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Torts

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TORTS

I. INTRODUCTION

The last New Mexico tort law survey article was published in 1986 and discussed major tort law decisions through March 31, 1985. This survey, therefore, analyzes important tort developments from April 1, 1985, through August 1, 1989. This article is divided into sections addressing professional malpractice, negligence, products liability, immunity, fraud, dramshop liability, malicious prosecution, defamation, and wrongful death. A later article will address developments in the Tort Claims Act.[1]

II. PROFESSIONAL MALPRACTICE

During the survey period, New Mexico appellate courts addressed professional malpractice issues involving the definition of "professional," the use of res ipsa loquitur in medical malpractice cases, and attorney immunity from malpractice suits.[2]

A. Definition of "Professional"

In negligence actions, "professionals" are held to a malpractice standard of care rather than a "reasonable man" standard of care.[3] Under the malpractice standard, a plaintiff must use expert testimony to prove that a defendant, in the practice of his profession, departed from recognized community standards for that profession.[4] In *Lewis v. Rodriguez*,[5] the court of appeals held that polygraph examiners are professionals subject to a malpractice standard of care and established guidelines for determining when an individual is a professional.

In *Lewis*, the plaintiff lost his job as a corrections officer at the Bernalillo County Detention Center after failing a polygraph examination.[6] The plaintiff's employer ordered the polygraph test after confidential informants at the jail alleged that the plaintiff was bringing drugs into

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1. N.M. STAT. ANN. §§ 41-4-1 to -27 (1978 and Repl. Pamp. 1989).

2. New Mexico appellate courts also addressed malpractice issues concerning attorneys' and physicians' duties to third parties. *See* Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 106 N.M. 757, 750 P.2d 118 (1988); Wilschinsky v. Medina, 108 N.M. 511, 775 P.2d 713 (1989). These cases are discussed along with other third party duty cases in the negligence section of this survey. *See infra* notes 61-88 and accompanying text.

3. Garcia v. Color Tile Distrib. Co., 75 N.M. 570, 573, 408 P.2d 145, 148 (1965).

4. *See* SUP. CT. RULES ANN. 13-1101 (Recomp. 1986) (U.J.I. Civ.) (malpractice must be proven by expert witnesses); Smith v. Klebanoff, 84 N.M. 50, 53, 499 P.2d 368, 371 (Ct. App.), *cert. denied*, 83 N.M. 37, 499 P.2d 355 (1972) ("Malpractice is the departure from the recognized standards of medical practice in the community."); *Garcia*, 75 N.M. at 573, 408 P.2d at 148 ("[T]he degree of care necessarily required by one who undertakes to render services to another in the practice of a trade which is a result of acquired learning, or developed through special training and experience, is that which a reasonably prudent man, skilled in such work, would exercise.").

5. 107 N.M. 430, 759 P.2d 1012 (Ct. App. 1988).

6. *Id.* at 431, 759 P.2d at 1013.

the jail.[7] The plaintiff sued the polygraph examiner, claiming that the examiner's abusive treatment both before and during the polygraph examination caused him to fail the examination.[8] The trial court instructed the jury on a malpractice standard of care, and the jury returned a verdict for the plaintiff.[9] The defendant appealed.

The court of appeals acknowledged that some jurisdictions recognize negligent administration of a polygraph examination as a cause of action.[10] However, rather than simply adopting this cause of action and establishing the existence of a duty, the court went one step further and determined the actual duty owed by polygraph examiners.[11]

To be held to a malpractice standard of care, a person must be considered a professional.[12] Analyzing a polygraph examiner's duties in light of the definitions of "professional" articulated in both the National Labor Relations Act (NLRA)[13] and the Fair Labor Standards Act (FLSA),[14] the court of appeals determined that a polygraph examiner is a professional because his duties "require a consistent exercise of discretion . . . [and] are predominantly intellectual and varied in character because the polygrapher is faced with a different issue and a different examinee each time he administers a polygraph examination."[15] Thus, in a negligence action, polygraph examiners must be held to a malpractice standard of care.[16]

The court of appeals used the definitions of "professional" provided in the NLRA and the FLSA despite the fact that "the reasons for classifying employees as 'professionals' under the NLRA and the FLSA

