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DEFAMATION IN NEW MEXICO

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I. INTRODUCTION

The New Mexico Constitution guarantees the right "freely [to] speak, write and publish . . . sentiments on all subjects," but cautions that citizens exercising that right shall be "responsible for [its] abuse. . . ."[1] The law of defamation defines one such "abuse." Formerly, whether the defamation was oral (slander) or in writing (libel) was of great significance. Libel was less "strictly construed"[2]: "The reason for this distinction is obvious. Written slander [sic], by reason of its wider circulation and enduring form, is calculated to inflict greater permanent injury to character, and suggests stronger malice by reason of its studied preparation."[3]

More recently, New Mexico courts have been tempted to abolish the distinctions between libel and slander. One reason for abolishing the distinctions was the development of broadcasting, which resembles written communications in its wider circulation but lacks "enduring form." It may or may not be the result of "studied preparation," depending on whether it is a scripted or extemporaneous broadcast communication. The New Mexico Court of Appeals resolved the broadcasting dilemma by stating that broadcasting of defamatory materials "by means of television [and, presumably, radio] is generally held to constitute libel and not slander, irrespective of whether it is read from a manuscript."[4] In any event, although the two torts are different, any significant distinction between libel and slander today exists primarily on a theoretical plane.[5]

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1. N.M. Const. art. II, § 17.

2. Dillard v. Shattuck, 36 N.M. 202, 205, 11 P.2d 543, 545 (1932) (holding that a statement by sheriff-defendant to attorney-plaintiff that certain persons paid money to the plaintiff for payment to the defendant neither imputed a charge of a crime nor touched upon the plaintiff's profession, and so was not slander per se).

3. *Id.*

4. Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 237 n.1, 656 P.2d 896, 900 n.1 (Ct. App. 1982) (partially affirming and partially reversing summary judgment for defendant television station on issues relating to privileged communications and actual malice).

5. In Reed v. Melnick, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970), *overruled on other grounds*, Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982), the court refused to abolish the distinction between libel and slander, reversed the dismissal of the complaint, and found the statement "people cannot get money out of [the plaintiff] as he is threatening bankruptcy" to be patently defamatory. 81 N.M. at 609, 471 P.2d at 179 (quoting Reed v. Melnick, 81 N.M. 14, 462 P.2d 148 (Ct. App. 1969)).

II. THE ELEMENTS OF DEFAMATION

Traditionally, the common law elements of a defamation action in New Mexico include the following: (1) publication to a third person (2) by the defendant (3) of an asserted fact (4) of and concerning the plaintiff (5) that is capable of being injurious to the plaintiff.[6] Recent first amendment decisions by the United States Supreme Court created several requirements, discussed below,[7] in addition to these traditional elements, producing the modern defamation action. Libel and slander are distinguished not so much by different elements but by differences in the types of applicable damages.

A. Publication to a Third Person

"Liability for defamation depends on publication."[8] Publication of defamatory matter "consists of its communication by the declarant intentionally or by a negligent act to one other than the person . . . defamed."[9] Publication may occur in a variety of media, including newspaper articles,[10] broadcasts,[11] letters,[12] affidavits,[13] written reports,[14] private con-

6. This summary of the traditional elements of a defamation action in New Mexico is based upon statements found in numerous decisions. None of the decisions discussed the elements as the author presents them here. While various New Mexico cases set out elements of a defamation action in different ways, all of the cases, when read together, establish that a prima facie case must contain these five items. The cases also deal with first amendment considerations that are discussed *infra* in the text accompanying notes 55-81.

By way of contrast, the Restatement describes the elements of a defamation action in the following manner:

> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting at least to negligence on the part of the publisher; and
> (d) either actionability of the statement or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977). As will be shown *infra* in the text accompanying notes 92-109, privilege in New Mexico generally is viewed as a defense, whereas in the Restatement, the unprivileged nature of the communication appears as a necessary part of the plaintiff's case. New Mexico apparently follows the Restatement in requiring a showing of fault even in cases involving nonmedia defendants, but the element of fault has grown out of recent first amendment decisions by the United States Supreme Court, discussed *infra* in the text accompanying notes 55-77, and is not a traditional burden of proof of defamation plaintiffs. The United States Supreme Court has not yet mandated a showing of fault, as a matter of constitutional law, in cases involving nonmedia defendants.

7. *See infra* text accompanying notes 55-81.

8. Bookout v. Griffin, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) (affirming judgment n.o.v. for the defendant, finding a republication of defamatory materials to have been privileged).

9. Poorbaugh v. Mullen, 99 N.M. 11, 21, 653 P.2d 511, 521 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982). In *Poorbaugh*, a broker brought a defamation action to recover against the purchaser of real estate after the purchaser wrote a letter accusing the broker of committing criminal offenses, fraud, and misappropriation of funds. The court of appeals reversed the plaintiff's defamation verdict, finding error in the trial court's instruction on damages.

10. Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982) (discussed at length below and hereinafter referred to as *"Marchiondo II"*); Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919) (affirming the plaintiff's libel verdict and finding the qualified privilege to report on court proceedings to have been lost where the report contained the publisher's own comments and insinuations against the plaintiff).

versations,[15] and public meetings.[16] A defamatory communication is not "published," however, if it is made solely to a person who is familiar with the facts and circumstances and knows that the plaintiff is innocent of the accusation.[17]

B. By the Defendant

A defendant can be responsible for defamatory communications by others. The New Mexico Court of Appeals, for example, has said that employers "may be liable for their employees' unauthorized slanderous statements made within the apparent scope and course of employment."[18] New Mexico, however, has not addressed directly the issue of liability for republication of another's defamation, except to state that republication may enjoy a qualified privilege if it was made within the scope of one's employment.[19]

11. Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906 (1978) (deputy sheriffs brought defamation action against radio broadcaster and his employees; the court reversed summary judgment for the defendant as premature where the plaintiff had been denied certain discovery).

12. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982) (discussed *supra* note 8); Franklin v. Blank, 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974) (communication by doctor to peer review committee requesting that it investigate allegations of coroner's competence held absolutely privileged).

13. Sands v. American G.I. Forum, Inc., 97 N.M. 625, 642 P.2d 611 (Ct. App. 1982) (defendants transmitted an allegedly defamatory affidavit to the Secretary of the Air Force and to the press; the court remanded the plaintiff's judgment because there was no specific finding as to the standard of proof applied by the trial court).

14. Stewart v. Ging, 64 N.M. 270, 327 P.2d 333 (1958) (minister brought defamation action based on statements contained in a report of a religious organization; the court reversed dismissal of the complaint because the jury should decide whether a qualified privilege was abused).

15. Tinley v. Davis, 94 N.M. 296, 609 P.2d 1252 (Ct. App. 1980) (affirming summary judgment for the defendants on the grounds that at the time the plaintiff made the defamatory statements, he was not acting within the course and scope of his employment with the defendants).

16. Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981) (reversing summary judgment for the defendant because whether the communication lowered the plaintiff's reputation was an issue for the jury).

17. Martinez v. Sears, Roebuck and Co., 81 N.M. 371, 467 P.2d 37 (Ct. App.), *cert. denied*, 81 N.M. 425, 467 P.2d 497 (1970) (plaintiff failed to prove that accusations of shoplifting by store officials were overheard by anyone else).

18. Tinley v. Davis, 94 N.M. 296, 297, 609 P.2d 1252, 1253 (Ct. App. 1980).

19. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982). The Restatement deals with the original publisher's liability for republication of his defamatory statement by third parties and with a third party's liability for republishing the defamation. As to the former situation, the Restatement holds the original publisher responsible for a third person's republication of his defamation if, but only if:

(a) the third person was privileged to repeat it, or
(b) the repetition was authorized or intended by the original defamer, or
(c) the repetition was reasonably to be expected.

Restatement (Second) of Torts § 576 (1977).

Except in broadcasting, "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character." A broadcaster, however, "is subject to the same liability as an original publisher." Restatement (Second) of Torts § 581 (1977).

