

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 32,594

WALTER F. SMITH, III,

Plaintiff-Appellant-Respondent,

vs.

COA No. 28,896

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

Defendants-Appellees-Petitioners,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

AMICUS CURIAE BRIEF OF THE

NEW MEXICO PRESS ASSOCIATION

and

NEW MEXICO BROADCASTERS ASSOCIATION



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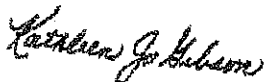


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213 (F) NMRA, I hereby certify that the foregoing Amicus Curiae Brief complies with the applicable type-volume limitation in that the body of the Amicus Curiae Brief contains 3,477 words as indicated by the word-count total of the word processing system used to prepare the same, which is Word Perfect X3.

INTRODUCTION

New Mexico's efforts to maintain a legal balance between the laws of defamation and the United States First Amendment and the New Mexico constitutional right of free speech and free press (Art. II, Sect. 17, Constitution of New Mexico), appear once again in this case of *Smith v Durden*.

The Court of Appeals decision has undercut 25 years of defamation jurisprudence in New Mexico and in doing so has weakened the First Amendment protection in the state.

It is a de facto issue in this case that as the parameters of defamation expand, the protections of First Amendment rights of free speech and free press contract.

Trying to package a definition of defamation with the wrappings of other tort actions such as *prima facie tort* or outrage, does not do justice to the values of democracy's cornerstone freedoms of free speech and free press. Defamation and freedoms of speech and the press are intertwined in a special way. Justice Kennedy in the dissenting opinion in *Smith v Durden* highlighted this concern. "I conclude then that the inclusion of actual injury to reputation as an element of the tort of defamation is the *sine qua non* of defamation. Otherwise, there is nothing

defamatory to distinguish a tort producing mental anguish and humiliation from, for instance, the tort of outrage or *prima facie tort*, if those 'feeling' injuries can stand alone."

Without requiring a showing of actual injury to reputation, defamation is not distinguished from other torts which do not involve First Amendment issues.

Why else would the New Mexico Supreme Court have framed the defamation uniform jury instructions to require that element of proof? Not only was actual injury to reputation a requirement in the defamation law of New Mexico before 1987 (when the UJIs took effect), the same concept has been approved by the New Mexico Supreme Court more recently in *Fikes v Furst*, *infra*, in 2003. The court no doubt has recognized the interaction between defamation, and freedom of speech and the press. There is no need to jettison the rights of free speech and free press into the general tort arena with other causes of action that are not constitutionally guaranteed.

While states are allowed to set their own standards of defamation for private individuals, New Mexico has a long history of protecting freedom of speech and the press and when given the constitutional choice of which of two paths to follow,

New Mexico courts traditionally have leaned toward free speech and free press. Both the U.S. Supreme Court case in *Gertz* and its progeny have provided constitutional permission for states to create their own legal balance in this free speech-free press/defamation area.

The Court of Appeals 2-1 decision changes that balance, narrowing the field of free speech, free press, and expanding the field of defamation.

Like a New Mexico pecan farmer shaking a pecan tree, causing the pecans to fall to earth, the United States Supreme Court shook the legal defamation tree with the *Gertz v. Robert Welch, Inc. (infra)* decision in 1974, and the legal issue shake-out continues to this day.

In a New Mexico appellate case involving a libel action and the *Gertz* reasoning regarding damages, Justice William Federici recited the New Mexico Supreme Court's basic legal concern:

“For years, federal and state courts, including those in New Mexico, have been confronted with the problem of achieving a proper balance between the laws of defamation and the laws of constitutionally protected freedom of speech and of the press. The problem again presents itself in this case.” (98 N.M. at 401)

Marchiondo v. Brown, 98 N.M. 424,773 P.2d 1231 (1982)

Some time after the *Marchiondo* case and the *Poorbaugh v. Mullen (infra)* case (decided just three months after *Marchiondo*), the Uniform Jury Instructions for defamation actions in New Mexico were changed. Specifically, UJI 13-1001 and UJI 13-1002(B)(8) (among others) were approved by the New Mexico Supreme Court as incorporating the New Mexico law of defamation. (UJI's effective as of January 1, 1987).

In UJI 13-1002(B)(8) the law states that the plaintiff in a libel action has the burden of proving "The communication caused actual injury to the plaintiff's reputation."

This has been the law on that issue from the time the UJI was adopted by the New Mexico Supreme Court until the decision rendered in the present case by the New Mexico Court of Appeals in August, 2010.