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 432, 759 P.2d at 1014 (citing Lawson v. Howmet Aluminum Corp., 449 N.E.2d 1172 (Ind. Ct. App. 1983); Zampatori v. United Parcel Serv., 125 Misc. 2d 405, 479 N.Y.S.2d 470 (1984)).
11. Although the *Lawson* and *Zampatori* cases "recognize a cause of action for negligent administration of a polygraph examination . . . [they do not] specifically [address] the duty of care owed by the polygraph examiner to the examinee." *Lewis*, 107 N.M. at 432, 759 P.2d at 1014.
12. *See id.* (citing *Garcia*, 75 N.M. 570, 408 P.2d 145 (1965)).
13. Under the National Labor Relations Act, an individual is a professional if his work: (1) is "predominantly intellectual and nonroutine"; (2) involves "the consistent exercise of discretion and judgment"; (3) is not "standardized in terms of time"; and (4) "require[s] knowledge customarily acquired by specialized study in an institution of higher learning." *Lewis*, 107 N.M. at 432-33, 759 P.2d at 1014-15 (quoting Annotation, *Who are Professional Employees Within Meaning of National Labor Relations Act (29 U.S.C.S. § 152(12))*, 40 A.L.R. FED. 25, 35 (1978)).
14. Under the Fair Labor Standards Act, an individual is a professional if his work: (1) requires "knowledge of an advanced type, in a field of science or learning, customarily acquired through a prolonged course of specialized intellectual instruction and study"; (2) is "original and creative in a recognized field of artistic endeavor"; or (3) involves "the practice of law, medicine, or teaching"; and (4) "requires the consistent exercise of discretion and judgment . . . and is predominantly intellectual and varied in character . . . as opposed to routine mental, manual, mechanical, or physical work." *Lewis*, 107 N.M. at 433, 759 P.2d at 1015 (quoting Annotation, *Who is Employed in "Professional Capacity," Within Exemption, Under 29 U.S.C.S. § 213(a)(1), from Minimum Wage and Maximum Hours Provision of Fair Labor Standards Act*, 77 A.L.R. FED. 681, 688 (1986)).
15. *Id.* at 434, 759 P.2d at 1016.
16. *Id.*

are different from [the reasons in malpractice suits]."[17] Therefore, New Mexico courts might expand the number of persons subject to a malpractice standard of care by following federal administrative and judicial decisions concerning whether an individual is a professional. If so, the following individuals, among others, may be professionals under various circumstances: accountants, architects, chemists, coaches, draftsmen, engineers, estimators, inspectors, interior designers, pharmacists, pilots, reporters, surveyors, and university professors.[18]

B. Res Ipsa Loquitur

A plaintiff must use expert testimony to prove malpractice unless "malpractice can be determined in a specific case by resort to common knowledge ordinarily possessed by an average person."[19] However, in *Schmidt v. St. Joseph's Hospital*,[20] the court of appeals held that a plaintiff's reliance upon the doctrine of *res ipsa loquitur* does not rebut a defendant physician's prima facie showing of no malpractice.[21]

In *Schmidt*, the plaintiff awoke from surgery suffering pain in his left arm.[22] After learning that his pain was caused by ulnar neuropathy (nerve damage), the plaintiff sued his surgeon, his anesthesiologist and the hospital for medical malpractice.[23] The trial court granted the defendants' summary judgment motion, and the plaintiff appealed.[24]

Applying the rule that *res ipsa loquitur* "does not relieve plaintiff from making a prima facie case" in a medical malpractice action,[25] the court of appeals affirmed the trial court, holding that in this case "expert testimony was required to rebut the prima facie showing that defendants adhered to recognized medical standards of the community and that their

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17. *Id.* at 433, 759 P.2d at 1015.

18. *See* Annotation, *Who are Professional Employees Within Meaning of National Labor Relations Act (29 U.S.C.S. § 152(12))*, 40 A.L.R. FED. 25 (1978); Annotation, *Who is Employed in "Professional Capacity," Within Exemption, Under 29 U.S.C.S. § 213(a)(1), from Minimum Wage and Maximum Hours Provision of Fair Labor Standards Act*, 77 A.L.R. FED. 681 (1986). These annotations discuss numerous professions, giving circumstances in which specific individuals are considered professionals and circumstances in which they are not. A full discussion of these circumstances is beyond the scope of this survey.

19. SUP. CT. RULES ANN. 13-1101 note on directions for use (Recomp. 1986) (U.J.I. Civ.).

20. 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987).