C. Of an Asserted Fact

The significance of this element is that an action for defamation will lie only for statements of fact and not for statements of opinion. The reason for this distinction is that "[u]nder the First Amendment there is no such thing as a false idea," but "there is no constitutional value in false statements of fact."[20]

New Mexico only recently has considered the distinction between fact and opinion.[21] The court of appeals adopted the following definition of opinion:

> An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based and then expresses a comment as to the plaintiff's conduct, qualifications or character; or when both parties to the communication know the facts or assume their existence and the comment is clearly based on the known or assumed facts in order to justify the comment.[22]

A statement is also opinion if the "average reader would have no difficulty in reading [it] to be an expression of the writer's opinion."[23] Therefore, a reference to the plaintiff as a "rabid environmentalist," clearly an expression of opinion, is privileged absolutely against a defamation action.[24]

On the other hand:

> Liability for libel may attach . . . when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, firsthand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact.[25]

Thus, a statement in a newspaper article that the plaintiff "used to send us letters so violent that we turned them over to the police" may lead to "speculation by the reader that the publisher possesses undisclosed and

20. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), *quoted in Marchiondo II*, 98 N.M. 394, 400, 649 P.2d 462, 468 (1982).

21. *Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982); Kutz v. Independent Publishing Co., 97 N.M. 243, 638 P.2d 1088 (Ct. App. 1981).

22. Kutz v. Independent Publishing Co., 97 N.M. 243, 245, 638 P.2d 1088, 1090 (Ct. App. 1981) (quoting Mashburn v. Collin, 355 So. 2d 879, 885 (La. 1977)).

23. Kutz v. Independent Publishing Co., 97 N.M. at 246, 638 P.2d at 1091.

24. The rationale for the privilege is that, "[a]n assertion that cannot be proved false cannot be held libelous [sic]. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. . . ." Kutz v. Independent Publishing Co., 97 N.M. at 245, 638 P.2d at 1090 (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977)).

25. Kutz v. Independent Publishing Co., 97 N.M. at 245, 638 P.2d at 1090 (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977)).

underlying facts" concerning previous conduct by the plaintiff.[26] Therefore, such a statement is not privileged as an opinion.

Where the statement complained of unambiguously constitutes a statement of fact, the court may decide as a matter of law that it is actionable. Where it is unambiguously a statement of opinion, the court may decide as a matter of law that the statement is privileged absolutely. Where the material as a whole contains full disclosure of the facts underlying the publisher's opinion, and permits the reader to reach his own opinion, "the court in most instances will be required to hold that it is a statement of opinion, and absolutely privileged."[27] Where, however, the statement "'could have been understood by the average reader in either sense, the issue must be left to the jury's determination.'"[28]

D. Of and Concerning the Plaintiff

New Mexico only recently has considered whether a communication which does not refer to the plaintiff by name nonetheless may be defamatory to him. In *Poorbaugh v. Mullen*,[29] the New Mexico Court of Appeals followed the Restatement[30] in declaring that: "[d]efamation of a class or group may . . . be actionable as a defamation of an individual member thereof if the class is so small or the circumstances of publication . . . can reasonably be understood to refer to the member."[31] Specifically, *Poorbaugh* held that "[l]ibel of a partnership trade name is libel per se of [each of] the [individual] partners."[32]

E. Capable of Being Injurious to the Plaintiff

A communication "'is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"[33] Consideration

26. Kutz v. Independent Publishing Co., 97 N.M. at 243, 246, 638 P.2d at 1088, 1091. The court of appeals in Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 656 P.2d 896 (Ct. App. 1982), held that the statement, "[e]ven the most optimistic sources say that this institution's liabilities will far outweigh its assets," possessed undisclosed information which was not available to the listener, and was therefore a statement of fact. *Id.* at 235, 239, 656 P.2d at 898, 902. On the other hand, statements that a comprehensive audit report being prepared "will likely show a very lopsided balance sheet" and that "[i]t will apparently be up to bonding companies and insurance corporations to put this credit union back on its feet" were, as a matter of law, statements of opinion. *Id.* at 239, 656 P.2d at 902.

27. Kutz v. Independent Publishing Co., 97 N.M. at 245, 638 P.2d at 1090.

28. *Id.* at 244, 638 P.2d at 1089 (quoting Good Gov't Group v. Superior Court, 22 Cal. 3d 672, 676, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978)).

29. 99 N.M. 11, 653 P.2d 511 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982).

30. Restatement (Second) of Torts § 562 (1977).

31. 99 N.M. at 20, 653 P.2d at 520.

32. *Id.* (citing Young v. New Mexico Broadcasting Co., 60 N.M. 475, 292 P.2d 776 (1956)).

33. Dominguez v. Stone, 97 N.M. 211, 213, 638 P.2d 423, 425 (Ct. App. 1981) (quoting Restatement (Second) of Torts § 559 (1977)).

"of whether published material is capable of a defamatory meaning is initially a question of law."[34]

Allegedly defamatory publications may fall into one of three categories: (a) defamation per se, (b) defamation per quod, or (c) not actionable. It is the court's responsibility as a threshold matter of law to determine into which category a particular communication falls.

1. Libel Per Se

The New Mexico Court of Appeals has defined libel per se in the following manner:

> To be libelous per se, the [communication] alone, without any reference to extrinsic facts, stripped of all insinuations, innuendos and explanatory circumstances, must tend to render the plaintiff contemptible or ridiculous in public estimation, or expose him to public hatred, contempt or disgrace. The language said to be libelous is to be given its plain and natural meaning and to be viewed by [the] court as people reading it would ordinarily understand and give it meaning, without knowledge or use of any special facts or circumstances. The language must be susceptible of but a single meaning, and a defamatory meaning must be the only one of which the [communication] is susceptible. . . . Defamatory character will not be given the words unless this is their plain and obvious import, and the language will receive an innocent interpretation where fairly susceptible to it.[35]

Therefore, to be libelous per se, the communication alone must carry a defamatory meaning without reference to any facts not contained in the communication itself.

A traditional example of the operation of this principle of libel per se is the statement that a particular woman is the mother of three children. Taken alone, that communication hardly could be called libelous. If, however, the woman has never been married, the statement would, at least in some circles, be defamatory. It is not libelous per se, however, because the fact which renders the statement defamatory is extrinsic to the communication. Furthermore, to be libelous per se, the communi-

34. Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 287, 648 P.2d 321, 326 (Ct. App. 1981), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) [hereafter referred to as *"Marchiondo I"*], *overruled in part, Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

35. Monnin v. Wood, 86 N.M. 460, 462, 525 P.2d 387, 389 (Ct. App. 1974) (reversing the plaintiff's judgment on the grounds that the defendants' letter, which said that the plaintiff's use of "Baltimore Catechism" in his classroom was jeopardizing the religious educational program, was not libelous per se). *See also* Rockafellow v. New Mexico State Tribune Co., 74 N.M. 652, 656, 397 P.2d 303, 306 (1964) (affirming jury verdict for the defendant because statement in newspaper article that the plaintiff carried $225 in city funds in his wallet for eight months out of loyalty to the city was not libelous per se).

cation must be susceptible to only one meaning and that meaning must be defamatory. If the statement also is capable of another, innocent (non-defamatory) meaning, the communication is not libelous per se.[36]

To facilitate the application of these general guidelines, New Mexico adopted the rule that a statement is deemed to be libelous per se if, without reference to extrinsic matters and viewed in its plain and obvious meaning, the statement imputes to the plaintiff one of the following:

> (1) the commission of some criminal offense involving moral turpitude; (2) affliction with some loathsome disease, which would tend to exclude the person from society; (3) unfitness to perform the duties of an office or employment for profit, or the want of integrity in the discharge of the duties of such office or employment; (4) some falsity which prejudices the plaintiff in his profession or trade; or (5) unchastity (of a woman).[37]

2. Libel Per Quod

Libel per quod consists of expressions which, although not actionable on their face, are one of the following: "(1) susceptible of two reasonable interpretations, one of which is defamatory and another which is innocent, or (2) publications which are not on their face defamatory, but which may become so when considered in connection with innuendos and explanatory circumstances."[38]

Where the communication is susceptible of both an innocent and a defamatory meaning, the finder of fact must determine which meaning was understood by the recipients of the communication.[39] Where the defamatory character of the communication only can be shown by reference to extrinsic facts, the plaintiff formerly had to "plead and prove either: (1) that the publisher knew or should have known of the extrinsic facts which were necessary to make the statement defamatory in its innuendo or (2) special damages."[40] The viability of this rule, however, is now in doubt, not to mention confusion.[41]

36. Bitsie v. Walston, 85 N.M. 655, 515 P.2d 659 (Ct. App.), *cert. denied*, 85 N.M. 639, 515 P.2d 643 (1973) (holding that photo caption implying that the plaintiff had cerebral palsy was not libelous per se).

