IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HELENA CHEMICAL COMPANY

Plaintiff/Appellant,

v.

ARTURO URIBE,

Defendant/Appellee.

COA No. 29,567

Doña Ana County
No. CV-2008-3038
Judge Jerald A. Valentine

APPELLANT HELENA CHEMICAL COMPANY'S REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF DOÑA ANA, HONORABLE JERALD VALENTINE

Robert L. Soza, Jr.
Elena P. Villaseñor
JACKSON WALKER L.L.P.
112 East Pecan Street, Suite 2400
San Antonio, Texas 78205
Telephone: (210) 978-7718
Facsimile: (210) 978-7790

Frank M. Bond
Faith Kalman Reyes
SIMONS FIRM, LLP
P.O. Box 5333
Santa Fe, New Mexico 87502-5333
Telephone: (505) 988-5600
Facsimile: (505) 982-0185

ATTORNEYS FOR PLAINTIFF-APPELLANT
HELENA CHEMICAL COMPANY

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO STATE CASES

OTHER STATE CASES

NEW MEXICO STATUTES

TREATISES

I.
BRIEF BACKGROUND

This is an appeal of summary judgments, dismissing Appellant Helena Chemical Company's ("Helena" or "Appellant") defamation actions against Appellees Linda Thomas and Thomas & Wan, L.L.P. (collectively, "Thomas") and Appellee Pamela Uribe ("Uribe") (collectively "Appellees") based on the absolute privilege affirmative defense. Appellees argue that the absolute privilege bars Helena's defamation case because their statement's related to lawsuit that Thomas, an attorney, filed on behalf of Uribe and others in Santa Fe County in October 2008 ("Santa Fe Lawsuit"). Four defamatory statements are at issue: two made by Thomas on December 13, 2007, ten months before the Santa Fe Lawsuit and before she had any clients; and two statements made after the Santa Fe Lawsuit was filed—one statement is by Thomas and the other by Uribe.

II.
SUMMARY OF ARGUMENT

The absolute privilege only protects attorneys and litigants from defamation actions when such statements *achieve the objects of litigation. See Romero v. Prince*, 85 N.M. 474, 477, 513 P.2d 717, 720 (Ct. App. 1973). Appellees would have this Court believe that slandering Helena to the press—in some cases months before the Santa Fe Lawsuit was filed when there was no attorney-client

relationship—furthers the objects of litigation. Appellees defamatory statements are not covered by the absolute privilege for the following reasons:

1. All four defamatory statements at issue in this appeal—three by Thomas and one by Uribe—were made to the news media—a recipient wholly unrelated to the Santa Fe Lawsuit.

2. Thomas has an additional burden, which she failed to meet, with regard to her two defamatory statements made on December 13, 2007 because they were made "preliminary to the Santa Fe Lawsuit." She has not shown that those statements were made in close proximity to litigation and at a time when she, in good faith, seriously considered the Santa Fe Lawsuit.

III.
DISPUTED CONTENTIONS

A. THE DECEMBER 2007 MEETING WAS NOT AN ATTORNEY-CLIENT MEETING

Thomas tries to convince this Court that the December 13, 2007 meeting was nothing more than initial meeting between attorneys and possible clients to discuss a potential lawsuit. *See Thomas' Answer Brief, pp. 2, 6 – 7, and 15.* That meeting was anything but an initial attorney-client meeting. It was an open forum with the news media invited, and Thomas admits that she did not represent anyone there. (RP 237 – 243; RP 89; RP 98). While some people in attendance eventually became Thomas' clients, including Uribe, there were people at that meeting, including but not limited to news reporters, that had no interest in the outcome of any possible litigation—they weren't potential parties or witnesses. (RP 237 – 243).

B. APPELLEES' RETALIATION ALLEGATIONS ARE UNSUPPORTED

In another smoke screen, Appellees also assert that Helena filed the underlying action in retaliation for the Santa Fe Lawsuit and that the underlying lawsuit interferes with the attorney-client relationship in the Santa Fe Lawsuit. *See Thomas' Answer Brief, pp. 4 – 5; see Uribe's Answer Brief, pp. 5 - 6.* Notably, Appellees cite no evidence of retaliation, and the undisputed evidence shows that the underlying action was not filed in retaliation. (RP 219, ¶ 6). Further, not only do Appellees fail to cite to any evidence of interference with the attorney-client relationship in the Santa Fe Lawsuit, they do not even attempt to explain how their relationship was allegedly affected, if at all.