21. *Id.* at 684, 736 P.2d at 138. Under the doctrine of *res ipsa loquitur*, "a plaintiff must establish that the injury was of a kind which does not ordinarily occur in the absence of someone's negligence and that the agent or instrumentality causing the injury was within the exclusive control of defendants." *Id.* at 683, 736 P.2d at 137 (citing Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971)).

22. 105 N.M. at 682, 736 P.2d at 136.

23. *Id.*

24. *Id.*

25. *Id.* at 683, 736 P.2d at 137. A plaintiff cannot rely on his claim that he does not know how his injury occurred if the defendant shows that his actions were not the cause of the plaintiff's injury. *Id.* at 684, 736 P.2d at 138. In any medical malpractice case, the plaintiff must prove that "1) the defendant owed him a duty recognized by law; 2) the defendant failed to conform to the recognized standard of medical practice in the community; and, 3) the actions complained of were the proximate cause of plaintiff's injuries." *Id.* at 683, 736 P.2d at 137 (citing Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964)).

actions were not the proximate cause of plaintiff's injury."[26] Therefore, the court rejected the plaintiff's argument that common knowledge implied a question of fact about the defendants' negligence.[27] In addition, the court held that the plaintiff did not even have a *res ipsa loquitur* claim because the plaintiff, by failing to deny a request for admission, admitted his injury could have occurred without any negligent action on the part of the defendants.[28]

C. *Attorney Immunity*

Attorneys cannot be held liable for legal malpractice if they are immune from suit. In *Herrera v. Sedillo*,[29] the court of appeals held that attorneys appointed to defend indigents under the Public Defender Act[30] are immune from legal malpractice suits arising from such representation.[31] Reading the Public Defender Act and the Indigent Defense Act[32] *in pari materia*,[33] the court determined that "the immunity granted to attorneys appointed under the Indigent Defense Act [applies] also to those appointed [under the Public Defender Act] because they are under contract to the Public Defender."[34]

An important immunity issue currently being considered by the supreme court is whether an attorney acting as a guardian ad litem (guardian) solely for the purpose of approving settlement is cloaked with quasi-judicial immunity. In *Collins v. Tabet*,[35] the court of appeals, unable to

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26. *Id.* at 684, 736 P.2d at 138. Expert testimony is generally required to prove medical malpractice; however, it is only essential "if the alleged negligence is in an area particularly within the knowledge of physicians." Sewell v. Wilson, 97 N.M. 523, 528, 641 P.2d 1070, 1075 (Ct. App. 1982) (citing Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977)).

27. *Schmidt*, 105 N.M. at 684, 736 P.2d at 138. Under *Pharmaseal*, lay testimony may establish a doctor's negligence if an average person possesses knowledge about the medical procedure used by the doctor. 90 N.M. at 758, 568 P.2d at 594. Generally, such knowledge concerns a doctor's "non-technical mechanical acts," such as forcible extraction of a mercury-filled balloon from a patient's lungs. *Id.* In this case, the plaintiff's ulnar neuropathy was not "the kind of injury or type of situation which [could] be resolved by reliance on a lay person's common knowledge." *Schmidt*, 105 N.M. at 684, 736 P.2d at 138.

28. *Schmidt*, 105 N.M. at 684, 736 P.2d at 138.

29. 106 N.M. 206, 740 P.2d 1190 (Ct. App. 1987).

30. N.M. STAT. ANN. §§ 31-15-1 to -12 (Repl. Pamp. 1984 & Cum. Supp. 1989).

31. *Herrera*, 106 N.M. at 207, 740 P.2d at 1191.

32. N.M. STAT. ANN. §§ 31-16-1 to -10 (Repl. Pamp. 1984 & Cum. Supp. 1989). Under the Indigent Defense Act, "[n]o attorney assigned or contracted with to perform services under the Indigent Defense Act . . . shall be held liable in any civil action respecting his performance or nonperformance of such services." N.M. STAT. ANN. § 31-16-10 (Repl. Pamp. 1984). The Public Defender Act does not have a similar immunity provision.

33. *Herrera*, 106 N.M. at 207, 740 P.2d at 1191. The supreme court decided that the statutes should be read *in pari materia* in State v. Rascon, 89 N.M. 254, 257, 550 P.2d 266, 269 (1976). Reading the Indigent Defense Act and the Public Defender Act *in pari materia*, the court of appeals found that "the two acts together provide a statutory scheme for providing counsel to indigent criminal defendants. The Indigent Defense Act gives indigent defendants the right to free counsel, thereby recognizing their sixth amendment rights. The Public Defender Act, enacted later, provides an administrative agency for accomplishing this objective." *Herrera*, 106 N.M. at 207, 740 P.2d at 1191.