37. *Marchiondo I*, 98 N.M. 282, 288, 648 P.2d 321, 327 (Ct. App. 1981). *See* Comment, *Torts—Libel and Slander—The Libel Per Se—Libel Per Quod Distinction in New Mexico*, 4 Nat. Resources J. 590 (1964-65).

38. *Marchiondo I*, 98 N.M. at 288, 648 P.2d at 327.

39. Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970), *overruled on other grounds*, *Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

40. Reed v. Melnick, 81 N.M. at 610, 471 P.2d at 180.

41. In *Marchiondo I*, 98 N.M. at 289, 648 P.2d at 328, the court of appeals suggested, without deciding, that the "New Mexico variation on the per se-per quod rule allowing pleading and proof of libel by extrinsic evidence without proof of special damages, has probably been overtaken by rulings of the United States Supreme Court. . . ." The court specifically referred to New York Times

3. Slander Per Se

Slander per se involves only four categories of communications: "imputations of crime, loathsome disease, unfitness for one's calling, or unchastity in a woman."[42] Any other kind of oral communication, though possibly defamatory, is not slander per se.

4. Not Actionable

A court may rule a communication not actionable as a matter of law either because it is incapable of any defamatory meaning[43] or because it is privileged.[44]

F. Proximately Resulting in Actual Damage

"[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[45] At least in libel actions against media defendants, plaintiffs unable to prove actual malice (knowledge of falsity or reckless disregard for the truth), on the part of the defendants, are restricted constitutionally from recovering more than their actual injury.[46] Actual injury may relate to injury to reputation (general damages),[47] or to a real, tangible loss which is provable; for example, loss of employment or a particular customer's business (special damages).[48]

Liability for libel per se is limited to general damages unless the plaintiff pleads and proves special damages.[49] In libel per quod, pleading and

Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny down through Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Further, as the court of appeals noted, the New Mexico Supreme Court's own revision of N.M. U.J.I. Civ. 10.4, "requires proof that alleged defamatory statements 'proximately caused special damages to the plaintiff,' *and* the defendant negligently failed to exercise ordinary care in determining the truth or falsity of the word prior to communication." *Marchiondo I*, 98 N.M. at 289, 648 P.2d at 328 (emphasis in original).

After *Marchiondo I*, the New Mexico Supreme Court deleted Instruction 10.4's limitation to special damages for libel per quod and stated that recovery for libel per quod also may include actual or general damages, without commenting on the extrinsic evidence issue. *Marchiondo II*, 98 N.M. 394, 403, 649 P.2d 462, 471 (1982). See *infra* text accompanying notes 45-51 for a discussion of special damages.

42. Reed v. Melnick, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970), *overruled in part, Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

43. Monnin v. Wood, 86 N.M. 460, 525 P.2d 387 (Ct. App. 1974).

44. Constitutional and common law absolute and qualified privileges are discussed below. *See infra* text accompanying notes 82-125.

45. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974), *quoted with approval in Marchiondo II*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982).

46. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); *Marchiondo II*, 98 N.M. 394, 402-403, 649 P.2d 462, 470-71 (1982).

47. Restatement (Second) of Torts § 621 (1977).

48. *Id.* § 622.

49. *Marchiondo II*, 98 N.M. 394, 402, 649 P.2d 462, 470 (1982).

proof of special damages formerly were necessary to any recovery,[50] or at least were a required alternative to proof of the defendant's knowledge of extrinsic facts.[51] In *Marchiondo v. Brown* (*Marchiondo II*),[52] the New Mexico Supreme Court abolished the old rule limiting libel per quod recovery to special damages. General damages now are clearly recoverable for either libel per se or libel per quod. Implicitly, the court also abolished the requirement that the plaintiff prove special damages to recover anything at all in libel per quod actions.[53] In all slander actions not involving slander per se, the plaintiff must plead and prove special damages.[54]

G. Fault—A Recent Constitutional Requirement

At common law, defamation was viewed as a strict liability tort. If the defendant published a false defamatory statement about the plaintiff, he was liable, regardless of fault. This common law view is no longer necessarily true.

In a series of famous decisions, beginning with *New York Times Co. v. Sullivan*,[55] the United States Supreme Court held that the United States Constitution required a showing of actual malice (knowledge of falsity or reckless disregard for the truth), for liability to be imposed upon media defendants in suits brought by "public officials."[56] The class of plaintiffs

50. *See Marchiondo I*, 98 N.M. 282, 289, 648 P.2d 321, 328 (Ct. App. 1981); N.M. U.J.I. Civ. 10.4.

51. Reed v. Melnick, 81 N.M. 608, 610, 471 P.2d 178, 180 (1970), *overruled in part, Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

52. 98 N.M. 394, 649 P.2d 462 (1982); see *supra* note 34 for history of related case, *Marchiondo I*.

53. The implication is derived from the following language:

> We further note particularly that N.M. U.J.I. Civ. No. 4, subparagraph 3 (Libel Per Quod), N.M.S.A. 1978 (Repl. Pamp. 1980), does not include general or actual damages, but mentions only recovery of special damages. This is no longer the law, and recovery for actual or general damages is to be included in the instruction.

Marchiondo II, 98 N.M. at 403, 649 P.2d at 471.

The court's apparent interchangeable use of actual damages and general damages was imprecise. In any event, the court did not instruct trial judges, pending the amendment of the uniform instruction, whether special damages are a prerequisite to general damages or actual damages or whether the plaintiff may recover the latter even if he does not prove special damages.

54. Reed v. Melnick, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970), *overruled in part, Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

55. 376 U.S. 254 (1964).

56. The Supreme Court thus created a constitutional privilege for statements criticizing official conduct that were made by persons not guilty of actual malice. The Court's opinion, by Justice Brennan, noted that public officials enjoy such protection in making statements within the scope of their responsibilities, and held that the first amendment affords analogous protection to their critics:

> The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . ." Analogous considerations support the privilege for the citizen-critic of government. It

affected by the actual malice requirement eventually included public figures[57] and political candidates,[58] as well as public officials.

In the final decision in this area, *Gertz v. Robert Welch, Inc.*,[59] the United States Supreme Court struck down strict liability in any libel case involving media defendants. Under *Gertz*, public official, public figure, and political candidate plaintiffs still must prove actual malice to recover for defamation against media defendants. Other plaintiffs (so-called "private figure plaintiffs") are subject to liability standards to be set by the individual states. The standards may range from simple negligence to actual malice, but must include some element of fault on the part of the defendant.[60]

In *Marchiondo II*,[61] the New Mexico Supreme Court adopted the least strict standard available by choosing ordinary negligence as the degree of fault necessary to establish liability for a private figure plaintiff's actual injury at the hands of a media defendant. No plaintiff, regardless of classification, now may recover punitive damages against a media defendant without proving actual malice.[62]

One remaining question is whether the *New York Times* and *Gertz* decisions apply to cases involving non-media defendants as well. Arguably, the free press considerations, which led to protection of media defendants in defamation cases, should apply with equal force under the free speech clause to cases involving individual defendants. The United States Supreme Court has never decided the question, although the Court has noted that it is an issue ripe for determination.[63] Without guidance from the United States Supreme Court, the New Mexico Court of Appeals has declared rather boldly that the "standards enunciated in [*Marchiondo II*] . . . also apply to suits in defamation actions against non-media defendants."[64]

> is as much his duty to criticize as it is the official's duty to administer. . . . It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

Id. at 282-83.

57. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

58. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

59. 418 U.S. 323 (1974).

60. *Id.* at 347-48.

61. 98 N.M. 394, 649 P.2d 462 (1982). For further discussion of *Marchiondo II*, see Note, *Libel Law—New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure*, 13 N.M.L. Rev. 715 (1983).

62. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *Marchiondo II*, 98 N.M. 394, 649 P.2d 462 (1982).

63. Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979).

64. Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982). In Sands v. American G.I. Forum, Inc., 97 N.M. 625, 642 P.2d 611 (Ct. App. 1982), the defendant was a veterans' organization accused of defamation in an affidavit submitted to the Secretary of the Air Force. Without discussing the media/nonmedia issue or even apparently

To recap briefly, in New Mexico, public officials, public figures, and political candidates must prove, by clear and convincing evidence,[65] actual malice to establish liability for defamation. In contrast, private figure plaintiffs need only prove ordinary negligence, by a preponderance of the evidence, to establish liability. Whether a person is a public or private figure plaintiff is a question of law for the court.[66] Obviously, the likelihood of success of a defamation action can hinge largely on the court's determination as to the plaintiff's status as either a public or a private figure.

1. Who is a Public Official?

Not all public employees are public officials for purposes of application of the *New York Times* standard,[67] nor are public officials limited to elected office holders.[68] Other jurisdictions vary widely in their approaches to defining public officials, most often distinguishing between public employees who have supervisory or administrative responsibilities and those who do not.[69]

The New Mexico Court of Appeals has adopted a rather simplistic approach for determining who are public officials in the context of a defamation suit. In *Ammerman v. Hubbard Broadcasting, Inc.*,[70] the court held that deputy sheriff plaintiffs were public officials. In reaching its holding, the court relied on an earlier opinion that held, in a different context, that deputy county assessors are public officers because they are required by statute to take an official oath.[71] The court noted that deputy

recognizing its existence, the court of appeals found the plaintiff to be a public official and applied the *New York Times* actual malice standard to the case, even though the case did not involve a media defendant.

65. "A plaintiff who must prove 'actual malice' under the *New York Times* test must do so with the 'convincing clarity which the constitutional standard demands.' 'Clear and convincing clarity' is something more than 'preponderance of the evidence' and less than 'beyond a reasonable doubt.'" Sands v. American G.I. Forum, Inc., 97 N.M. 625, 629, 642 P.2d 611, 615 (Ct. App. 1982) (citations omitted).

66. *Marchiondo II*, 98 N.M. 394, 399, 649 P.2d 462, 467 (1982).

67. "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

68. Rosenblatt v. Baer, 383 U.S. 75 (1966) (appointed supervisor of county recreational facility held public official).

69. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.

Id. at 86.

70. 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906 (1978).

71. State *ex rel.* Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915).

sheriffs likewise are required by statute to take an official oath and for that reason concluded that they are public officials for *New York Times* purposes. There is no evidence that the taking of an official oath has anything to do with the rationale behind *New York Times,* but the conclusion in *Ammerman* is probably no less arbitrary than conclusions reached in other decisions that appear to be reasoned more carefully.[72]

2. Who is a Public Figure?

The New Mexico Supreme Court has recognized, at least implicitly, two kinds of public figures: those who exert a pervasive influence in society (general purpose public figures) and those who have voluntarily injected themselves into or been drawn into a particular public controversy (limited purpose public figures).[73] Little precedent exists in New Mexico for identifying public figures, but, whatever public figure may mean in this state, it does not include a prominent attorney who is a well-known member of a political party.[74]

3. Actual Malice: Meaning and Burden of Proof

The New Mexico Court of Appeals has noted:

> "[A]ctual malice" has become a term of art clearly distinguishable from the ordinary definition of "malice" in terms of ill will, . . . "actual malice" consists of "deliberate falsification" of facts or "reckless disregard" of the truth, i.e., reckless publication despite a high degree of awareness, harbored by the publisher, of probable falsity of the published statements.[75]

A failure to investigate, taken alone, is not sufficient to establish reckless disregard for the truth. "Whether the failure of the media to investigate constitutes sufficient proof of 'reckless disregard' in publication of the

72. For example, in Hutchinson v. Proxmire, 443 U.S. 111 (1979), the plaintiff was director of research at a state mental hospital, yet the United States Supreme Court did not find him to be a public official, implied that he was not, and stated that a public official "cannot be thought to include all public employees. . . ." *Id.* at 114, 119 n.8.

73. *Marchiondo II,* 98 N.M. 394, 399, 649 P.2d 462, 467 (1982).

74. *Id. Marchiondo I,* 98 N.M. 282, 291, 648 P.2d 321, 330 (Ct. App. 1981). A troubled credit union is a public figure in New Mexico because the "general public has a vital interest in knowing the financial status of a large credit union which has suspended the payments of dividends and which circulates data to its members indicating that it has experienced management and investment problems." Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 241, 656 P.2d 896, 904 (Ct. App. 1982).

75. McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 168, 538 P.2d 804, 810 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975) (harboring of ill will by a publisher against the plaintiff police officer because of the latter's uncooperativeness in giving details of an incident was not actual malice) (quoting Tagawa v. Maui Publishing Co., 448 P.2d 337, 340 (Hawaii 1969)).

truth depends upon the state of the record."[76] A plaintiff who must prove actual malice must do so with "clear and convincing clarity," which means "something more than 'preponderance of the evidence' and less than 'beyond a reasonable doubt.'"[77]

H. Falsity—Perhaps Another Constitutional Requirement?

Traditionally, although the plaintiff generally is required to plead falsity in his complaint, falsity is presumed and the burden of pleading and proving truth falls on the defendant. The *Gertz*[78] requirement that there be no liability for defamation by a media defendant without some showing of fault has placed this tradition in jeopardy.[79]

In *Wilson v. Scripps-Howard Broadcasting Co.*,[80] the Sixth Circuit held that a plaintiff who has the burden of proving fault also has the burden of proving falsity:

> It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. The two elements of carelessness and falsity are inevitably linked. . . . Fault then must be held to consist of two elements: carelessness and falsity.[81]

New Mexico has not had an occasion to address the reasoning of *Wilson*, but it is difficult to find fault with the Sixth Circuit's logic.

III. SUBSTANTIVE DEFENSES AND PRIVILEGES

A. Truth

"Truthfulness is a defense to an action for defamation."[82] To assert successfully the defense of truth, however, it is not necessary to prove the literal truth of all statements made by the defendant: "Slight inaccuracies of expression are immaterial provided the defamatory charge is

76. Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 254, 572 P.2d 1258, 1262 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906 (1978).

77. Sands v. American G.I. Forum, Inc., 97 N.M. 625, 629, 642 P.2d 611, 615 (Ct. App. 1982) (citations omitted).

78. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

79. As has been discussed, in New Mexico, *Gertz* and its brethren may apply equally to media defendants and to nonmedia defendants. *See supra* note 64 and accompanying text.

80. 642 F.2d 371 (6th Cir. 1981).

81. *Id.* at 375.

82. Franklin v. Blank, 86 N.M. 585, 588, 525 P.2d 945, 948 (Ct. App. 1974). *See supra* note 12.

true in substance, and it is sufficient to show that the imputation is 'substantially' true."[83]

Mere denial of a plaintiff's allegation of falsity, however, may be insufficient to raise the truth defense. *Eslinger v. Henderson*[84] held that, even though the defendants in a slander action had denied allegations of falsity, their failure to assert truth as an affirmative defense precluded them from presenting evidence of truth. The court reasoned: "Truth is an affirmative defense, and here as in libel suits, notice of defenses must be given with sufficient particularity to adequately inform the plaintiff of the defenses he must be prepared to meet."[85]

This reasoning will be brought into question if New Mexico elects to follow *Wilson v. Scripps-Howard Broadcasting Co.*[86] in shifting the burden of proving falsity to the plaintiff. In any case, *Eslinger* seems to elevate form over substance and is not terribly persuasive. The best rule would be to follow *Wilson* and require the plaintiff to prove falsity, at least in cases, such as those involving media defendants, addressing first amendment issues. Even if New Mexico does not follow *Wilson,* a better rule would be to recognize that any pleading of truth by the defendant, either as a denial of plaintiff's allegations or as an affirmative defense, is sufficient to raise the issue of truth.

