IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HELENA CHEMICAL COMPANY,

Plaintiff,

v.

Court of Appeals No. 29,567
District Court CV-2009-3038

ARTURO URIBE, PAMELA URIBE, LINDA THOMAS, INDIVIDUALLY AND AS REPRESENTATIVE OF THOMAS & WAN, L.L.P., AND THOMAS & WAN, L.L.P.,

Defendants.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE JERALD A. VALENTINE, PRESIDING

ANSWER BRIEF OF APPELLEES LINDA THOMAS AND THOMAS & WAN, L.L.P.

Jack Brant
Law Office of Jack Brant, P.C.
202 Tulane Dr. SE
Albuquerque, New Mexico 87106

Counsel for Defendants-Appellees
Linda Thomas and Thomas & Wan, L.L.P.

TABLE OF CONTENTS **PAGES**

TABLE OF AUTHORITIES

STATUTES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

NM RULES OF EVIDENCE

TREATISES

I.
SUMMARY OF PROCEEDINGS

Not provided by Appellees per SCRA 12-213(B).

II.
STATEMENT OF FACTS

In addition to the facts set forth in Appellants Brief in Chief, Appellees Linda Thomas and Thomas & Wan, L.L.P. (hereinafter "Thomas") respectfully set forth the following additional facts.

Plaintiff (hereinafter "Helena") is a chemical company operating a plant in Mesquite, New Mexico. Virtually since it first opened the plant in 1989, Helena has been accused of violating New Mexico environmental standards and regulations.[1] A 2005 news article reported that Helena had been in non-compliance with the New Mexico Environment Department (NMED) requirement for an air quality permit since the company began operations in Mesquite in 1989. (RP 221). In November of 2007, less than one month before the December 13, 2007 town meeting at which Thomas made the alleged defamatory statements at issue, the Deputy Secretary of NMED was quoted as follows:

> Helena Chemical has a history of noncompliance with the department and a bad record with many residents in Dona Ana County. Helena potentially put residents at risk by failing to monitor pollutants from the plaint. We consider this to be a serious disregard for residents and the environment.

[1] In addition to the supporting evidence in the Record Proper, which was provided to the court by Helena, this Court can take judicial notice of Helena's record of environmental infractions maintained by NMED, which are a part of the public records of the State of New Mexico. *See* SCRA 11-201. The news reports placed in the court record by Helena also constitute admissions by Helena, which are not hearsay. *See* SCRA 11-801(D)(2)(b).

(RP 228). The Deputy Secretary made this statement in connection with NMED's issuance of a notice of fifteen environmental violations by Helena. *Id.* It was allegedly at least the third time since 2006 that Helena had faced possible sanctions from NMED. *Id.*

Ms. Thomas and Thomas & Wan, L.L.P. (collectively "Thomas") are attorneys in good standing, licensed to practice law in Texas. (RP 178; 182). Their law practice includes representing clients in "toxic tort" litigation, including at least one other suit against Helena. *Id.* At the time of Thomas' alleged defamatory statements in question, Thomas was actively pursuing a "toxic tort" lawsuit against Helena in Texas state court. *Id.*

As a result of Thomas' involvement against Helena in the Texas litigation, Thomas was invited by a group of Mesquite, New Mexico residents to meet with them in New Mexico, on December 13, 2007, to discuss possible litigation against Helena. (RP 180; 184; 627). These Mesquite residents were members of the Mesquite Community Action Committee, which at the time was actively engaged with Helena over environmental issues. (*See* RP 221). These citizens were considering bringing a "toxic tort" lawsuit against Helena in New Mexico, and were interested in having Thomas represent them in such a lawsuit. (RP 180; 184; 627) Allegedly defamatory statements were made by Thomas at that initial meeting with the Mesquite residents, on December 13, 2007. *See* Complaint.

Thomas subsequently began to represent a number of these Mesquite residents as clients, adverse to Helena, shortly after the December 13, 2007 meeting. (RP 180; 184).

