IN THE COURT OF APPEALS OF THE STATE OF NEW MEXIO

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 AND WAN, L.L.P., AND THOMAS AND WAN, L.L.P.

Defendants

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

ANSWER BRIEF OF APPELLEE PAMELA URIBE

LUIS B. JUAREZ
JUAREZ LAW OFFICE
P.O. BOX 1715
LAS VEGAS, NEW MEXICO 87701

Counsel for Defendant-Appellee
Pamela Uribe

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I.
SUMMARY OF PROCEEDINGS

Not provided by Appellee per SCRA 12-2 13(B).

II.
STATEMENT OF FACTS

In addition to the facts set forth in Appellants Brief in Chief, Appellee Pamela Uribe (hereinafter "Mrs. Uribe") respectfully sets 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 noncompliance 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, 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.

(RP 228).

[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).

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.*

In association with New Mexico counsel, Mrs. Uribe subsequently brought a "toxic tort" lawsuit against Helena on behalf of herself and her children 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- 10 1 -CV-200802864. (RP 178-79; 182-83). The lawsuit was filed on or about October 8, 2008, was removed to federal court improperly by Helena, was remanded and is currently in the discovery phase of litigation. *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 Mrs. Uribe, her husband and her attorneys for defamation, the foregoing allegations against Helena were already a matter of public record. The instant lawsuit by Helena against the Uribes and their attorneys was filed exactly two months after the Toxic Tort lawsuit was filed. The inference that Helena brought the instant

lawsuit in retaliation against the Uribes and their attorneys for suing Helena is inescapable. Although Helena representatives were present at the December 13, 2007 meeting (RP 219; 238) and thus heard some of 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. Furthermore, Mrs. Uribe's allegedly defamatory statement **occurred after she filed her Toxic Tort lawsuit**. 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.

With regard to Mrs. Uribe's 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 injuries that her children suffered, Mrs. Uribe stated: "[u]pper respiratory problems, pneumonia and bad allergies." (RP 181; 3 12). In other words, all that Mrs. Uribe actually did was to describe the health problems of her children, nothing more. The law protects such statements from claims for defamation.

III
ARGUMENT & AUTHORITIES

A. HELENA'S DEFAMATION CLAIMS AGAINST MRS. URIBE 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 3 38-2-9.2 provides as follows:

> 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.

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[2] **A Strategic Lawsuit Against Public Participation ("SLAPP")** is a 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 plaintiffs goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs or simple exhaustion and abandons the criticism. A SLAPP may also intimidate others 6om participating in the debate. According to New York Supreme Court Judge 1. 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. Prigg. 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.

In this case, there is a well-settled legal principle available to the courts to bar Helen's SLAPP suit against Mrs. Uribe: the absolute privilege accorded speech, even allegedly defamatory speech, related to ongoing or prospective litigation. New Mexico law is clear and well-settled that litigants (and attorneys) 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 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, Znc. v. Linnerooth, supra, 103 N.M. at 7 19, citing *Romero v. Prince,* 85 N.M. at 477, 513 P.2d at 720. "[The 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 22 1.

In this case, the undisputed facts establish that the alleged statement by Mrs. Uribe concerning upon which Helena's defamation claim is based arose out of and was directly related to pending Toxic Tort lawsuit by her family 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 Helena's claims against Mrs. Uribe. Her alleged defamatory statement is absolutely privileged and immune from Helena's defamation claim as a matter of New Mexico law and public policy.

B. 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 OUESTION

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. 5 17,520,684 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]

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

In response to a question from the press about the injuries that her children suffered, Mrs. Uribe stated: "[u]pper respiratory problems, pneumonia and bad allergies." (RP 181; 3 12). In other words, all that Mrs. Uribe actually did was to describe the health problems of her children, nothing more. The law protects such statements from claims for defamation. Courts in other jurisdictions considering

[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.

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., Znc.*, 877 S.W. 2d 774,783 (Tex. App. 1994), *aff'd in part, rev'd in part,* 891 S. W. 2d 638 (Tex. 1994).

In this case, the Record Proper shows that Mrs. Uribe 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 Mrs. Uribe is accused by Helena of doing here. As a matter of New Mexico law and sound public policy the conduct by Mrs. Uribe is well within the litigation privilege.

D. CONCLUSION

The legal principle at issue in this case, that speech related to ongoing litigation is privileged, is well-settled in New Mexico and throughout this country. The statement at issue here is related to the litigation.

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.

Mrs. Uribe'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-Appellee Mrs. Uribe respectfully requests this Court to affirm the district courts dismissal of the claims against her.

JUAREZ LAW OFFICE

By: Luis Juarez (authorized signature)

Luis B. Juarez
P.O. Box 1715
Las Vegas, New Mexico 87701
505-426-8001 – Phone
505-426-8001 – Fax