C. APPELLEES DID NOT MOVE FOR JUDGMENT BASED ON SLAPP

Appellees throw around the term "SLAPP suit," using it the wrong context and inferring that the District Court found that the underlying lawsuit was barred by the Strategic Lawsuit Against Public Participation ("SLAPP") statute. *See Thomas' Answer Brief, pp. 5, 8 – 9; see Uribe's Answer Brief, pp. 4 – 6.* The New Mexico SLAPP statutes affords litigants the rights to an affirmative defense. NMSA § 38-2.9.1(A) and (B). Further, New Mexico's SLAPP statute only protects against causes of action for speech made in connection with...a quasi-judicial proceeding. NMSA § 38-2.9.2. In the underlying proceeding, Appellees did not assert a SLAPP affirmative defense, did not move for judgment on those grounds or even allege that their defamatory statements were made in a quasi-

judicial proceeding. (RP 81 – 95; RP 104 – 120). Accordingly, the Court should disregard any SLAPP allegations.

D. HELENA DID NOT ADMIT TO THE TRUTH OF THE NEWSPAPER ARTICLES

Appellees further assert that because Helena cited to newspaper articles, Helena has admitted to the truth of all of the statements contained within the news articles that are part of the Record. *See Appellee's Answer Briefs, fn. 1.* While the newspaper articles presented in the Record are self-authenticating, Helena did not cite any newspaper article to prove the truth of statements in those articles. SCRA 11-902 (news articles are self-authenticated). (RP 192 – 216). Helena merely cited to those news articles to show that Appellants were quoted in them. (RP 192 – 216). Helena has not admitted the truth of anything in those articles.

IV.
BURDEN OF PROOF

Appellees, as the parties asserting the affirmative defense of absolute privilege, bear the burden of pleading and proving affirmative defense. *Washington v. Atchison, Topeka and Santa Fe Ry. Co.*, 1992, 114 N.M. 56, 834 P.2d 433 (1992); *Beyale v. Arizona Public Service Co.*, 105 N.M. 112, 729 P.2d 1366 (1986); *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017 (1986); *Brown v. Taylor*, 120 N.M. 302, 901 P.2d 720 (1995).

V.
ARGUMENT & AUTHORITIES

A. ALL FOUR DEFAMATORY STATEMENTS ARE ACTIONABLE BECAUSE THE ABSOLUTE PRIVILEGE DOES NOT APPLY TO "WHOLLY UNINTERESTED" RECIPIENTS, LIKE THE PRESS MEDIA

Thomas' three defamatory statements and Uribe's one defamatory statement are actionable because the absolute privilege does not protect defamatory statements made to the wholly uninterested news media regardless of the timing.

1. The standard is "wholly uninterested" not "direct interest"

The recipient of a defamatory statement is not only relevant to the application of the absolute privilege, but dispositive of it. *See Penny v. Sherman*, 101 N.M. 517, 684 P.2d 1182 (Ct. App. 1984), cert. denied, 685 P.2d 1963 (1984). Appellees argue that Helena has incorrectly stated that the absolute privilege doctrine requires the recipient to have a "direct interest" in the judicial proceeding. Helena never cites a "direct interest" standard. While the absolute privilege may apply when the recipient has *some* interest in the proceeding, the absolute privilege does not apply when a recipient is *wholly uninterested* in the proceeding. *Id.* at 519, 1184. This Court has even used an attorney's communication to a newspaper as an example of communications that fall outside of the absolute privilege because the newspaper is a wholly unrelated recipient. *Id.* (citing *Kennedy v. Cannon*, 229 Md. 92, 182 A.2d 54 (Ct. App. 1962)).

The undisputed evidence shows that all four Defamatory Statements at issue were made to the news media. (PR 87, ¶ 12; RP 112, ¶ 12; RP 237 – 238; RP 247; RP 269; RP 312. There is no evidence that the news media is a party, witness or has any other interest in the outcome of the Santa Fe Lawsuit. (RP 121 – 142). In fact, the undisputed evidence shows that the news reporters had no interest in the Santa Fe Lawsuit. (RP 238, ¶ 8).