34. *Herrera*, 106 N.M. at 207, 740 P.2d at 1191.

35. No. 9768 (N.M. Ct. App. June 6, 1989) (certification to the supreme court).

agree on disposition of this issue, certified the issue to the supreme court as "a question of substantial public interest."[36]

In this case, a jury held Tabet, an attorney acting as a guardian, liable for negligent approval of a medical malpractice settlement agreement.[37] Tabet appealed the verdict, arguing that he was cloaked with quasi-judicial immunity because a guardian is an arm of the court.[38] In separate opinions, the court of appeals panel: (1) denied Tabet immunity under a function-based approach;[39] (2) granted Tabet total immunity from suit;[40] and (3) granted Tabet immunity from the parents' suit in their individual capacities while remanding the case to the trial court in the child's action to determine whether Tabet's acts constituted gross negligence.[41]

Judge Apodaca, denying Tabet immunity, developed a "function-based analysis" for determining guardian immunity.[42] Because the main reason

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36. *Id.* at 2.

37. Collins v. Perrine, 108 N.M. 714, 778 P.2d 912 (Ct. App.), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989). *Perrine* and *Tabet* were companion cases consolidated for appeal. They were severed by the court of appeals when the panel was unable to decide the quasi-judicial immunity issue. *Tabet*, No. 9768 at 1.

In the original medical malpractice action, the Collinses sued Presbyterian Hospital and Dr. Sollins for misdiagnosis of their minor son's spinal meningitis, which left their son permanently mentally and physically handicapped. After a $46,000 settlement was reached, Tabet was appointed guardian ad litem for the limited purpose of reviewing the settlement. The settlement was approved by the trial court after the Collinses approved the settlement and Tabet testified that the settlement was fair. *Perrine*, 108 N.M. at 716, 778 P.2d at 914.

In a second lawsuit against the Indian Health Service Hospital ("IHS"), the Collinses won a $3.9 million judgment. However, the IHS was held liable for only 40% of that amount, while Presbyterian and Dr. Sollins were held liable for 60%. Because of the prior settlement, the Collinses were unable to collect approximately $2.3 million of the judgment. Therefore, the Collinses sued Perrine, their attorney, and Tabet for negligently advising settlement with Presbyterian and Dr. Sollins. *Id.*

In the legal malpractice case, a jury awarded the Collinses $2,958,789. Perrine was held liable for 54% of the judgment, Tabet for 39%, and Mr. Collins for 7%. Both Perrine and Tabet appealed the judgment. *Id.*

Once the two cases were split, the court of appeals affirmed the jury's verdict against Perrine because it determined that the jury

> could readily have found that Perrine settled the case without performing even the minimum level of discovery necessary, . . . did not have sufficient information about the facts and law involved in the case when he decided to recommend settlement, . . . [and] did not meet the standard of an attorney practicing in Albuquerque in 1978 and 1979.

Id. at 717, 778 P.2d at 915.

38. *Id.* at 715, 778 P.2d at 913. Tabet argued that a guardian should be granted immunity from civil suit "derivative of that granted to judges and other persons who are integral parts of the judicial process, such as witnesses, prosecutors, probation officers reporting to the court, and court-appointed psychiatrists." *Tabet*, No. 9768, Appendix A at 1. Tabet also argued that he was immune from suit because he was a "public employee" under the Tort Claims Act, which "does not waive immunity for the acts of a judge or an employee acting in a quasi-judicial capacity." *Id.* Appendix A at 6. Judge Apodaca and Judge Donnelly disagreed. *Id.* Appendix A at 8, Appendix C at 8. Judge Apodaca determined that Tabet was an independent contractor because the trial court had no control over Tabet's performance of his duties. *Id.* Appendix A at 7-8.

39. *Tabet*, No. 9768, Appendix A at 1-6 (Apodaca, J.). For a discussion of Judge Apodaca's opinion, see *infra* notes 42-45 and accompanying text.

40. *Id.* Appendix B at 1-8 (Bivens, J.). For a discussion of Judge Bivens' opinion, see *infra* notes 52-58 and accompanying text.