The Court of Appeals decision holds UJI 13-1002(B)(8) is not a correct statement of the law of defamation in New Mexico, and that a plaintiff in a libel action is not required to prove actual injury to his or her reputation, provided the plaintiff can prove personal humiliation and mental anguish sufficient to establish actual injury.

Actual injury to reputation, not personal humiliation and mental anguish, is the essence of being defamed and was the basis for the UJI's being framed the way

they were in 1987, and supported by the language in the *Fikes v Furst* case, *infra*.

The New Mexico Press Association and the New Mexico Broadcasters Association side with the Appellees in this action, and believe that UJI 13-1002(B)(8) is (or was) a correct statement of the law of defamation in New Mexico, and also support the dissenting opinion of Hon. Roderick T. Kennedy, for the reasons presented in this amicus curiae brief.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

The New Mexico Press Association (hereinafter NMPA) and the New Mexico Broadcasters Association (hereinafter NMBA) adopt and incorporate the Nature of the Case statement of the Appellee, as if here set forth in full.

II. STATEMENT OF PROCEEDINGS

The NMPA and NMBA adopt and incorporate the Statement of Proceedings of the Appellee, as if here set forth in full.

III. SUMMARY OF THE FACTS

The NMPA and NMBA adopt and incorporate the Summary of Facts of the Appellee, as if here set forth in full.

ARGUMENT

I.

LEGAL BACKGROUND OF THE ISSUE OF WHETHER ACTUAL INJURY TO REPUTATION IS A PREREQUISITE FOR RECOVERY IN A DEFAMATION ACTION

In the case of *Gertz v Robert Welch, Inc.* 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997, 1 Media L R 1633 (1974) the United States Supreme Court retrenched somewhat from what had been a growing area of protection for the media, that had started with *New York Times v Sullivan*, 376 US 254, 11 L. Ed 2d 686, 84 S Ct 710, 1 Media L R 1527, 95 ALR2d1412 (1964), protecting comment about public officials; then moved on to *Curtis Pub. Co. v Butts*, 388 US 130, 18 L Ed 2d 1094, 87 S Ct 1975, 1 Media L R 1568 (1967), protecting comment about public figures; and finally *Rosenbloom v Metromedia*, 403 US 29, 29 L Ed 2d 296, 91 S Ct 1811, 1 Media L R 1597 (1971), protecting comment about issues of public concern.

In *Gertz* the U.S. Supreme Court retained the protections regarding public officials and public figures, but relaxed the legal protections somewhat protecting private individuals who were involved in issues of public concern. Originally, the *Gertz* case was best known for that legal retrenchment. Now, a second legal issue addressed by *Gertz* is increasingly important, and that is the issue of the extent of legal protections that confront private individuals who file claims for defamation.

On this issue, the U.S. Supreme Court passed the ball back to the states with the proviso the states could define the standard of defamation liability for private individuals in their jurisdictions as long as they did not impose liability without fault.

In a subsequent case, *Time, Inc. v Firestone*, 424 US 448, 47 L Ed 2d 154, 96 S Ct 958, 1 Media L R 1665 (1976) the court specifically stated that if a state permitted recovery without regard to injury to reputation, such a standard would not violate the *Gertz* requirements that compensatory awards be supported by competent evidence regarding actual injury.

Thus, states are left with the clear choice that they may require actual injury to personal reputation as a prerequisite to recovery, or they may not require it, (provided there are no presumed damages, where a private person's claim is based

on negligence and not actual malice as established in the *New York Times* definitions and its progeny).

Having reached that legal plateau, whether any individual state requires or does not require actual injury to reputation, as a prerequisite for recovery in a defamation action, is determined by the law of that particular state.

New Mexico has made this choice by requiring that a defamation claimant first show there was some actual injury to reputation. That is a very different standard than that proposed by the Court of Appeals opinion, which would allow a person only feeling some level of humiliation or mental stress to advance a defamation claim to the trier of fact, even though no actual injury to reputation is shown.

The legal standard recited in the existing UJI's takes into account that what is added to the law of defamation is subtracted from the constitutional rights of free speech and free press.

II.

BACKGROUND ON THE ISSUE OF ACTUAL INJURY TO REPUTATION IN NEW MEXICO

This now brings us to the state of the law in New Mexico on this defamation issue.

The New Mexico case most directly on point is *Fikes v. Furst*, 2003-NMCA-033, 134 N.M. 602, 81 P.3d 545.

