P.2d at 1160. Upon review, the court looks to the whole record and takes note of any evidence that puts a material fact in issue, and it views the matters presented in the light most favorable to support the right to trial on the issues. *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 156, 597 P.2d 1190, 1196 (Ct.App.1979).

The facts concerning this appeal are not in dispute. Therefore, this Court should review the grant or denial of Allstate's Motion for Summary Judgment *de novo*. *Self v. United Parcel Serv., Inc.*, 1998- NMSC-046, Para. 6, 126 N.M. 396, 970 P.2d 582, *Sam v. Estate of Sam*, 2006-NMSC-022, Para 9, 139 N.M. 474, 134 P.3d 761.

### ***Introduction To Argument***

With respect to Defendants' argument that the Plaintiff failed to establish that he suffered humiliation, anguish or suffering, the Defendants failed to list any undisputed fact concerning the lack of anguish or humiliation on the part of Father Smith or his family. RP 155-159. Indeed, if Defendants had wanted to raise the issue they could have listed as an undisputed fact: "The Plaintiff suffered no



anxiety or humiliation.” There is nothing like that in their twenty-four statements of undisputed facts. *Id.* Rather, Defendants’ Motion was directed to the assertion that there was no actual injury because: (1) Plaintiff could not identify an independent witness who believed the defamatory letter; and (2) Smith had earlier published a portion of the letter. RFP 163-164.

Thus, the issue before this Court is not whether Father Smith suffered anguish and/or humiliation. That fact could have been easily disputed with his affidavit and with affidavits of his family. The Defendants did not place that issue before the court. Rather, the issue is whether a defamation action can be maintained if, notwithstanding the anguish and humiliation suffered by the victim, no third party believed the letter.

Plaintiff submits that Defendants therefore made two arguments supporting their motion for summary judgment: (1) The letter had already been published by Plaintiff and, therefore, the republication by the Defendants was not defamation; and (2) there was no actual damage as a result of any publication because there was no evidence to show that someone believed the statements to be true.

***1. Republication.***

Father Smith was directed to announce to the congregation that the letter had been written and he summarized portions of the letter for the congregation. RP

197-198. However, the evidence revealed that the Defendants were the first to publish references to the untrue allegation that Father Walt had sexual relationships with a boy. RP 198. And, in any event, Restatement (Second) of Torts Section 578 states: “Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.” Comment b to Section 578 adds: “Each time that libelous matter is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability.” *See also Garcia v. Aerotherm Corp.*, 1999 U.S. App. LEXIS 33395 (10<sup>th</sup> Cir. 1999) (federal court determined that New Mexico courts would apply the rule as contained in the Restatement (Second) of Torts Section 578 regarding third party republication).

## ***2. Belief That The Statement Is True Is Not Required.***

Belief in an otherwise defamatory statement is not an element of defamation. Even if the recipients do not believe the defamatory statement, an action for defamation may still exist. *See Fikes v. Furst*, 2003-NMCA-006, Para. 21, 133 N.M. 146, 61 P.3d 855, *quoted with approval*, *Fikes v. Furst*, 2003-NMSC-033, 134 N.M. 602, 607, 81 P.3d 545, 550. Rather, the question is whether the recipient(s) *could* consider the words to have defamatory meaning. *Fikes v. Furst*, 134 N.M. at 608, 81 P.3d at 551.

In **Fikes**, the Defendants were able to argue that, given the academic audience, the words used to attack the Plaintiff were able to be “discount[ed]” by the context in which they were made. *Fikes v. Furst*, 134 N.M. at 608, 81 P.3d at 551. The Supreme Court explained: “[S]tatements that may appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting.” *Id.* No such argument can be made in this case of Father Smith.

Here, Father Smith, in detail and graphic language, was accused of very specific acts of pedophilia. There is no context in which such statements could be viewed as part of the regular discourse of the Church. Defendant William DeVries admits this in his deposition when he testified:

Q. . . . Is it part of your church belief and tenet that officials of the church should be accused openly of child molestation or sexual molestation?

A. No. If I understand your question correctly, no, we do not – no.

Q. There is nothing in the church’s canons, for example that you talk about where that’s a matter that should be openly raised in the church?

A. Not that I am familiar with.

...

Q. Do you take this letter, Exhibit Number 3, as an express of religious belief?

A. No, sir.

***Q. Do you read that letter, Exhibit 3, as calculated to damage the reputation of the priest?***

***A. Yes.***

***Q. Would you anticipate that a person who is the subject of that type of letter could have, as a result of it, could suffer distress, anxiety, and such?***

***A. From reading the letter?***

***Q. Right. Reading the letter and having it, you know, be distributed to people.***

***A. Yes.***

Emphasis added. RP 202. Not only does Mr. DeVries deny that disseminating the letter was a part of some church procedure but he confirms that the letter's contents are defamatory because: (1) the letter was calculated to damage the reputation of the priest; and (2) simply reading the letter could cause distress and anxiety.

### ***3. Actual Injury.***

Actual injury is required by the New Mexico Supreme Court's decision in *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). **Marchiondo** in turn relied on the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) which discussed actual injury in the following manner:

We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

94 S.Ct. at 3011-12. Thus, damage to reputation, personal humiliation and mental anguish are all consistent with actual injury.

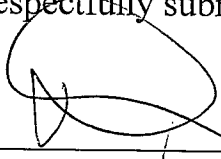
U.J.I. CIV 13-1010 makes clear that damage to reputation includes: Harm to the plaintiff's good name and character among his friends, neighbors and acquaintances, harm to the plaintiff's good standing in the community, personal humiliation, or mental anguish. These are all claims being made in this case. RP 1-2. In addition, Plaintiff is claiming punitive damages because the Defendants published the letter with knowledge of its falsity. *Id. See Poorbaugh, v. Mullen*, 99 N.M. 11, 653 P.2d 511 (Ct. App. 1982) (punitive damages are recoverable only if there is proof that the publication was made with actual malice (knowledge of falsity or reckless disregard of the truth)).

In this case, no matter how broad the context, accusing a religious leader of pedophilia, if false, is defamatory.

### CONCLUSION

Plaintiff-Appellant respectfully submits that the District Court's decision granting Defendants-Appellees' Motion for Summary Judgment should be reversed.

Respectfully submitted,



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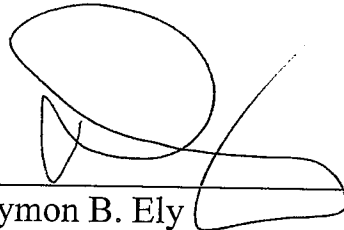
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**Certificate of Service**

It is hereby certified that I caused to be mailed a true and correct copy of the foregoing pleading to the following counsel of record on this 11<sup>th</sup> day of February, 2009:

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