2. This Court should apply New Mexico law and take guidance from prior New Mexico cases

Even though one of the Appellees is a Texas lawyer does not mean this Court should apply Texas law. The Defamatory Statements at issue were made in New Mexico and the underlying case is pending in New Mexico. (RP 85, ¶ 6; PR 87, ¶ 12). Yet, without citing one New Mexico case, Appellees rely on Texas law for the proposition that their post-lawsuit statements to the media are protected by the absolute privilege.

This Court need not look further than its own bench for guidance on whether defamatory statements made outside of the courtroom to a newspaper, after a lawsuit is filed, are privileged. *Id.* In *Penny*, this Court cited *Kennedy v. Cannon*, 229 Md. 92, 182 A.2d 54 (Ct. App. 1962) to provide an example of circumstances when the absolute privilege would not apply:

> "[C]ourts have refused to apply the absolute privilege to communications made to recipients wholly unrelated to the proceeding. *Compare Kennedy v. Cannon*, 229 Md.

> 92, 182 A.2d 54 (Ct. App. 1962) (attorney's communication with newspaper was outside absolute immunity)....This is not such a case."

Penny, 101 N.M. at 521, 684 P.2d at 1184. Additionally, the Restatement on the absolute privilege—upon which this Court consistently relies—also cites *Kennedy* for the proposition that the absolute privilege does not apply to statements made during press conferences. RESTATEMENT (SECOND) OF TORTS, § 586, reporter's notes; *see Romero*, 85 N.M. at 476, 513 P.2d at 719 (relying on the absolute privilege Restatement); *see Penny*, 101 N.M. 517, 519 – 520, 684 P.2d at 1184 – 1185 (same).

Kennedy involved a criminal defense attorney who, after his client had been arrested and charged by the state's attorney general's office, called the local newspaper and defamed the victim/accuser. *Kennedy*, 229 Md. at 94 – 95, 182 A.2d at 56 – 57. The *Kennedy* court held:

> "The scope of the privilege is restricted to communications such as those made between an attorney and his client, or in the examination of witnesses by counsel or in statements made by counsel to the court or jury. *3 Restatement Torts, 586, comments a and c....*
>
> [A]side from any question of ethics, an attorney who wishes to litigate his case in the press will do so at his own risk. We hold that the appellee [attorney] had no absolute privilege in regard to the statement made by him to the newspaper."

Id. at 98 – 99, 60 – 61. This Court should continue to rely on *Kennedy* as it did in the *Penny* case. *See Penny,* 101 N.M. at 521, 684 P.2d at 1184. To rely on Texas law, in complete contradiction to this Court's prior guidance and the Restatement, would serve an injustice and open the floodgates to trial by press tactics.

3. Even so, both Texas cases cited by Appellees are distinguishable

This Court should not give any weight to the Texas cases cited by Appellees because they are distinguishable from the instant case. Unlike the underlying action, neither the *Hill* nor *DISD* case involve a press conference called by the defaming defendants. *See Hill v. Harold-Post Pub. Co., Inc.*, 877 S.W.2d 774, 782 – 783 (Tex. App.—El Paso 1994), *rev'd in part on other grounds*, 891 S.W.2d 744 (Tex. 1994); *see Dallas Independent School District v. Finlan*, 27 S.W. 3d 220, 239-240 (Tex. App.—Dallas 2000, *pet. denied*).

In the *Hill* case, the Texas Appellate Court cited the Restatement for the proposition that, "The absolute privilege does not extend to a press conference," implying that the absolute privilege would not have applied if the defaming defendant had held a press conference. *See Hill*, 877 S.W.2d at 782 – 783 (citing RESTATEMENT (SECOND) OF TORTS, Appendix § 586, at 517 (1981). In *Hill*, there was no evidence in the record that the defamation defendant held a press conference, and the *DISD* case , which also did not involve a press conference,

merely relies on *Hill*. *Id.* at 783; *Dallas Independent School District*, 27 S.W.3d 239 – 240.

In the present case, Appellees admitted that their two Defamatory Statements made on October 8, 2008 occurred at a press conference that they called and held. (PR 87, ¶ 12; RP 112, ¶ 12; RP 238, ¶ 4). Accordingly, even if this Court were to apply Texas law, this Court should still reverse the District Court's judgment as even *Hill* acknowledges that statements made in a press conference are not protected by the privilege.