In association with New Mexico counsel, Thomas subsequently brought a "toxic tort" lawsuit against Helena on behalf of certain Mesquite residents in New Mexico state court in Santa Fe, *Uribe, et al. v. Helena Chemical Co., et al.*, New Mexico First Judicial District Court Cause No. D-101-CV-200802864. (RP 178-79; 182-83). The lawsuit was filed on or about October 8, 2008, was removed to federal court, and remains pending. *Id.*

The New Mexico lawsuit against Helena alleges that during the course of its operations, and since at least 1989, Helena has regularly and systematically vented or otherwise allowed to escape into the neighborhood, without proper filtration, hazardous dusts, fumes and contaminants that were created or otherwise occurred during the process of mixing, blending and formulating products. *Id.* The lawsuit alleges that, as recently as November of 2007, Helena has received citations from NMED for violations of Helena's Air Quality Permit for its Mesquite, New Mexico plant and has been assessed a penalty of $279,076.00. *Id.* The lawsuit alleges other NMED citations against Helena in the past for soil and ground water contamination and chemical spills, including the following claims made in the lawsuit:

a) "personal injury and property damage suffered by residents of Mesquite, New Mexico as a result of their exposure to hazardous dusts, fumes, and contaminants emanating from the Defendant Helena Chemical Company." (RP).

b) "children and the elderly have been severely impacted by the Defendant's conduct in the operation of the plant." *Id.*

c) "Defendants have also allowed said chemicals to spill, leak or otherwise contaminate the soil and ground, causing soil and ground water contamination. The fertilizers, herbicides, pesticides and chemicals handled by Defendant Helena Chemical are known to cause potentially deadly adverse health effects, including cancer, birth defects, central nervous system and respiratory effects." *Id.*

d) "Defendants ... willfully and with full knowledge of the grave, and potentially fatal, consequences to the Plaintiffs and persons of the general public, allowed toxic and hazardous wastes, chemicals, solvents and substances to freely release into the soil, water and air on, under and about the plant." *Id.*

e) "The conduct on the part of the Defendants ... constitutes a flagrant disregard for the rights of the Plaintiffs and others." *Id.*

f) The Defendants knew that their acts "would, in reasonable probability, result in human death, great bodily harm or property damage." *Id.*

Thus, at the time that the instant lawsuit was filed by Helena against Thomas and the Uribes for defamation, the foregoing allegations against Helena were already a matter of public record. The instant lawsuit by Helena against Thomas and the Uribes was filed shortly thereafter. The inference that Helena brought the instant lawsuit in retaliation against Thomas and the Uribes for suing Helena is inescapable. Although Helena representatives were present at the December 13,

2007 meeting (RP 219; 238) and thus heard the alleged defamatory statements at the time they were made, Helena did not bring suit alleging defamation until nearly a year later, after the toxic tort lawsuit was filed. It is apparent that this defamation lawsuit was not the result of the statements themselves but was retaliatory, the result of the filing of the toxic tort lawsuit. Those earlier statements were of no concern to Helena. They are simply a pretext for this SLAPP suit against the Uribes and their attorneys.

At the meeting with Mesquite residents on December 13, 2007, the residents asked Thomas to discuss with them the steps necessary to institute and prosecute the above-referenced toxic tort lawsuit in New Mexico against Helena; the potential health effects of being exposed to chemicals such as the ones present at Helena's Mesquite plant; and Helena's air quality permit citations and fines issued by NMED. (RP 254-310). Helena has placed into the court record below a complete, verbatim transcript of the December 13, 2007 meeting. *See Id.* Therefore, this Court can review for itself exactly what occurred and what was said at that community meeting.

A review of the transcript shows that the meeting primarily consisted of the *citizens* of Mesquite telling the *lawyers* all of the injuries, diseases and damages that they already believed that they had suffered at the hands of Helena. *Id.* This

was not a situation where the lawyers came to town and told the citizens bad things about Helena. It was the other way around. *Id.*

This Court can see for itself, from the transcript of the December 13, 2007 meeting, that the alleged defamatory statements in question were all directly related to a potential lawsuit by the residents of Mesquite against Helena. *Id.* This Court can compare the meeting transcript with the "toxic tort" complaint that was subsequently filed, and can see for itself that that the "toxic tort" lawsuit was a direct result of what occurred at the community meeting. The transcript of the meeting shows that Thomas' statements at issue were an appropriate and necessary part of a meeting like the one that occurred to discuss a possible lawsuit against Helena. *Id.* The residents were interested to learn what these lawyers knew about claims against alleged polluters like Helena. *Id.* They were interested in telling these lawyers about their own experiences with Helena. *Id.* And they were interested in learning whether proceeding with a lawsuit against Helena was a possibility, legally and financially. *Id.*

The lawyers shared some of their knowledge gained in the ongoing Texas lawsuit against Helena, and their knowledge in general about toxic tort issues. *Id.* The lawyers compared some of the things that they heard from the citizens at the meeting, with things that they had seen before in other toxic tort situations. *Id.* The lawyers' statements were not provocative or inflammatory in these circumstances.