41. *Id.* Appendix C at 1-9 (Donnelly, J.). For a discussion of Judge Donnelly's opinion, see *infra* notes 46-51 and accompanying text.

42. *Id.* Appendix A at 1-6.

for granting immunity "is to encourage effective performance of official duties," Judge Apodaca argued that a guardian should be granted immunity only when he acts as "an integral part of the judicial process during his representation."[43] This determination depends on "the extent to which the guardian's duties involve . . . vigorous legal representation of the child, as opposed to impartial decision-making concerning the child."[44] Judge Apodaca denied Tabet immunity under this analysis because Tabet's "primary duty was to represent [the child's] interests rather than to weigh all the various factors and provide independent, disinterested advice to the trial court."[45]

Judge Donnelly decided that guardians should be granted immunity from actions brought by a child's parents in their individual capacities because the best interests of the parents and the child do not always coincide.[46] However, Judge Donnelly adopted a gross negligence standard for determining whether a guardian is immune from suit brought for or on behalf of a minor.[47]

Because general guardians may be sued for breach of their fiduciary responsibilities under certain circumstances,[48] "it would appear contrary to legislative policy to extend complete judicial immunity to a guardian ad litem where such immunity does not exist for a general guardian or attorney."[49] Thus, if a guardian's settlement recommendation is approved by the court, the guardian should be subject to suit only for acts of fraud or gross negligence.[50] In light of this standard, Judge Donnelly remanded the Tabet case for a determination of whether Tabet's conduct constituted gross negligence.[51]

Judge Bivens granted Tabet quasi-judicial immunity because of the policy reasons underlying judicial immunity and the judicial necessity for requesting non-judicial persons to perform quasi-judicial functions.[52] Minors must be protected by the court, and guardians perform this function for the court.[53] In order for a guardian to successfully protect a minor's interests, "a guardian ad litem must be able to function without the worry of possible later harassment and intimidation from dissatisfied parents."[54] Thus, guardians should be granted immunity from civil suit for negligent settlement of a minor's claims.[55]

Judge Bivens rejected Judge Apodaca's function-based analysis because guardians always have a duty to represent the minor's interests.[56] Thus,

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43. *Id.* Appendix A at 3.
44. *Id.* Appendix A at 3.
45. *Id.* Appendix A at 4.
46. *Id.* Appendix C at 3, 4.
47. *Id.* Appendix C at 9.
48. *Id.* Appendix C at 4 (citing N.M. STAT. ANN. § 45-5-209 (1978)).
49. *Id.* Appendix C at 5.
50. *Id.* Appendix C at 7.
51. *Id.* Appendix C at 9.
52. *Id.* Appendix B at 8.
53. *Id.* Appendix B at 3 (citing Haden v. Eaves, 55 N.M. 40, 47, 226 P.2d 457, 462 (1950)).
54. *Id.* Appendix B at 5 (citing Kurzawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984)).
55. *Id.* Appendix B at 8.
56. *Id.* Appendix B at 5.

according to Judge Bivens, Judge Apodaca's analysis effectively denies immunity for all guardians.[57] Judge Bivens also rejected Judge Donnelly's gross negligence standard as unworkable, at least until case law establishes the parameters for gross negligence on the part of a guardian.[58]

Because it is expeditious for the judiciary to rely upon guardians' settlement recommendations in suits involving minors, the supreme court's resolution of the quasi-judicial immunity issue is critical. If the supreme court denies immunity, attorneys may decline judicial guardianship appointments. If this happens, the judiciary will find itself saddled with the added responsibility of investigating the fairness of all settlements involving minors. However, if the supreme court grants blanket immunity, it runs the risk of allowing well-meaning but incompetent attorneys to perform their duties without fear of liability. The supreme court will have to balance these interests when it considers granting guardians quasi-judicial immunity.

III. NEGLIGENCE

During the survey period, New Mexico appellate courts addressed negligence issues involving the duties owed to third parties by attorneys, physicians, and financial institutions, several liability, and premises liability. New Mexico courts also addressed the measure of damages for negligent misrepresentation and the computation of post-judgment interest.[59]

A. Duty to Third Parties

A plaintiff may recover damages from a defendant in a negligence action only if the defendant breached a duty owed to the plaintiff.[60] During the survey period, New Mexico appellate courts decided questions concerning an attorney's duty to protect the interests of an adverse party,

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57. *Id.* Appendix B at 6.