The New Mexico Constitution contains some interesting language on the subject of the truth defense in criminal libel cases: "In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true *and* was published with good motives *and* for justifiable ends, the party shall be acquitted."[87] Thus, it appears that a criminal libel defendant is not out of the woods merely by proving the truth of what he said. He also must prove his "good motives" and "justifiable ends." On the other side of the coin, however, it is sufficient that an indictment charge only that the allegedly defamatory material is false. The indictment need not also charge that, "if true, the matters were not published with good motives and justifiable ends. . . ." This result is purportedly because "such negative statement is not such a proviso in the law as is required to be negatived in the indictment, but is a matter of defense on the trial."[88]

83. Saleeby v. Free Press, 197 Va. 761, 763, 91 S.E.2d 405, 407 (1956), *quoted with approval in* Franklin v. Blank, 86 N.M. at 588, 525 P.2d at 948.

84. 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969) (slander action against two defendants, one of whom had publicly accused plaintiff of stealing money).

85. *Id.* at 481, 457 P.2d at 1000.

86. 642 F.2d 371 (6th Cir. 1981). *See supra* text accompanying note 80.

87. N.M. Const. art. II, § 17 (emphasis added).

88. State v. Elder, 19 N.M. 393, 404, 143 P. 482, 485 (1914) (libel action in which the court held libelous statements in a newspaper charging a person with being "an unprincipled son," "a moral coward," and "one who has about as much regard for truth as an infidel has for the Bible." *Id.* at 397, 398, 143 P. at 483).

Both the state constitutional provision and the cases thereunder (all of ancient vintage) are of doubtful validity today under current federal constitutional principles. Specifically, in *Garrison v. Louisiana*,[89] the United States Supreme Court extended the *New York Times v. Sullivan* rule regarding actual malice[90] to cases of criminal libel and also held that truth is a defense in cases brought by public officials.[91] Therefore, the New Mexico Constitution's qualification of the truth defense, at least in cases brought by public officials and public figures, runs afoul of federal constitutional dictates.

B. Common Law Absolute Privileges

New Mexico courts recognize numerous types of communications as being privileged from liability for defamation. Some of these privileges are absolute; most are qualified.

> An absolute or unqualified privilege means absolute immunity from liability for defamation. It "has been confined to very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendants' motives." It is generally limited to judicial proceedings, legislative proceedings, executive communications, consent of the plaintiff, husband and wife, and political broadcasts.[92]

New Mexico has specifically declared absolute immunity for communications made to achieve the objects of litigation (including statements made in open court, pleadings, briefs, affidavits, and settlement negotiations),[93] impartial and accurate accounts of court proceedings,[94] statements made during the course of labor-grievance-arbitration proceedings,[95] statements made during the course of a professional society's peer review process,[96] remarks made by officers of the state in the exercise of an executive function (if the statement has some relation to the executive

89. 379 U.S. 64 (1964).

90. *See supra* text accompanying notes 55-60.

91. 379 U.S. at 67-73.

92. Neece v. Kantu, 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App.), *cert. denied sub nom.*, Ritschel v. Neece, 84 N.M. 696, 507 P.2d 443 (1973) (recognizing an absolute immunity from defamation liability for communications made during the course of labor grievance arbitration proceedings) (quoting W. Prosser, Law of Torts § 114 (4th ed. 1971)).

93. Romero v. Prince, 85 N.M. 474, 513 P.2d 717 (Ct. App. 1973); Stryker v. Barbers Super Markets, Inc., 81 N.M. 44, 462 P.2d 629 (Ct. App. 1969).

94. Rockafellow v. New Mexico State Tribune Co., 74 N.M. 652, 397 P.2d 303 (1964); Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919). The privilege, however, is lost if the report is discolored, garbled, or slanted. *Henderson*, 26 N.M. at 566, 191 P. at 452.

95. Neece v. Kantu, 84 N.M. 700, 507 P.2d 447 (Ct. App.), *cert. denied sub nom.*, Ritschel v. Neece, 84 N.M. 696, 507 P.2d 443 (1973).

96. Franklin v. Blank, 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974). But see Stewart v. Ging, 64 N.M. 270, 327 P.2d 333 (1958), which suggests that only a qualified privilege exists in this area.

function),[97] publications made with the consent of the person defamed,[98] and former employers' responses to inquiries concerning a former employee's competence.[99]

C. Common Law Qualified Privileges

Conditional or qualified privileges arise out of the particular occasion upon which the defamation is published. Qualified privileges

> are based upon a public policy that recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of the actor's own interests, the interest of a third person or certain interests of the public. In order that this information may be freely given it is necessary to protect from liability those who, for the purpose of furthering the interest in question, give information which, without their knowledge or reckless disregard as to its falsity, is in fact untrue.[100]

Gengler v. Phelps[101] illustrates the distinction between an absolute and qualified privilege. Plaintiff Gengler, an unsuccessful applicant for a nursing position at a Veterans Administration hospital, sued her former employer, Dr. Phelps, for uncomplimentary remarks made about her professional competence to Drs. Smith and Clark of the same hospital. The New Mexico Court of Appeals held Dr. Phelps' conversation with Dr. Smith absolutely privileged, but held that his discussion with Dr. Clark was only conditionally privileged. The difference between the two statements was that Dr. Smith initiated the first conversation pursuant to Gengler's consent, contained in her employment application, to inquiries concerning her professional qualifications. Dr. Phelps initiated the second conversation and there was no consent by the plaintiff to this conversation.

A former employer "has absolute immunity from damages in a slander suit when the alleged defamation stems from an inquiry addressed to the former employer and concerns an employee's job capabilities."[102] On the other hand, a former employer is privileged only conditionally "for state-

97. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961).

98. Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979).

99. *Id.*

100. Restatement (Second) of Torts 584 (Introductory Note) (1977), *quoted in* Gengler v. Phelps, 92 N.M. 465, 467, 589 P.2d 1056, 1058 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979). Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 656 P.2d 896 (Ct. App. 1982), sets out five different occasions when a defamatory statement may be privileged: "These are when the speaker seeks to protect: (1) his own interest; (2) the interest of the recipient of the communication or a third person; (3) an interest he holds in common with others; (4) the interest of a member of the speaker's immediate family; and (5) the interest of the public in general." *Id.* at 241, 656 P.2d at 904 (citing Restatement (Second) of Torts §§ 594 to 598 (1977)). The New Mexico Court of Appeals described this as the "good faith privilege."

101. 92 N.M. 465, 589 P.2d 1056 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979).

102. *Id.* at 467, 589 P.2d at 1058.

ments made about a former employee if made to one having an interest in the subject matter of the statements," where the statements are not in response to an inquiry but initiated by the former employer.[103]

In *Gengler,* the conversation, which was conditionally privileged, enjoyed immunity only if the defamatory statements were "made for the purpose of enabling [the hearer] to protect his own interests" and were "reasonably calculated to do so."[104] As a result, "only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege. . . ."[105] A conditional privilege "has the effect of taking away from defamatory language the presumption of malice in the publication, and casts upon the plaintiff the burden of proving actual malice. If the burden is carried forward by the plaintiff, the conditional privilege becomes functus officio and affords no further protection."[106]

A defendant also may lose a qualified privilege if he abuses it.

> Abuse arises out of the publisher's lack of belief, or reasonable grounds for belief, in the truth of the alleged defamation; by the publication of the material for an improper use; by the publication to a person not reasonably necessary for the accomplishment of the purpose; or by publication not reasonably necessary to accomplish the purpose.[107]

The existence of a qualified privilege is a matter of law and the question of abuse of a privilege also is subject to determination as a matter of law. The issue of whether a privilege has been abused, however, becomes one of fact "if more than one conclusion can be drawn from the evidence."[108]

In addition to inquiries of former employers, numerous New Mexico cases recognize a qualified privilege for communications "between parties who have common business or personal interests in the subject matter of the publication and if they are made in good faith in order to protect one's interest or in the discharge of a public or private duty."[109]

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103. *Id.*

104. *Id.* at 468, 589 P.2d at 1059 (quoting Restatement (Second) of Torts § 595, Comment i (1977)).

105. 92 N.M. at 468, 589 P.2d at 1059 (quoting Restatement (Second) of Torts § 595, Comment i (1977)).

106. 92 N.M. at 468, 589 P.2d at 1059 (citing Ward v. Ares, 29 N.M. 418, 223 P. 766 (1924)). The court in *Gengler* used "actual malice" to mean spite or ill will, which is quite different from the meaning given in New York Times v. Sullivan, 376 U.S. 254 (1964), that is, knowledge of falsity or reckless disregard for the truth.

107. Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 296, 442 P.2d 783, 786 (1968) (affirming summary judgment for the defendant on the grounds that a letter by a bank to the Small Business Administration, in which the bank declined to make a loan to the plaintiff, was qualified or conditionally privileged and the defendant did not abuse the qualified privilege).

108. Poorbaugh v. Mullen, 99 N.M. 11, 21, 653 P.2d 511, 521 (Ct. App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982).

109. Poorbaugh v. Mullen, 99 N.M. 11, 21, 653 P.2d 511, 521 (Ct. App. 1982); *see also* Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 442 P.2d 783 (1968), and Mauck, Stastny & Rassam, P.A. v. Bicknell, 95 N.M. 702, 704, 625 P.2d 1219, 1221 (Ct. App. 1980) (privilege unavailable where publication was made in "willful disregard of the rights of the parties").

D. Fair Comment/Opinion

1. The Difference Between Fair Comment and Opinion

One of the murkiest areas of libel law is the relationship between the common law fair comment privilege and the constitutional privilege to express an opinion. Nowhere is the relationship murkier than in New Mexico.

Part of the problem in differentiating between the two privileges is that the fair comment privilege, as developed in various jurisdictions, has been described in different and often contradictory ways. The privilege began as protection primarily for literary and artistic criticism. Confusion arose as the fair comment privilege was claimed for discussion of other matters of public interest, including the conduct of politicians. A split occurred between jurisdictions holding that the privilege was available only if the criticism was based upon true underlying facts[110] and those jurisdictions declaring that the privilege was available even if the underlying facts were wrong, so long as they honestly were believed to be true.[111]

The latter position appears to be the majority view today, although the fair comment privilege usually is restricted to matters of public interest. Thus, in *Mauck, Stastny & Rassam, P.A. v. Bicknell,*[112] the New Mexico Court of Appeals stated that the fair comment privilege "generally is stated to apply to all discussion and communication involving matters of public or general concern."[113] Recently, the court of appeals described the fair comment privilege in the following manner:

> The common law defense of "fair comment" is predicated upon the principle that the interests of society are furthered through a free discussion of public affairs and matters of public interest. The rule normally requires that the publication relate to a matter of public interest; it cannot impute dishonorable motives to its subject; and it must reflect expression of opinion on truly-stated facts.[114]

As has been discussed earlier, a required element of a defamation claim is that the statement complained of is an asserted fact. Most statements of opinion, unless they imply undisclosed facts, are not statements of asserted fact. Additionally, statements of opinion are privileged constitutionally. In *Gertz v. Robert Welch, Inc.*,[115] the United States Supreme

110. *See, e.g.*, Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893).

111. *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).

112. 95 N.M. 702, 625 P.2d 1219 (Ct. App. 1980). For further discussion of this case, see Note, *Libel—The Defenses of Fair Comment and Qualified Privilege*, 11 N.M.L. Rev. 243 (1980-81).

113. 95 N.M. at 704, 625 P.2d at 1221.

114. *Marchiondo I*, 98 N.M. 282, 294, 648 P.2d 321, 333 (Ct. App. 1981).

115. 418 U.S. 323 (1974).

Court explained the constitutional basis for the difference in treatment between opinion and fact:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide open" debate on public issues.[116]

This extension of first amendment protection to opinions left the New Mexico courts to ponder its effect on the common law fair comment privilege, with interesting results. In *Mauck, Stastny & Rassam, P.A. v. Bicknell,*[117] the court of appeals stated that the constitutional privilege applied only to cases involving public figures or public officials, whereas "the common law privilege is available to one who . . . communicates regarding a matter of public interest" regardless of the plaintiff's status as a public or private figure.[118]

The *Mauck* court then asserted that the *New York Times*[119] actual malice standard qualified the common law fair comment privilege. The court said that the privilege isolated the defendant from liability only "so long as there is no proof of actual malice, as defined in *New York Times v. Sullivan*. . . ."[120] Noting that actual malice does not refer to bad faith but instead involves scienter, the court concluded: "It is not the defendant's desire to injure the plaintiff that destroys the privilege, but rather that the defendant makes his statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[121]

Eighteen months later, in *Marchiondo v. New Mexico State Tribune Co. (Marchiondo I),*[121a] the New Mexico Court of Appeals viewed *New York Times* and *Gertz* as an expansion of the common law fair comment privilege:

> The privilege of stating opinions under the ruling in *New York Times v. Sullivan* . . . and *Gertz v. Robert Welch, Inc.* . . . has expanded the common law conditional privilege of "fair comment," not only to permit expressions of opinion, but to include inaccurate or misleading statements of fact, unless made with "actual" malice.[122]

116. *Id.* at 339-40 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
117. 95 N.M. 702, 625 P.2d 1219 (Ct. App. 1980).
118. *Id.* at 705, 625 P.2d at 1222.
119. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
120. 95 N.M. at 705, 625 P.2d at 1222.
121. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).
121a. 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981). For subsequent case history see *supra* note 34.
122. 98 N.M. at 294, 648 P.2d at 333.

Indeed, the court of appeals appeared to view the common law fair comment privilege as an outmoded relic made wholly unnecessary by the constitutional opinion privilege: "The defense of 'fair comment' appears to have been enveloped by *Gertz'* recognition of an indefeasible First Amendment privilege protecting expression of opinions and ideas."[123]

Therefore, in two opinions within eighteen months of each other, the court of appeals stated that (1) fair comment was distinguished from the constitutionally based opinion privilege because it involved all matters of public interest, rather than just comments about public figures and officials; (2) the opinion privilege conditioned fair comment by imposing an actual malice qualification; and (3) the opinion privilege expanded and enveloped fair comment. Six months later, the New Mexico Supreme Court entered the discussion and confused the relationship even further.

In *Marchiondo II*,[124] the supreme court noted that in *Rosenbloom v. Metromedia*,[125] the United States Supreme Court had "applied the common law doctrine of fair comment to the requirements of the First Amendment. The Court in *Rosenbloom* held that a defamation plaintiff must prove actual malice where the alleged defamation involved matters of public interest."[126] Additionally, the New Mexico Supreme Court stated that the *Gertz* decision both "clearly retreated from" *Rosenbloom* and criticized *Rosenbloom* "for going too far in protecting constitutional rights without adequately considering the role of the states in protecting the reputations of private individuals through the law of defamation. . . ."[127] The supreme court found that *Gertz* altered the "public interest" privilege.[128]

The problem is that *Marchiondo II* did not suggest how *Gertz* altered the "public interest" privilege. While the supreme court appeared to criticize the court of appeals' recognition[129] of a "qualified privilege for a non-public figure [sic] who makes a statement regarding a matter of public interest" as being contrary to *Gertz*,[130] the court did not elaborate on how the court of appeals should have ruled on the issue.

123. *Id.* at 295, 648 P.2d at 334.
124. 98 N.M. 394, 649 P.2d 462 (1982).
125. 403 U.S. 29 (1971).
126. 98 N.M. at 403, 649 P.2d at 471.
127. *Id.*
128. *Id.* at 404, 649 P.2d at 472.
129. Mauck, Stastny & Rassam, P.A. v. Bicknell, 95 N.M. 702, 625 P.2d 1219 (Ct. App. 1980).
130. *Marchiondo II*, 98 N.M. 394, 403, 649 P.2d 462, 471 (1982). Coronado Credit Union v. KOAT Television, Inc., 99 N.M. 233, 656 P.2d 896 (Ct. App. 1982), provides further confusion. The court of appeals misread both *Gertz* and *Marchiondo II* by indicating that the actual malice test applies whenever the plaintiff is either a public official or a public figure *or* when the allegedly defamatory statement involved a matter of public concern. *Id.* at 241, 656 P.2d at 904. But *Gertz* and *Marchiondo II* make it clear that if the plaintiff is a private figure, the actual malice standard is not required constitutionally, even if the statement involved a matter of public interest or concern.