They were appropriate and measured. The statements in question were a legitimate part of an initial meeting with a group of potential clients to evaluate the possibility of filing an environmental lawsuit against an alleged toxic polluter; a lawsuit that was, in fact, subsequently filed. *Id.* All of the statements made by Thomas at the December 13, 2007 meeting were related to the toxic tort lawsuit against Helena that was subsequently filed in New Mexico; or to the pending toxic tort lawsuit against Helena in Texas.

This may have been a public meeting, but the transcript shows that it was not much different from any initial meeting between a lawyer and potential clients. *Id.* The lawyers were introduced. *Id.* They told the potential clients a few things about themselves and why they might be qualified to represent the residents in a lawsuit against Helena. *Id.* These potential clients then described their issues and their alleged injuries. *Id.* The lawyers made some comments about the potential that the prospective defendant may be liable for the citizens' injuries. *Id.* The lawyers agreed to evaluate the matter further, which they did. *Id.* Following the meeting, citizens and the lawyers entered into agreements for legal representation, and a lawsuit was subsequently filed based upon the facts and circumstances discussed at the meeting. (RP 180; 184).

With regard to Ms. Thomas' alleged defamatory statement to the press on October 9, 2008, following the filing of the lawsuit against Helena, the Record

Proper shows the following. In response to a question from the press about the lawsuit that had been filed, Ms. Thomas stated: "It's a negligence lawsuit against Helena for basically contamination of air and water. The underground water has been contaminated." (RP 181; 312). In other words, all that Ms. Thomas actually did was to describe summarily the lawsuit that had been filed, nothing more. The law protects such statements from claims for defamation.

III.
ARGUMENT & AUTHORITIES

A. HELENA'S DEFAMATION CLAIMS AGAINST THE THOMAS LAWYERS ARE BARRED BY THE LITIGATION PRIVILEGE AS A MATTER OF WELL-SETTLED NEW MEXICO LAW

The facts of this case read like a John Grisham novel. A group of poor, Hispanic citizens of a small rural town take on a large chemical company that is polluting the local environment and endangering the citizens' health. The citizens file a lawsuit against the company. The company then sues the citizens and their attorneys on trumped-up claims, seeking to harass and intimidate them in retaliation for bringing the lawsuit.

Such suits, called SLAPP suits[2], are against public policy in New Mexico. NMSA § 38-2-9.2 provides as follows:

---

[2] **A Strategic Lawsuit Against Public Participation ("SLAPP")** is a lawsuit that is intended to intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. Winning the lawsuit is not necessarily the intent of the person filing the SLAPP. The plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs or simple exhaustion and

> The legislature declares that it is the public policy of New Mexico to protect the rights of its citizens to participate in quasi-judicial proceedings before local and state governmental tribunals. Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals. Such lawsuits can be an abuse of the legal process and can impose an undue financial burden on those having to respond to and defend such lawsuits and may chill and punish participation in public affairs and the institutions of democratic government. These lawsuits should be subject to prompt dismissal or judgment to prevent the abuse of the legal process and avoid the burden imposed by such baseless lawsuits.