58. *Id.* Appendix B at 6-7.

59. In Cross v. City of Clovis, a case not discussed in the text, 107 N.M. 251, 755 P.2d 589 (1988), the supreme court considered the negligence of police officers. Alan Cross, a thirteen-year-old boy, was killed when a stolen car crashed through a police roadblock, ran off the road, and struck Cross. Cross' father sued under the Tort Claims Act, N.M. STAT. ANN. §§ 41-4-1 to -27 (Repl. Pamp. 1989), alleging that the police officers negligently maintained the roadblock. The trial court directed a verdict for the City of Clovis. *Cross,* 107 N.M. at 252, 755 P.2d at 590.

The supreme court held that police officers have "the duty in any activity actually undertaken to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done." *Id.* at 253, 755 P.2d at 591 (footnote omitted). The court further held that in light of the facts of the case, the issues of breach of duty and proximate cause should have been submitted to the jury. *Id.* at 255, 755 P.2d at 593.

Justice Stowers dissented, arguing that the majority opinion extended police officer liability to third party negligence in violation of the Tort Claims Act. *Id.* at 256, 755 P.2d at 594. However, Justice Stowers' dissent appears to be misdirected because the majority simply addressed the negligence of the officers themselves, a permissible inquiry under the Tort Claims Act. *See id.* at 252, 755 P.2d at 590; Methola v. County of Eddy, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980); N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989).

60. Schear v. Bd. of County Comm'rs, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984).

a doctor's duty to protect a third party, and a bank's duty to disclose a customer's financial status to a non-customer.

In *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*,[61] a case of first impression, the supreme court held that an attorney has no legal duty to protect the interests of an adverse party.[62] In *Garcia*, the plaintiffs brought suit against the attorneys for the Socorro school board, who had successfully defended the board and its members against Garcia's federal civil rights action.[63] During the course of the trial on Garcia's civil rights claim, counsel for the school board represented that the board would not raise "some kind of immunity or something" if Garcia dismissed his action against the individual board members.[64] After the Tenth Circuit reversed Garcia's jury award on the basis of the board's eleventh amendment sovereign immunity defense, the plaintiffs sued the board's attorneys in state district court for negligence, breach of contract, negligent misrepresentation, constructive fraud, promissory estoppel, and violation of both the Attorney's Oath and the Code of Professional Responsibility.[65] The trial court granted the defendants' motion to dismiss and the plaintiffs appealed.[66]

The supreme court affirmed, holding that as a matter of public policy an attorney has no duty to protect an adverse party's interests.[67] Because of the adversarial nature of the American legal system, an attorney must be exclusively loyal to his client.[68] Without such loyalty, conflicts of interest would replace the attorney-client relationship, and attorneys would be constantly concerned about malpractice suits.[69] Therefore, because the defendants owed no duty to Garcia, each of plaintiffs' claims which required proof of breach of a legal duty were correctly dismissed by the trial court.[70] In addition, neither a violation of the Code of Professional Responsibility nor a violation of the Attorney's Oath provides a foundation for civil liability.[71] The Code only provides a structure for regulating attorney conduct through the disciplinary process; neither the Code nor the Oath were created to provide a private cause of action.[72]

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61. 106 N.M. 757, 750 P.2d 118 (1988). A complete discussion of *Garcia* will appear in the next issue of the New Mexico Law Review.

62. *Id.* at 761, 750 P.2d at 122.

63. *Id.* at 759, 750 P.2d at 120. A jury originally awarded plaintiff $180,000 on his claim that the board, acting in its official capacity, had violated his civil rights. *Id.* On appeal, the Tenth Circuit Court of Appeals reversed the judgment on grounds of sovereign immunity. *Id.* at 760, 750 P.2d at 121.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 761, 750 P.2d at 122.

68. *Id.* Additionally, an adverse party is not the intended beneficiary of the attorney's services and cannot justifiably rely on the opposing attorney for protection from harm. *Id.*

69. *Id.*

70. *Id.* at 761-63, 750 P.2d at 122-24.

71. *Id.* at 762, 750 P.2d at 123.

72. *Id.* (citing Rules of Professional Conduct note on scope, SUP. CT. RULES ANN. 16-101 to -805 (1986); Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff'd*, 447 F.2d 598 (6th Cir. 1973)).