One reading of *Marchiondo II* is that the constitutional opinion privilege has not "enveloped" but instead has destroyed fair comment as a separate ground of privilege. Nothing in *Gertz* mandates that result nor precludes the states from developing fair comment as a distinct, and perhaps broader, privilege. The interpretation of the fair comment privilege as distinct from the constitutional opinion privilege appears to be the direction the New Mexico Court of Appeals has taken, albeit in a confusing manner.

New Mexico defense practitioners still should assert fair comment as a privilege, but they should understand that until the New Mexico Supreme Court clarifies *Marchiondo II*, it may be that only the constitutional opinion privilege is presently viable in this state. The destruction of the fair comment privilege would be unfortunate because the two privileges developed from different backgrounds and serve different purposes. There is nothing in the federal decisions which indicates that the creation of the constitutional privilege was intended to, or should, destroy the common law privilege of fair comment.

2. The Scope and Application of the Constitutional Opinion Privilege

Marchiondo II discussed at length the factors to be considered in determining whether an allegedly defamatory statement is a constitutionally protected opinion or a statement of fact that may subject its publisher to liability. Generally, the New Mexico Supreme Court suggested the following guidelines:

> What constitutes a statement of opinion as distinguished from a statement of fact must be determined in each case. In resolving the distinction, the following should be considered: (1) the entirety of the publication; (2) the extent that the truth or falsity may be determined without resort to speculation; and (3) whether reasonably prudent persons reading the publication would consider the statement as an expression of opinion or a statement of fact.[131]

Although the court of appeals found the fair comment defense to be qualified by the *New York Times* actual malice standard,[132] it found no such qualification of the constitutional opinion privilege: "Ideas and opin-

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This discussion by the court of appeals appeared in the context of a description of the fair comment privilege, which the court described as "predicated upon the principle that the interests of society are furthered through a free discussion of public affairs and matters of public interest." *Id.* at 240, 656 P.2d at 903. That statement is accurate, but the entire analysis only serves to show how confused New Mexico courts have become in distinguishing between fair comment and the constitutional privilege.

131. 98 N.M. 394, 401, 649 P.2d 462, 469 (1982).

132. *Marchiondo I*, 98 N.M. 282, 294, 648 P.2d 321, 333 (Ct. App. 1981).

ions, although incorrect or faulty in their premise, are protected by the United States Constitution. False statements of fact, whether intentionally or negligently published, are unprotected."[133] It probably is correct that opinions are privileged absolutely under *Gertz*. The New Mexico Supreme Court has yet to address that issue, although it did refer to the court of appeals' analysis in *Marchiondo I*,[134] as "an exhaustive and scholarly discussion and citation of authorities on the question of constitutionally protected expression of opinion. . . ."[135]

In *Marchiondo II*, the supreme court clarified the New Mexico rule as to who is to determine whether a statement is fact or opinion. The court adopted the following rule:

> Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion. However, where the alleged defamatory remarks could be determined either as fact or opinion, and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury.[136]

E. Neutral Reportage

In *Edwards v. National Audubon Society, Inc.*,[137] the Second Circuit held that "when a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity."[138] This new constitutional privilege, commonly referred to as "neutral reportage," has not enjoyed universal acceptance,[139] but has received considerable attention. So far as can be ascertained, the privilege has not been tested in New Mexico.

F. Statutory Privilege

Although not technically creating a privilege, N.M. Stat. Ann. §41-7-6 (1978) exempts from liability for defamation the "owner, licensee or operator" of a radio or television station or network resulting from any broadcast "by one other than such owner, licensee or operator, or any agent or employee thereof, unless it shall be alleged and proved . . . that

133. *Id.* at 291, 648 P.2d at 330.

134. 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

135. *Marchiondo II*, 98 N.M. 394, 401, 649 P.2d 462, 469 (1982).

136. *Marchiondo II*, 98 N.M. 394, 404, 649 P.2d 462, 472 (1982) (quoting Bindrim v. Mitchell, 92 Cal. App. 3d 61, 77-78, 155 Cal. Rptr. 29, 39, *cert. denied*, 444 U.S. 984 (1979)).

137. 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

138. 556 F.2d at 120.

139. The Third Circuit specifically rejected this privilege in Dickey v. CBS, Inc., 583 F.2d 1221 (3d Cir. 1978).

[such defendant] has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."

IV. SOME PROCEDURAL CONSIDERATIONS

A. No Retraction Statute in New Mexico

Other jurisdictions have enacted legislation providing for a demand for a retraction or correction as a prerequisite to certain kinds of recovery in specified defamation cases.[140] New Mexico has no such statute.

B. Statute of Limitations

The statute of limitations in New Mexico for a defamation action is three years.[141]

C. Uniform Single Publication Act

New Mexico has adopted the Uniform Single Publication Act,[142] which basically provides that a plaintiff may bring only one defamation action in one jurisdiction for any single publication (*e.g.*, one newspaper edition, one broadcast). Recovery in that action may include all damages suffered by the plaintiff in all jurisdictions, and a substantive decision in one action is res judicata as to any other actions brought by the same plaintiff on the same publication.

D. Pleadings

A New Mexico statute makes specific provisions for pleadings in defamation cases. The statute requires the defendant to plead truth and mitigating circumstances.[143] As has been discussed, the New Mexico Court of Appeals has held that truth is an affirmative defense that must be pleaded as such;[144] mere denial of the falsity of a statement is not sufficient to raise the defense of truth nor render evidence of truth admissible. In drafting a complaint and anticipating a defense of a qualified privilege, it is necessary for the plaintiff to plead facts that would overcome the privilege, but such facts, for example, malice, may be pleaded generally.[145]

140. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-653.01 to .03 (1981); Cal. Civ. Code § 48a (West 1982).

141. N.M. Stat. Ann. § 37-1-8 (1978).

142. N.M. Stat. Ann. §§ 41-7-1 to 41-7-5 (Repl. Pamp. 1982).

143. "[T]he defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence, to reduce the amount of damages, and whether he prove the justification or not, he may give mitigating circumstances in evidence." N.M. Stat. Ann. § 38-2-9 (1978).

144. Eslinger v. Henderson, 80 N.M. 479, 457 P.2d 998 (Ct. App. 1969). *See supra* text accompanying note 84.

145. Stewart v. Ging, 64 N.M. 270, 327 P.2d 333 (1958).

E. Personal Tort

In New Mexico, as in virtually every jurisdiction, defamation is a personal tort. Therefore, the defamation action does not survive the death of the plaintiff.[146]

F. Subject Matter Jurisdiction

The New Mexico Constitution vests jurisdiction for all defamation actions in the district courts.[147] The statutes creating magistrate courts specifically exclude defamation actions from their jurisdiction.[148]

G. Personal Jurisdiction Over the Defendant

In *Blount v. TD Publishing Corp.*,[149] a New York magazine publisher maintained a regular distribution plan for its magazines into New Mexico through independent New Mexico distributors. The New Mexico Supreme Court held that the publisher transacted business in New Mexico for purposes of the then-existing long-arm statute.[150] The court also found that, even though the publisher had no offices, employees, or agents in New Mexico, asserting personal jurisdiction over the publisher would not offend constitutional due process.[151] Although *Blount* was a case involving the issue of invasion of privacy, the decision no doubt would apply in a New Mexico defamation action against a nonresident publisher with regular distribution channels into the state.

H. Questions of Law and Questions of Fact

As has been noted throughout this discussion, defamation actions present numerous threshold questions which the court must decide as a matter of law, are reserved for the finder of fact, or are treated as a mixed question of law and fact. Such questions include whether an allegedly defamatory communication is a statement of fact or opinion,[152] whether the plaintiff is a public official or public figure subject to the *New York*

146. Gruschus v. Curtis Publishing Co., 342 F.2d 775 (10th Cir. 1965) (affirming dismissal of complaint because children had no cause of action for defamation of their deceased father).

147. N.M. Const. art. VI, § 13.

148. N.M. Stat. Ann. § 35-3-3 (1978).

149. 77 N.M. 384, 423 P.2d 421 (1966).