In this case, there is a well-settled legal principle available to the courts to bar Helena's SLAPP suit against Thomas: the absolute privilege accorded speech, even allegedly defamatory speech, related to ongoing or prospective litigation. New Mexico law is clear and well-settled that attorneys (and litigants) are absolutely immune from defamation claims for statements related to ongoing or prospective litigation. *See Superior Construction, Inc. v. Linnerooth*, 103 N.M. 716, 712 P.2d 1378 (1986); *Stryker v. Barbers Super Markets, Inc.*, 81 N.M. 44, 462 P.2d 629 (Ct. App. 1969); *Romero v. Prince*, 85 N.M. 474, 513 P.2d 717 (Ct. App. 1973); *Penny v. Sherman*, 101 N.M. 517, 684 P.2d 1182 (Ct. App. 1984); *Gelinas v. Gabriel*, 106 N.M. 221, 741 P.2d 443 (Ct. App. 1987). "Absolute

---

abandons the criticism. A SLAPP may also intimidate others from participating in the debate. According to New York Supreme Court Judge J. Nicholas Colabella, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." A number of jurisdictions have made such suits illegal, provided that the appropriate standards of journalistic responsibility have been met by the critic. The acronym was coined in the 1980s by University of Denver professors Penelope Canan and George W. Pring. The term was originally defined as "a lawsuit involving communications made to influence a governmental action or outcome, which resulted in a civil complaint or counterclaim filed against nongovernment individuals or organizations on a substantive issue of some public interest or social significance."[1] It has since been defined more broadly to include suits about speech on any public issue. Wikipedia.

immunity is accorded to attorneys for defamation reasonably related to communication preliminary to, in the institution of, or during the course and as part of judicial proceedings in which the attorney participates as counsel." *Candelaria v. Robinson*, 93 N.M. 786, 789, 606 P.2d 196 (Ct. App. 1980).

> It is not absolutely essential, in order to obtain the benefits of absolute privilege, that the language claimed to be defamatory be spoken in open court or contained in a pleading, brief, or affidavit.... If the alleged defamatory statement is made to achieve the objects of the litigation, the absolute privilege applies even though the statement is made outside the courtroom and no function of the court or its officers is involved.

Superior Construction, Inc. v. Linnerooth, *supra*, 103 N.M. at 719, *citing Romero v. Prince*, 85 N.M. at 477, 513 P.2d at 720. "[T]he question of the relationship between the alleged defamatory matter and the proposed or existing judicial proceeding is a question of law to be determined by the court." *Gelinas v. Gabriel, supra,* 106 N.M. at 221.

In this case, the undisputed facts establish that all alleged statements by these attorneys concerning Helena upon which plaintiff's defamation claims are based arose out of and were directly related to pending and/or proposed litigation by the attorneys against Helena. This Court, on *de novo* review of the district court's legal determination that the privilege does apply here, can review the facts set forth in the Record Proper and, on that basis, affirm the dismissal of plaintiff's claims against these attorneys. The attorneys' alleged defamatory statements are

absolutely privileged and immune from plaintiff's defamation claims as a matter of New Mexico law and public policy.

B. THIS COURT SHOULD NOT CHANGE NEW MEXICO LAW TO SET AN ARTIFICIAL TIME LIMIT FOR THE APPLICATION OF THE LITIGATION PRIVILEGE

Helena asks this Court to limit the broad, public policy protection afforded to speech related to prospective litigation, by setting some artificial time limitation on the privilege. In this case, Helena asks this Court to hold that the speech in question, made some ten (10) months before the lawsuit was filed, was made too far in advance of the filing of the lawsuit to qualify for the privilege.

Under the circumstances of this case, however, such a ruling would squarely contradict the very purpose for recognition of the privilege in the first place. Public policy supports and encourages the use of the legal process by citizens to protect their rights and legitimate interests. Speech by lawyers and clients about such litigation, including prospective litigation, is a necessary part of the process of getting into Court. Allowing defamation claims based upon such speech would have a chilling effect on such use of legal process, and would therefore directly contravene well-settled public policy. Thus, the privilege must apply broadly, as all of the New Mexico cases discussing the privilege have held.

Helena would have this Court condone its SLAPP suit, based upon the technicality that the statements, even though obviously and directly related to the

lawsuit that was filed, were made too far in advance for absolute immunity to apply. Such a ruling would be contrary to the express language of the Restatement and the New Mexico cases that have recognized the absolute judicial privilege – that statements made "preliminary to a proposed judicial proceeding" are absolutely privileged. *See Romero v. Prince*, 85 N.M. at 476 (citing Restatement of Torts § 586). Such a ruling would be contrary to another express principle of New Mexico law: that statements "made to achieve the objects of litigation" are absolutely privileged. *See Gregory Rockhouse Ranch v. Glenn's Water Well Service*, 2008-NMCA-101 at ¶ 18. Such a ruling would elevate form over substance with regard to the public policy and underlying purpose for recognizing an absolute privilege for litigation-related statements.