In *Wilschinsky v. Medina*,[73] the supreme court held that doctors may owe a duty to persons other than their patients. In *Wilschinsky*, Dr. Straight injected Helen Medina (Medina) with two drugs, one a narcotic, at his office.[74] The drugs were known to cause drowsiness and impairment of judgment.[75] Approximately seventy minutes later, Medina struck and injured Tui Wilschinsky (Wilschinsky) with her car.[76] Wilschinsky and his family sued Dr. Straight in the United States District Court for the District of New Mexico for negligently administering the drugs.[77] Dr. Straight moved to dismiss plaintiffs' complaint against him, and the district court certified to the New Mexico Supreme Court the issue of a doctor's duty to third parties.[78]

To determine whether Dr. Straight owed a duty to the general public, the supreme court balanced the likelihood of injury, the burden placed upon the doctor in guarding against the injury, and the consequences of placing the burden upon the doctor.[79] The court found that Dr. Straight owed a duty to the driving public under the circumstances of this case because:

> [1] [t]he likelihood of a vehicular accident immediately following injection of a narcotic in combination with other drugs [was] high; [2] [w]hen [a] narcotic is administered by a doctor in his office, the burden of guarding against that foreseeable danger is not unreasonable if the doctor is judged by standards of normal medical procedures, rather than subjected to after-the-fact speculative attack; [and] [3] if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible.[80]

The supreme court expressly limited the scope of its opinion "to persons injured by patients driving automobiles from a doctor's office when the patient has just been injected with drugs known to affect judgment and driving ability."[81] The court ruled that the scope of the duty owed to a third party depends upon the standards set by the medical community.[82] The court could go no further than stating that Dr. Straight owed a duty under the facts before the court.[83] Absent factual findings regarding the adequacy of the warning in light of medical standards, the court

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73. 108 N.M. 511, 775 P.2d 713 (1989).
74. *Id.* at 513, 775 P.2d at 715.
75. *Id.* at 512, 775 P.2d at 714.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 515, 775 P.2d at 717 (citing Kirk v. Michael Reese Hosp. & Medical Center, 117 Ill. 2d 507, 513 N.E.2d 387 (1987), *cert. denied*, 108 S. Ct. 1077 (1988)).
80. *Id.*
81. *Id.* The court held that this third party liability exists only for injections given in a doctor's office; it did not decide whether negligently prescribing drugs gives rise to third-party liability. *Id.* at 514, 775 P.2d at 716.
82. *Id.* at 515, 775 P.2d at 717.
83. *Id.* at 515-16, 775 P.2d at 717-18.

could not say whether a warning to Medina would have discharged the duty as a matter of law.[84]

Because the court defined a doctor's duty to third parties in terms of existing medical standards, the court rejected Justice Scarborough's charge that the creation of this duty "significantly enlarge[s] a physician's potential liability."[85] Moreover, the court rejected Justice Scarborough's argument that doctors should not be subject to third-party liability because the court failed to subject attorneys to third-party liability in *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*[86] The court reasoned that lawyers, unlike doctors, operate in an adversarial system and must zealously represent their clients.[87] Therefore, holding lawyers liable to an opposing party would "imply representation in direct conflict with the representation actually undertaken."[88]

In another case concerning whether a duty was owed to a third party, *Shea v. H.S. Pickrell Co.*,[89] the court of appeals held that a mortgage lender generally has no duty to protect a third party from the tortious acts of a customer/vendor.[90] The plaintiff, Gertrude Shea (Shea), bought a new townhouse from Samuel A. Andrade and Andrade Homes, Inc.[91] She applied and qualified for a mortgage in the amount of $30,000 from H.S. Pickrell Company (Pickrell) but did not borrow from Pickrell.[92] Unknown to Shea until after paying the vendors $69,900, Pickrell held an $88,000 construction loan mortgage on the townhouse at the time Shea applied for the mortgage.[93] Because Pickrell did not disclose its construction loan mortgage on the townhouse, and Shea was later unable to secure clear title to the townhouse, Shea sued Pickrell for negligence.[94]

The court of appeals upheld the trial court's dismissal of Shea's claims in light of the general rule that "[i]n the absence of special circumstances, a lender is generally under a duty not to disclose the financial condition of its customers."[95] A lender has a duty to disclose one customer's

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84. *Id.* There was evidence suggesting that Medina might not have been able to understand a warning even if Dr. Straight had warned her. *Id.* at 516, 775 P.2d at 718. The parties contested whether any warning was given at all. *Id.*

85. *Id.* at 518, 775 P.2d at 720.