4. Appellees statements do not "achieve the objects of litigation"

The absolute privilege immunizes attorneys and litigants from defamation actions when speech achieves the objects of litigation and promotes the presentation of claims before the court. *See Gregory Rockhouse Ranch, L.L.C. v. Glenn's Water Well Service*, 2008-NMCA-101, ¶ 18, 144 N.M. 690, 191 P.3d 548; *see Romero*, 85 N.M. at 477, 513 P.2d at 720. Despite this fundamental public policy, Appellees fail to mention how their statements to newspapers, in some cases months in advance of litigation, achieved the objects of litigation or promoted the presentation of their claims to the court. Communications to the news media do not generally further the investigation of claims. *Asay v. Hallmark Crds, Inc.*, 594 F.2d 692 (8th Cir. 1979). Appellees neglect to allege how this case is somehow different.

B. UNDER *ROCKHOUSE*, THOMAS' TWO DECEMBER 13, 2007 DEFAMATORY STATEMENTS ARE ACTIONABLE

Thomas has an additional burden, which she failed to meet, with regard to her two defamatory statements made on December 13, 2007 because they were made "preliminary to the Santa Fe Lawsuit."

1. *Rockhouse* is exactly on point

Thomas made two defamatory statements on December 13, 2007—more ten months before filing the Santa Fe Lawsuit—when she admittedly had no clients and considered litigation only a bare possibility. (RP 89) ("Linda Thomas was at the meeting for the purpose of possibly establishing an attorney client relationship"). This Court's recent decision in *Rockhouse* is exactly on point with regard to Thomas' December 13, 2007 Statements, holding that the absolute privilege does not apply to defamatory statements made six months in advance of litigation or when litigation was not seriously considered. *Rockhouse*, 2008-NMCA-101, ¶ 19. Interestingly, Thomas fails to cite to any cases involving pre-suit defamation or any cases where pre-suit defamation was absolutely privileged.

2. *Rockhouse applies to defamation cases*

Thomas argues that Helena's reliance on *Rockhouse* is misplaced because *Rockhouse* involves a slander of title claim rather than a defamation claim. New Mexico case law on absolute privilege, however, makes no distinction between slander of title and defamation as they are both sub-categories of the law of libel

and slander. *See Rockhouse*, 2008-NMCA-101, ¶ 17 – 18 (defining "slander of title" as the publication of matter which is untrue and disparaging about another's property and citing the RESTATEMENT (SECOND) OF TORTS § 635); *see* RESTATEMENT (SECOND) OF TORTS § 635 (the absolute privilege that applies to defamation applies to slander of title claims as well); *see* Am. Jur., Libel and Slander, § 525 (slander of title and defamation of person share primary elements). Although *Rockhouse* is a slander of title case, this Court relied on the following defamation cases when determining that the slander in *Rockhouse* was not absolutely privileged: (1) *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct. App. 1973), (2) *Romero*, 85 N.M. 474, 513 P.2d 717 (Ct. App. 1973), and (3) *Penny*, 101 N.M. 517, 684 P.2d 1182. *See Rockhouse,* 2008-NMCA-101, ¶¶ 18 – 19. Finally, even Thomas relies upon the slander of title case styled *Superior Construction, Inc. v. Linerooth*, 103 N.M. 716, 712 P.2d 1378 (1986). *See Thomas' Answer Brief, pp. 9 – 10.* Notably, *Linerooth* also relies upon the *Romero* and *Penny* defamation cases. *Linerooth*, 103 N.M. at 719, 712 P.2d at 1380. Thomas' attack on this point is a distraction attempt because she knows that *Rockhouse* is fatal to her case.

3. *Rockhouse*'s ruling on absolute privilege is <u>not</u> dicta

In another endeavor to shift this Court's focus away from the real issues in this appeal, Thomas asserts that the Court's decision in *Rockhouse* that the absolute

privilege did not apply is dicta. Whenever a question fairly arises and there is a distinct decision of such question, the ruling of the court in respect thereto cannot be called mere dictum. *Duncan v. Brown*, 18 N.M. 579, 139 P. 140 (1914); see also BLACK'S LAW DICTIONARY 366 (7th ed. 2000) (dictum is "an opinion by a court...***that is not essential to the decision***.") (emphasis added). The appellant in *Rockhouse* argued that the absolute privilege applied, or in the alternative, the qualified privilege applied. *Rockhouse,* 2008-NMCA-101, ¶¶ 17 and 20. The Court of Appeals first made a distinct decision that the absolute privilege did not apply before turning to the alternative question of qualified privilege. *See id.* at ¶¶ 17 – 20. The decision is not dicta.