Such a ruling would also permit Helena improperly to interfere with the attorney-client relationship between these lawyers and their clients in the toxic tort lawsuit, in violation of another important New Mexico public policy principle – that litigants are entitled to the counsel of their choice, unhampered by litigation tactics of the opposing party designed to interfere with that lawyer-client relationship. *See Chappelle v. Cosgrove*, 121 N.M. 636, 916 P.2d 836 (1996) (attempts to call opposing counsel as witness at trial were "disguised attempts to divest opposing parties of their counsel of choice.").

Helena relies on the recent New Mexico case of *Gregory Rockhouse Ranch L.L.C. v. Glenn's Water Well Service*, 2008-NMCA-101, for the proposition that statements made ten months prior to the institution of litigation are not privileged. First, *Glenn's Water Well Service* was a slander of title lawsuit, not a defamation suit. Its facts are not in any way similar to the facts in this case. Gregory sent letters to the BLM and OSE allegedly slandering Glenn's title to water rights. Later, Gregory filed a suit seeking to enjoin Glenn from drawing water from the well in question. That lawsuit was only tangentially related, at best, to the earlier letters that Gregory had sent to the BLM and OSE. Thus, the *Glenns* case is factually distinguishable from this case, where the statements made by these lawyers at the public meeting in Mesquite were directly related to and, in essence, resulted in the filing of the toxic tort lawsuit, albeit some months later. Furthermore, the actual holding of this Court in *Glenn's Water Well Service* was that all of the statements in question were in fact privileged, under a qualified privilege. Thus, Helena is relying on *dicta* for the proposition that statements made months before a lawsuit is filed cannot be privileged. No New Mexico case has actually so held.

The court stated in *Glenns*:

> Glenn's slander of title claim is predicated upon the series of letters sent by Gregory to the BLM and OSE between September 15, 1999, and June 5, 2000. Judicial proceedings were initiated on December 5, 2000. Accordingly, a period of months or more separated the various letters from

> the judicial proceedings. Although we acknowledge that statements made in close proximity to the initiation of judicial proceedings may be absolutely privileged, *see Penny v. Sherman*... (observing that statements made in relation to "an ongoing or contemplated judicial proceeding" may be absolutely privileged), we find no authority to support extension of this privilege to communications made so far in advance of litigation. **Nor do we find any indication that litigation was seriously contemplated at the time that the communications were made. We regard this as fatal to Gregory's claim of absolute privilege.** *See* Restatement (Second) of Torts § 587 cmt. E (1977) (observing that, with respect to communications which are preliminary to a judicial proceeding, the absolute privilege applies only if a proceeding "is contemplated in good faith and under serious consideration" at the time the communication is made.)

2008-NMCA-101 at ¶ 19. (Emphasis Added)

In other words, the court in *Glenns* denied Gregory's claim of absolute privilege because there was no showing that litigation was contemplated and under serious consideration at the time the letters were sent "slandering" Glenn's title. The Court stated that it was this fact that was "fatal" to Gregory's privilege claim.

Helena actually attempts to argue that, in this case, the lawyers and their clients were not seriously considering litigation at the December 2007 meeting. They make this argument in the face of the undisputed evidence that the only reason the lawyers were at the meeting was in regard to a potential lawsuit against Helena. This Court need only review the transcript of the December 2007 meeting to see that the whole purpose, focus and subject of the meeting was a potential lawsuit against Helena. The press was in attendance, and the press had no confusion about the purpose of the meeting:

> "Thursday evening ... more than 65 people showed up to a community meeting to discuss the possibility of suing Helena Chemical Company in an apparent attempt to chase it out of town."... "There's a strong possibility that a lawsuit will eventually determine" the problems with Helena discussed at the meeting by the citizens of Mesquite. "Mesquite residents met Thursday with high-powered Houston attorneys who have sued Helena in the past to determine whether a lawsuit is an appropriate step."

(RP 245-48).