In this case, two anthropologists were at odds over academic subjects. The court states:

“Dr. Furst made statements that Dr. Fikes was “a lousy anthropologist,” “beset by devils” and was “pursuing a half-assed fantasy.” Dr. Fikes, for his part, wrote a book that chronicled his disagreement with Dr. Furst’s conclusions about the Huichol that was entitled *Carlos Castaneda: Academic Opportunism and the Psychedelic Sixties*. The manuscript contained statements, referring to Dr. Furst’s work with the Huichol Indians, such as: “I discovered what may be the most complicated and fascinating anthropological hoax of the 20th century.”

(134 N.M. at 604)

In an opinion written by Hon. Pamela Minzner, the New Mexico Supreme

Court states:

“The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one’s reputation. *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776,(10th Cir. 1965) Thus, no matter how opprobrious a defendant’s statement may be, a plaintiff is not entitled to recover damages unless he or she can show that it caused injury to reputation.” (134 N.M. at 606)

This last sentence recites the same legal standard found in UJI 13-1002(B)(8). It has been the law in New Mexico since the UJI’s were adopted in 1987.

It is supported and founded by other New Mexico cases.

One of the earliest cases on this issue in New Mexico, if not the first, is *Marchiondo v Brown*, supra. This case included a defamation claim by well known attorney, William Marchiondo, against the Albuquerque Journal group. In discussing a cross-appeal by the Journal, Justice Federici clearly was aware of the holding in *Gertz* and refers to the *Gertz* reasoning on numerous occasions.

It is clear that the New Mexico Supreme Court was anticipating New Mexico’s Uniform Jury Instructions would change to conform to their understanding of the *Gertz* changes in the law of defamation. Until those changes were made in

the state's UJIs, the Court stated:

“The trial courts should fashion appropriate instructions based upon the facts of each case, at least until we have approved specific uniform jury instructions to substitute for the instructions which are now in existence but which are erroneous.” (98 N.M. at 403)

Three months after *Marchiondo*, the New Mexico Supreme Court dealt with another defamation case, *Poorbaugh v Mullen*, 99 N.M. 11, 653 P.2d 511 (Ct. App, 1982). In this case a real estate purchaser had written a letter accusing the Plaintiff (broker) of fraud and misappropriation of funds. The New Mexico Court of Appeals recognized the shifting ground initiated by the *Gertz* decision and says:

“The standards enunciated in *Marchiondo v Brown, supra*, also apply to suits in defamation actions against non-media defendants.” (99 N.M. at 20)

And additionally in *Poorbaugh* the New Mexico Court of Appeals says:

“Liability for defamation is based upon both publication, i.e., communication to a third person, and proof of actual damages.” (99 N.M. at 21) thus moving one step closer to a definition of liability in the future Uniform Jury Instructions.

III.

**IN NEW MEXICO THE LAW HAS BEEN THAT
PLAINTIFF'S DEFAMATION DAMAGES ARE
NOT PRESUMED OR CONSIDERED UNTIL,
AND UNLESS, THERE IS A THRESHOLD PROOF
OF ACTUAL DAMAGES TO REPUTATION**

Some time after *Marchiondo* and *Poorbaugh* a new set of Uniform Jury Instructions were proposed and eventually adopted by the New Mexico Supreme Court.

While the jury instructions speak for themselves, it is pertinent to note that in UJI 13-1002(B)(8), the instruction says that before a plaintiff can recover for defamation, the plaintiff must prove that "The communication caused actual injury to the plaintiff's reputation."

This focuses the question as to whether New Mexico courts have declared that to be the law in New Mexico. It is clearly declared in the jury instruction.

Also to be considered is UJI 13-1001, "Defamation: Defined. Defamation is a wrongful (and unprivileged) injury to (a person's) reputation." This makes it clear that the concept of actual injury to reputation was not some kind of sleeper issue, that just happened to appear in the UJIs

In *Gruschus v. Curtis Publishing Company*, 342 F. 2d 775 (10th Cir., 1965) the Tenth Circuit Court, interpreting New Mexico libel law, stated: “The primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one’s reputation.” (342 F.2d at 776) upholding a grant of summary judgment by the Hon. Howard Bratton.

Ten years after the UJI was adopted, in another federal case from New Mexico on libel, Judge Campos summarized the elements needed to prevail in a defamation claim. In *Schuler v. The McGraw-Hill Companies, Inc.* 989 F. Supp. 1377 (D.N.M. 1997) Judge Campos said the elements require proof that:

“....4) the communication proximately caused actual injury to the plaintiff’s reputation” (citing N.M. UJI 13-1002).

