

Litigation Privilege Does Not Shield Attorney and Client Who Make Allegedly Defamatory Statements to News Reporters

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[*Helena Chemical Company v. Pamela Uribe, et al.*, ___ P.3d___ \(N.M. Ct. App. Mar. 30, 2011\)](#)

Brief Summary

The New Mexico Court of Appeals held that an attorney and client who made allegedly defamatory statements to news reporters who had no interest in the judicial proceeding were not absolutely immune from liability. The court held that the absolute litigation privilege applies when: (1) the alleged defamatory statement is made to achieve the objects of litigation; and (2) the statements are reasonably related to the subject matter of the judicial proceeding.

Complete Summary

This action arose out of a toxic tort action against a company, followed by a lawsuit filed by the company against plaintiff's lawyers and plaintiff. The company sued the attorneys and client for alleged defamatory statements they made about the company both before and after filing of the toxic tort suit. Before the underlying action was filed, the client held a public meeting—which the lawyers attended—to consider a lawsuit against the company. The day after the tort action was filed, the attorneys held a press conference outside of the company facility to announce the filing. Alleged defamatory statements were made to the media during the public meeting and press conference.

The trial court granted summary judgment to the lawyers and client in the defamation action, holding that they were immune from liability based on the absolute privilege for statements in litigation. The New Mexico Court of Appeals reversed the grant of summary judgment and remanded the case, without ruling on the merits of the

defamation claims themselves. The appellate court laid out a two prong test for determining if the defense of absolute litigation privilege is available: (1) the alleged defamatory statement must be made to achieve the objects of litigation; and (2) the statement must be reasonably related to the subject matter of the judicial proceeding.

In applying the test, the court stated that the privilege generally is unavailable in instances where defamatory statements do not serve the purpose of the judicial proceeding, enhance its function or legitimately achieve its objects. Additionally, the court considered the level of interest the recipient of the statement has in the judicial proceeding. In regard to prefiling statements, the absolute privilege can apply when the statements are made in good faith and in serious consideration of initiating a judicial proceeding.

In applying the test to the pre-action statements here, the court determined that the alleged defamatory statements were made in good faith and in serious consideration to initiating a judicial proceeding, which did in fact mature into a lawsuit. However, all of the statements were made with an avowed purpose to educate the public and were directed to news reporters with no interest in the judicial proceeding outside of their capacity as news reporters. The court concluded that the statements did not aid in achieving the objects of litigation (which generally are to investigate or prepare claims for adjudication) since the statements might "taint" prospective jurors. The court held that the recipient of the extra-judicial communication must have had some connection to the judicial proceeding for the contact to be privileged here.

Significance of Opinion

This New Mexico Court of Appeals refused to shield lawyers and their clients from defamation actions based on statements they made to the media in anticipation of and during litigation. The court held, in effect, that the recipient's identity can be the decisive factor in whether the litigation privilege applies and that statements to media were not absolutely privileged in this instance. In so doing, the court appears to have implicitly rejected the notion that public exposure may have some salutary effects for the plaintiff in the litigation, including in a negotiated disposition short of trial, and not involving a potential "tainted" jury pool at all.

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