Under the circumstances, a public meeting of concerned citizens was an appropriate way for the citizens to discuss with out-of-state counsel a possible lawsuit against an alleged community polluter. The fact that the press, and indeed representatives of Helena, attended the meeting is irrelevant to the essential nature of the meeting: it was an initial meeting between lawyers and potential clients regarding a possible lawsuit. The law must protect discussions between lawyers and potential clients at such an initial meeting, held to discuss possible legal representation. Such meetings are an integral part of the legal process. Without them, the lawyers and the clients would never get together.

> The policy of "access" to the courts requires protection not only for the client but also for the litigation attorney. If the attorney's representation is compromised, the client's entry into the judicial process is frustrated or limited. Freedom to communicate is an inherent purpose of the privilege. This modern refinement of the policy recognizes that the mere threat of a retaliatory action contemporaneous with the attorney's representation may interfere seriously with that representation. *See Berman v. RCA Auto Corp., 222 Cal. Rptr. 877* (2d Dist. 1986) (attorney can sue plaintiff for malicious prosecution when he has defeated an action based upon absolute immunity).

3 R. Mallen & J. Smith, Legal Malpractice § 22.8 at 152-53 (2008 ed.).

This Court should affirm the district court's judicial determination that these statements were related to potential litigation; that they were made to advance the purposes of that potential litigation; and that they are therefore absolutely privileged from defamation claims under New Mexico law. "The primary limitation on the privilege is the requirement that the statement be 'relevant' to the proceedings. Because freedom of access to the judicial process is the paramount policy consideration supporting the privilege, the courts have been extremely liberal in finding the necessary relevancy." Mallen & Smith, supra at 157.

In this case, the speech in question falls squarely within the privilege. No matter that it occurred some ten (10) months before a lawsuit was filed; and no matter that it occurred at a public meeting; without any question, the speech concerned specific potential litigation against Helena, litigation that in fact ensued. The statements attributed to Thomas concerning Helena - "The underground water has been contaminated." "Children are out here, and they're playing in the yard, they're putting their hands in their mouth. So they're really getting a dose that way, much greater risk." "Helena's actions are pretty egregious." – are perfectly understandable, appropriate, and indeed necessary, for a lawyer to make in the context of discussing a possible legal representation concerning personal injury claims arising from Helena's alleged conduct. It was speech between lawyers and potential clients that was essential – it had to occur – in order for the litigation to

eventuate. Despite the public nature of the meeting, the sole and exclusive purpose for the meeting was to commence the use of the legal process by these citizens against Helena.

New Mexico public policy encourages and supports such use of the legal process by its citizens. New Mexico public policy therefore protects the speech that led directly to the filing of the lawsuit. Conversely, it would fundamentally contradict New Mexico public policy if Helena were allowed to punish and retaliate against these citizens and their attorneys by suing them for defamation for the speech that occurred in this preliminary meeting to discuss a possible lawsuit.

The Restatement of Torts § 586 (1938), adopted as the law of New Mexico, *see Romero v. Prince*, 85 N.M at 476, could not be clearer:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications **preliminary to a proposed judicial proceeding**, or in the institution of, or during the course and as part of a judicial proceeding in which he participates as counsel, if it has **some relation thereto**.

[Emphasis added]. New Mexico law thus does not require the litigation to be pending at the time of the statement; nor that the litigation must be imminent; nor that the litigation must be filed within some specified period of time after the speech occurs. Statements by attorneys, even if false and defamatory, are absolutely privileged if they have "some relation" to a proposed judicial

proceeding. There is no denying that Thomas' statements here had some relation to a proposed judicial proceeding.

C. THIS COURT SHOULD NOT CHANGE NEW MEXICO LAW TO BAR THE PRIVILEGE WHENEVER SOMEONE WITHOUT A "DIRECT INTEREST" IN THE LAWSUIT HEARS THE SPEECH IN QUESTION