Since the current defamation UJIs were adopted in 1987, there have been several appellate cases that have touched on the actual damages to reputation area. The first case was *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231, (S Ct, 1989) In this case the Plaintiff alleged he had been defamed by false accusations regarding the reasons his employment was terminated.

The New Mexico Supreme Court states in its opinion that:

“Accordingly, for Newberry to be compensated for actual injury, he must prove that Ballard negligently published the communication, and that, the communication proximately caused actual injury to plaintiff’s reputation.” (108 N.M. at 430). This statement is consistent with UJI 13-1001 and UJI 13-1002(B)(8). (108 N.M. at 430)

Then in the next sentence, the Newberry opinion states:

“The instruction to the jury said that plaintiff had the burden of proving one or more of the following injuries: harm to plaintiff’s good name and character among friend, neighbors and acquaintances; harm to plaintiff’s good standing in the community; personal humiliation; and mental anguish and suffering.” (108 N.M. at 430) This statement is consistent with UJI 13-1010 regarding damages in libel actions, once liability has been found.

This pattern of liability determination as Step 1, and damages determination as Step 2, (if liability is found), is a customary protocol in tort actions.

In *Cowan v. Powell*, 115 N.M. 603, 856 P12d 251, 1993, the New Mexico Court of Appeals stated in this libel case:

“These jury instructions clearly establish a two-step process for reaching a verdict: the jury first determines, under SCRA 13-1002, whether the plaintiff was defamed and then, under SCRA 13-1010, determines the amount of compensation, if any, the plaintiff should receive.” (115 N.M. at 604)

Thus, the *Newberry* reasoning is consistent with an actual injury to reputation standard for determining liability, and then a consideration of a wider range of damages for purposes of compensation.

The case following *Newberry* is *Fitz v Furst*, reported above.

CONCLUSION

The legal progeny of *Gertz v. Welsh, Inc.* have returned the law of defamation regarding individuals to the states, as regards the definition of defamation.

Through the adoption of UJIs confirming the law and then the *Fitz v Furst* decision by Justice Minzner, New Mexico courts declared their position on this defamation issue, and ruled that before a defamation claimant could recover, they

must show that they suffered some actual injury to reputation. The Court of Appeals decision would change this rule of law. Unfortunately, the change proposed would reduce the protections of a free press and free speech and expand the range of defamation.

One of the concerns of the NMPA and NMBA is that the different legal standard suggested in the New Mexico Court of Appeals decision will subject defamation defendants to damage verdicts that are based not on substantial evidence, but on the force of emotional winds that on occasion swirl through society and the legal system. This is the problem that led to the *New York Times v Sullivan* decision, when news operations reporting on an unpopular issue became the target of libel actions.

As the rights of defamation expand, the protections of the First Amendment contract.

If a plaintiff need only testify to the fact he or she was humiliated or had mental anguish over a particular non-factual statement, then the legal exposure of all speakers and writers in all walks of life, is more precarious. This compared to the present standard of requiring a plaintiff to show there was actual injury to the plaintiff's reputation, before the case proceeds to damages.

The present UJIs on defamation have worked well in New Mexico for more than two decades. If the New Mexico Court of Appeals' opinion remains the law it will be easier for defamation plaintiffs to prevail in the future, than it has been in the past. The practical result will cause speakers and writers to be more cautious in expressing deeply held or unpopular opinions. Self-censorship will be more likely when the speaker or writer feels the information presented cannot be proved in a court of law.

What the existing New Mexico UJIs do, however, is require that at least some actual injury to reputation be proved before the case advances to damages, rather than allowing only a claim of some degree of humiliation or mental stress to advance a case to damages, even though no actual injury to reputation is shown.

The NMPA and NMBA believe that in trying to maintain a proper balance between free speech and a free press, and an individual's right to maintain his or her reputation, the New Mexico courts have made the right choice, as the law has been developed prior to the most recent Court of Appeals decision in this case.

The opinion of the New Mexico Court of Appeals in the present case tilts the balance in favor of those seeking damages to their reputations, without requiring

them to prove actual injury to their reputations. Judges and juries may be asked to award compensation without any substantial evidence of what they are compensating.

In sum, the NMPA and NMBA believe that the existing UJI's on defamation are serving their intended purpose of reciting the law of defamation in New Mexico and balancing the interests of free speech and free press, along with an individual's right to protect his or her reputation. Therefore, they respectfully disagree with the proposed changes and/or modifications to UJI 13-1002(B)(8) as made by the opinion of the New Mexico Court of Appeals majority, and agree with the minority opinion of the Hon. Roderick T. Kennedy.

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