150. N.M. Stat. Ann. § 21-3-16(A)(1), (3) (1953 Comp., Repl. Vol. 4 1965).

151. "We hold that the regular distribution plan of the defendants with the commercial benefit to the nonresident defendants which they derive from the sale of magazines is sufficient contact to satisfy the requirements of due process and subject the [nonresident] defendants . . . to the jurisdiction of our courts." 77 N.M. at 391, 423 P.2d at 428. For a recent Supreme Court case which supports this outcome, see Keeton v. Hustler Magazine, Inc., 52 U.S.L.W. 4346 (U.S. March 20, 1984), and Calder v. Jones, 32 U.S.L.W. 4349 (U.S. March 20, 1984).

152. *See supra* text accompanying notes 27-28 & 136.

Times v. Sullivan actual malice standard,[153] and whether an absolute or qualified privilege applies.[154]

I. Discovery

In *Herbert v. Lando,*[155] the United States Supreme Court held that because a public figure plaintiff (or a private figure plaintiff seeking punitive damages) must prove actual malice to prevail on his defamation claim, he is entitled to inquire in discovery into the state of mind, before publication, of the defendants, both editors and reporters.[156] The Court rejected the defendants' claim of first amendment privilege, declaring that evidentiary privileges, "even those rooted in the Constitution must give way in proper circumstances."[157]

In *Marchiondo II,*[158] the New Mexico Supreme Court embraced the position taken in *Herbert v. Lando* and held that "the thoughts, editorial processes and other information in the exclusive control of the alleged defamer" were proper subjects of discovery when actual malice was at issue.[159] Similarly, where proof of actual malice is involved and there is an issue as to the credibility and reliability of confidential informants, the plaintiff is entitled to access to the identity of such informants and their statements, despite claims of first amendment privilege.[160]

J. Reporters' Privilege

New Mexico recognizes no first amendment privilege, absolute or qualified, to refuse to reveal confidential sources or information relevant to a court proceeding.[161] The only protection afforded to media defendants desiring to protect the identity of confidential sources or confidential information may be found in N.M. R. Evid. 514, which was recently adopted by the New Mexico Supreme Court.[162]

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153. *See supra* text accompanying note 66.
154. *See supra* text accompanying note 108.
155. 441 U.S. 153 (1979).
156. *Id.* at 169-71.
157. *Id.* at 175.
158. 98 N.M. 394, 649 P.2d 462 (1982).
159. *Id.* at 399, 649 P.2d at 467.
160. Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978).
161. 91 N.M. at 257, 572 P.2d at 1265.
162. N.M. R. Evid. 514 (Cum. Supp. 1983). The Rule protects the confidentiality of journalists' sources and confidential information, under certain circumstances, unless it can be shown that (1) the information sought is material and relevant to the proceedings; (2) the party seeking the information has exhausted alternative means of obtaining it; (3) the information is "crucial"; and (4) the need for the information "clearly outweighs the public interest in protecting the news media's confidential information and sources." N.M. R. Evid. 514(C) (Cum. Supp. 1983).

K. Summary Judgment

In *Hutchinson v. Proxmire,*[163] the United States Supreme Court noted a trend in the courts in favor of summary judgment for media defendants. The trend developed as a method of avoiding harassment and attempts to intimidate the media through the filing of spurious but expensive defamation actions.[164] In *Hutchinson,* the Supreme Court said that it felt "constrained to express some doubt"[165] regarding the notion that summary judgment in favor of defamation defendants ought to be the rule, rather than the exception, at least in cases requiring proof of actual malice. Because the actual malice issue must turn on the defendant's state of mind, the Court reasoned, it does not readily lend itself to summary disposition.[166]

Summary judgment certainly is not the rule in New Mexico defamation cases, nor is it likely to become the rule. In *Marchiondo II,*[167] the state supreme court overturned summary judgment on the issue of actual malice because "it was rendered before the thoughts, editorial processes and other information in the exclusive control of the alleged defamer could be examined."[168] In *Ammerman v. Hubbard Broadcasting, Inc.,*[169] the New Mexico Court of Appeals overturned summary judgment on actual malice because the plaintiff had been denied access to the defendants' confidential sources and those sources' credibility and reliability were directly at issue.

Once discovery obstacles to summary judgment have been overcome, media defendants face the rule set out by the New Mexico Court of Appeals in *Tinley v. Davis:*[170]

> Summary judgement procedures are not designed to resolve inferential disputes.
>
> "It seems obvious that in situations where, *though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to the ultimate facts* such as intent, knowledge, good faith, negligence, et cetera, *a summary judgment would not be warranted.*"[171]

163. 443 U.S. 111 (1979).

164. *See, e.g.,* Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967), and Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 309 (2d Cir. 1976).

165. 443 U.S. at 120 n.9.

166. *Id.*

167. 98 N.M. 394, 649 P.2d 462 (1982).

168. *Id.* at 399, 649 P.2d at 467.

169. 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978).

170. 94 N.M. 296, 609 P.2d 1252 (Ct. App. 1980).

171. *Id.* at 298, 609 P.2d at 1254 (emphasis in original) (quoting Sanders v. Day, 2 Wash. App. 393, ___, 468 P.2d 452, 455-56 (1970)).

L. Jury Instructions

New Mexico's Uniform Jury Instructions include instructions for defamation cases.[172] Note, however, that *Marchiondo II* referenced several errors[173] in these uniform instructions as they pertain to damages issues.[174]

V. CONCLUSION: THE NEED FOR SOME CLARIFICATION

New Mexico defamation law is fraught with unanswered questions: Is there any meaningful distinction today between libel and slander? Does there remain any reason to distinguish between libel per se and libel per quod? If any reason for distinction between the two still exists, are the pleadings and damages requirements for them nonetheless the same? What constitutes a public figure in this state? What is the present relationship between the common law fair comment privilege and the constitutional opinion privilege?

The New Mexico appellate courts recently have addressed all of these significant issues but they have failed to present a clear resolution. To practitioners grappling with cases where these issues may be dispositive, the confusion left by the courts is frustrating at best and maddening at worst.

Additionally, significant developments in other jurisdictions have yet to be considered in our state. Will neutral reportage be recognized in New Mexico as a constitutional privilege? Must plaintiffs faced with a need to prove actual malice also prove falsity as an essential element of their defamation claim? Until these and similar questions definitively are answered by the New Mexico courts, the law of defamation will remain in a state of flux and in some confusion.

Existing decisions do offer some portent for the future. In general,

172. N.M. U.J.I. Civ. 10.0 to 10.26.

173. 98 N.M. 394, 403, 649 P.2d 462, 471 (1982). Specifically, the supreme court noted that N.M. U.J.I. Civ. 10.4 (3) (Libel Per Quod) "does not include general or actual damages, but mentions only recovery of special damages. This is no longer the law, and recovery for actual or general damages is to be included in the instruction." 98 N.M. at 403, 649 P.2d at 471.

Secondly, the court stated that the Committee Comment to N.M. U.J.I. Civ. 10.4, that punitive damages "are not recoverable" (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)) "is not correct." Punitive damages are recoverable, but only if "there is proof that the publication was made with actual malice. . . ." 98 N.M. at 403, 649 P.2d at 471.

174. Partially as a result of the court's admonition and partially to update generally the New Mexico Civil Uniform Jury Instructions so that they conform to recent state and federal developments in defamation law, the New Mexico Supreme Court's Civil Uniform Jury Instructions Committee is currently reviewing those instructions as they pertain to libel and slander. The Committee will then make whatever recommendations for alterations in these instructions it deems appropriate. Telephone interview with Honorable Lorenzo F. Garcia, New Mexico District Court Judge, First Judicial District, and member of the New Mexico Supreme Court Civil Uniform Jury Instructions Committee (June 6, 1983).

New Mexico is not a friendly jurisdiction for media defendants in defamation cases. New Mexico, for example, adopted the minimum available standards of fault in private figure cases; refused to recognize any constitutional reporter's privilege; opened the door to extensive discovery of confidential sources and information, and of the state of mind of reporters, editors, and publishers; and made summary judgment for media defendants virtually impossible. Paradoxically, plaintiffs suing nonmedia defendants in New Mexico face constitutional standards of proof not required by any United States Supreme Court decision.

Whatever the significance of these general trends, many specific issues remain to be decided. When the New Mexico courts address these issues, they need to resolve them clearly and in a manner which will provide better guidance for the future. Until then, there is room for persuasive advocacy on the state of the law of defamation in New Mexico and how it should be developed.