Helena argues that publication of the alleged defamatory statement to someone with a "direct interest in the judicial proceeding" is required for absolute immunity to apply. *Penny v. Sherman*, 101 N.M. 517, 520, 684 P.2d 1182 (Ct. App. 1984), holds directly to the contrary: publication to one with a "direct interest" is not essential. If "direct interest" is required, however, then obviously the citizens of Mesquite who attended the meeting and became clients of the lawyers, and who then became plaintiffs in the lawsuit, had such a direct interest. Helena apparently contends that if the speech in question is heard by anyone who does not have a "direct interest," then the privilege is destroyed. However, Helena provides no authority for that proposition, upon which much of its argument is premised; and indeed there is no such authority. It would be illogical for the law to provide that if someone without a "direct interest" happens to hear the protected speech, it suddenly loses its protection, despite all of the public policy arguments requiring that it be protected. This is, after all, a privilege based upon public policy that is to be construed broadly. It should not be subject to some arbitrary

"gotcha," destroying the privilege, if someone without a "direct interest" also happens to hear the speech in question.[3]

D. THE LITIGATION PRIVILEGE APPLIES TO A LAWYER'S STATEMENTS TO THE PRESS WHICH FAIRLY CHARACTERIZE THE CLAIMS IN A PENDING LAWSUIT

With regard to Thomas' alleged "defamatory" statement to the press on October 9, 2008, following the filing of the lawsuit against Helena, the Record Proper shows the following. In response to a question from the press about the lawsuit that had been filed, Ms. Thomas stated: "It's a negligence lawsuit against Helena for basically contamination of air and water. The underground water has been contaminated." (RP 181; 312). In other words, all that Ms. Thomas actually did was to describe, summarily, the lawsuit that had been filed, nothing more.

Courts in other jurisdictions considering such a situation have held that these kinds of statements to the press, simply announcing the filing of a lawsuit, fall within the absolute privilege. "The mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in the waiver of the absolute privilege." *Hill v. Herald-Post Publishing Co., Inc.*, 877 S.W. 2d 774, 783 (Tex. App. 1994), *aff'd in part, rev'd in part,* 891 S.W. 2d 638 (Tex. 1994).

[3] Most initial meetings between attorneys and potential clients are private and are protected from disclosure by the attorney-client privilege. Thus, typically, there is no issue of "publication" of the alleged defamatory statement to a third party. Here, the circumstances are such that the discussion between the attorneys and prospective clients were not confidential and protected by the attorney-client privilege. The fact that they were not confidential communications is irrelevant, however, to the question whether they were litigation-related and thus protected from claims for defamation.

In *Dallas Independent School District v. Finlan*, 27 S.W. 3d 220, 239-240 (Tex. App. 2000), the lawyer for the School District issued the following news release:

> September 13, 1995
>
> For Immediate Release
>
> Attention News Director
>
> The Dallas Independent School District filed suit today in Dallas District Court against Richard Finlan, Don Venable, Ed Grant, who is a former member of the DISD Board of Trustees, and Ronald Hinds, who is the attorney for Don Venable and Ed Grant, for Fraud, Civil Conspiracy, and Racketeering. The DISD has been patiently dealing with Venable, Finlan, and Grant within the confines of the courtroom in suits initiated by them; however, the time has come to expose to the public what these men are truly trying to accomplish.
>
> These men are not serving as "self-appointed government watchdogs." As has been publicly released, Venable and Finlan are seeking a $1,650,000 settlement from DISD. They are only out for their own personal gain seeking to create a financial windfall for themselves by harassing the DISD with the filing of frivolous lawsuits and seeking the private bank records of the members of the DISD Board of Trustees. The lawsuit seeks actual and punitive damages of $1,500,000. The DISD's attorney, Lawrence J. Friedman, will be available for comments today.

The Texas Court of Appeals held as follows concerning the litigation attorney's foregoing alleged "defamatory" statement to the press:

> We agree with the El Paso Court of Appeals that the mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in the waiver of the absolute privilege. *Hill*, 877 S.W.2d at 783. The harm resulting to a defamed party from delivery of pleadings in a lawsuit to the news media could demonstratively be no greater than if the news media found the