4. Helena is not asking for a form over substance ruling

Thomas would have this Court believe that the timing of the defamatory statement is unimportant and is a mere form over substance argument. In doing so, Thomas is attempting to evade her heightened burden of proof due to the fact that her statements were made "preliminary to a judicial proceeding" rather than "during a judicial proceeding."

This Court believed timing was relevant in *Rockhouse*, making timing a central issue in addition to the requirement that litigation be under serious consideration. This Court held the absolute privilege did not apply because:

> "[W]e find no authority to support the extension of this privilege to communications made so far in advance [six

> months] of litigation. Nor do we find any indication that litigation was seriously contemplated at the time that the communications were made."

Id. (citations omitted). The double negative is apparent: The absolute privilege does not apply if the communication is made so far in advance of litigation OR litigation was not seriously contemplated. *See id.* Conversely, the absolute privilege only applies if the communication is made in close proximity AND litigation was seriously contemplated. *See id.* Appellee has to prove both, and she is skirting the issue because she can't prove either.

5. Regardless, Thomas did not prove either close proximity or serious consideration

There is no question that Thomas fails to meet her burden on close proximity. It is undisputed that two of Thomas' Defamatory Statements were made on December 13, 2007, ten months before she filed the Santa Fe Lawsuit in October 2008. (Compare RP 247 and 269 with RP 121 – 142). According to *Rockhouse*, "there is no authority to support the extension of this privilege so far in advance of litigation." *See id.* This Court, therefore, should reverse the underlying judgment on the sole ground that the statements were made too far in advance of litigation.

Even if the Court finds, however, that *Rockhouse* only requires Thomas to meet her burden by establishing close proximity OR serious consideration, this Court should still find in favor of Appellant because Thomas' evidence on serious

consideration is insufficient. "The bare possibility that a proceeding might be instituted is not to be used as a cloak to provide immunity." RESTATEMENT (SECOND) OF TORTS § 586, cmt. e. Discussing the bare possibility of filing a lawsuit with people who she admittedly did not even consider her clients does not amount to good faith contemplation and serious consideration. (RP 89). The District Court erroneously found that Thomas seriously considered litigation as of December 13, 2007. This Court should reverse.

VI.
CONCLUSION

New Mexico requires that an attorney/litigant establish close proximity, serious consideration, and an interested recipient to obtain immunity from defamation as afforded by the absolute privilege. Such prerequisites exist because they support public policy—advocacy within the context of the judicial system. Although a finding that Appellees failed to establish any one of those requirements mandates reversal, none of those elements are present. Defaming Appellant to the press, in some cases nearly a year before filing a lawsuit, when Thomas did not even have any clients, is beyond the bounds of the protection afforded by the absolute privilege. This Court should not encourage this conduct under the cloak that there was a "bare possibility of litigation" or that trying a case to the press "achieves the objects of litigation."

Respectfully submitted,

By: /s/ Robert L. Soza, Jr. by FLER

Robert L. Soza, Jr
Elena P. Villaseñor (pro hac vice)
JACKSON WALKER L.L.P.
112 East Pecan Street, Suite 2400
San Antonio, Texas 78205
Telephone: (210) 978-7718
Facsimile: (210) 978-4618

Faith Reyes
Frank M. Bond
Simons Firm, LLP
P.O. Box 5333
Santa Fe, New Mexico 87502-5333
Telephone: (505) 988-5600
Facsimile: (505) 982-0185

ATTORNEYS FOR PLAINTIFF HELENA CHEMICAL COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the following counsel this 10th day of February, 2009:

Jack Brant
Law Office of Jack Brant, P.C.
202 Tulane Drive SE
Albuquerque, NM 87106

Via Facsimile at (505) 232-5335

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

Via Facsimile (505) 426-8001

Michelle W. Wan
Thomas & Wan, LLP
1710 Sunset Blvd
Houston, Texas 77005

Via Facsimile (713) 529-1116

Elena P. Villaseñor