> pleadings on their own. *Id.* Likewise, we conclude that advising the media that a lawsuit has been filed, including a basic description of the allegations, has no practical effect different from providing the pleadings to the media.
>
> Here, the first amended petition itself and the statements in the press release which relate the allegations in that petition are absolutely privileged pursuant to the judicial proceeding privilege. *Id.* at 782. The statement that "the DISD has been patiently dealing with [the defendants] within the confines of the courtroom in suits initiated by them; ..." relates to pending litigation among the same parties. Likewise, the second paragraph above relates to pending litigation and settlement efforts.
>
> We recognize the issues raised in this lawsuit, and issues concerning DISD in general, have played a prominent role in the local news media. Nevertheless, we are mindful that **we must resolve all doubt in favor of the relevance of the lawyer's statement.** *Russell,* 620 S.W.2d at 870. **Further, we must extend the privilege to any statement that bears some relation to a judicial proceeding.** *Id.* Under the facts of this case, we hold that the press release had some relation to this lawsuit in particular and to other litigation between the same parties. Therefore, the statements were privileged and cannot serve as the basis of a defamation action. *Reagan,* 166 S.W.2d at 912; *Hill,* 877 S.W.2d at 782, *Russell,* 620 S.W.2d at 868.

27 S.W.3d at 239-40 [emphasis added].

In this case, the Record Proper shows that Thomas was not "trying the case in the press," as Helena contends. The public was entitled to know about the filing of the lawsuit – it is, after all, a matter of public record and, indeed, a matter of some public interest. In logic and fairness, then, it cannot be actionable as a matter of law for a lawyer or a client simply to advise the press that a lawsuit has been filed. The pleadings in the lawsuit speak for themselves, and the press and public may read them. Thus, again, it cannot be actionable as a matter of law for the lawyer or client simply to state in summary fashion what the publicly-filed lawsuit

already alleges. That is all that Thomas is accused by plaintiff of doing here. As a matter of New Mexico law and sound public policy, that conduct by Thomas ought to be well-within the litigation privilege.

D. CONCLUSION

The legal principle at issue in this case, that speech related to prospective or ongoing litigation is privileged, is well-settled in New Mexico and throughout this country. New Mexico courts have never imposed a specific, or even a general, time limit in which litigation must be filed, or else the privilege is lost. And this is certainly not the appropriate case for this Court to change New Mexico law to impose such a time limit. The statements at issue here were related – indeed, they were critical – to the litigation that followed. The time that it took the lawyers to investigate the facts and prepare the lawsuit after meeting with the citizens of Mesquite concerning the possibility of such a lawsuit, even if that period of time was ten (10) months, ought to be irrelevant where, as here, all of the other factors supporting the litigation privilege are present.

Helena's position is not helped by the nature and circumstances of its defamation claims. The circumstances leave little doubt that this was a SLAPP suit by Helena, intended solely to harass, intimidate and burden the plaintiffs and their lawyers. Helena's agents heard the allegedly defamatory statements personally, yet Helena did nothing to pursue a defamation claim. Then, when the

citizens and their counsel sued Helena, it used the earlier statements as a pretext for filing a lawsuit to harass and intimidate the plaintiffs and their counsel. Helena should not be rewarded for this improper conduct by having this Court change New Mexico law to allow this otherwise invalid lawsuit to proceed.

Finally, with regard to the post-filing statement to the press, there may be situations where a lawyer addressing the press should legitimately forfeit the right to rely upon the litigation privilege. This is not such a case, however. The lawyer's statement here did nothing except advise the press generally about the claims made in the lawsuit. Where the speech in question mirrors what the press and public can learn, simply from reading the complaint, no defamation claim should lie.

For all of the foregoing reasons, Defendants-Appellees Linda Thomas and Thomas & Wan, L.L.P. respectfully request this Court to affirm the district courts dismissal of the claims against them.

LAW OFFICE OF JACK BRANT, P.C.

By: _____
Jack Brant
202 Tulane Dr. SE
Albuquerque, New Mexico 87106
(505) 232-5300 - Phone
(505) 232-5335 – Fax
jack@jackbrantlaw.com

Counsel for Defendants Linda Thomas and Thomas & Wan, LLP

I hereby certify that a copy of the foregoing was mailed to the following counsel this 7 day of January, 2010:

Robert L. Soza, Jr.
Jackson Walker, LLP
112 East Pecan Street, Suite 2400
San Antonio, TX 78205

Glenn D. Hall
Sandenaw & Anderson, P.C.
2951 N. Roadrunner Pkwy
Las Cruces, NM 88011-0814

Luis B. Juarez
Juarez Law Office
P.O. Box 1715
Las Vegas, NM 87701

By _____
Jack Brant