86. *Id.* at 515, 775 P.2d at 717. Justice Ransom expressed "chagrin that seeds of further interprofessional discord needlessly may be sewn [sic] by certain language in the dissent." *Id.* at 518, 775 P.2d at 720 (Ransom, J., specially concurring). For a discussion of the *Garcia* decision, see *supra* notes 61-72 and accompanying text.

87. *Id.* at 515, 775 P.2d at 717.

88. *Id.*

89. 106 N.M. 683, 748 P.2d 980 (Ct. App. 1987).

90. *Id.* at 686-87, 748 P.2d at 983-84.

91. *Id.* at 684, 748 P.2d at 981.

92. *Id.*

93. *Id.*

94. *Id.* Shea alleged that Pickrell knew the builder and seller of the townhouse were having financial difficulties; therefore, Pickrell failed to warn her about its construction loan mortgage in order to shift the risk of loss to Shea. *Id.* at 685, 748 P.2d at 982.

95. *Id.* at 686, 748 P.2d at 983 (citing MacKenzie v. Summit Nat'l Bank, 363 N.W.2d 116 (Minn. Ct. App. 1985); Richfield Bank & Trust Co. v. Sjogren, 309 Minn. 362, 244 N.W.2d 648 (1976)). Examples of such "special circumstances" include a bank's actual knowledge of a customer's fraudulent activity, *Richfield*, 309 Minn. at 365, 244 N.W.2d at 651, or a bank's active participation

financial status to a third party only if: (1) the parties have a fiduciary or confidential relationship; and (2) one party has information that the other could not discover by using reasonable diligence, or one party has knowledge that the other is mistaken as to material fact.[96]

Because Shea did not borrow money from Pickrell, Shea and Pickrell were not in a confidential or fiduciary relationship.[97] Even if a fiduciary relationship existed, Shea did not allege that Pickrell knew that the builder was insolvent or engaged in fraudulent activity.[98] Thus, in the absence of a special circumstance requiring disclosure, Pickrell had no duty to disclose the existence of the construction loan mortgage to Shea.[99]

In *R.A. Peck, Inc. v. Liberty Federal Savings Bank*,[100] the court of appeals held that "special circumstances," mentioned in *Shea*,[101] gave rise to a bank's duty to disclose information about a customer's financial condition to a third party.[102] Liberty Federal Savings Bank (Liberty) entered into a loan construction agreement with Cordova Lodge, Inc. and Lawrence Smith (Smith) for construction of a ski lodge and restaurant.[103] Smith then contracted with R.A. Peck, Inc. (Peck) to construct the project.[104] After receiving Liberty's assurance that the construction loan was approved, Peck began construction.[105] Smith defaulted on his first two payments to Peck, and Liberty told Peck to submit all construction payment requests to Liberty for payment.[106] Liberty continued to instruct Peck to submit payment requests to it for processing even after all loan funds were obligated.[107]

After Liberty refused to make a $350,000 payment because the loan funds were exhausted,[108] Peck sued Liberty for fraud, constructive fraud, and negligent misrepresentation.[109] The trial court dismissed the complaint

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in home construction beyond merely "lend[ing] money at interest on the security of real property." Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 864, 447 P.2d 609, 616, 73 Cal. Rptr. 369, 376 (1968). The court of appeals clarified the "special circumstances" issue in R.A. Peck, Inc. v. Liberty Fed. Sav. Bank, 108 N.M. 84, 766 P.2d 928 (Ct. App. 1988). *See infra* notes 100-128 and accompanying text.

96. *Shea*, 106 N.M. at 685, 748 P.2d at 982 (citing Krupiak v. Payton, 90 N.M. 252, 561 P.2d 1345 (1977)).

97. *Id.* at 686, 748 P.2d at 983.

98. *Id.*

99. *Id.* at 687, 748 P.2d at 984.

100. 108 N.M. 84, 766 P.2d 928 (Ct. App. 1988).

101. *See supra* notes 89-99 and accompanying text.

102. *Peck*, 108 N.M. at 90, 766 P.2d at 934. This duty generally arises in fraudulent or negligent misrepresentation claims consisting of allegations of concealment or failure to disclose. *Id.* at 89, 766 P.2d at 933.

103. *Id.* at 87, 766 P.2d at 931.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* Both Liberty and Smith disbursed loan funds for purposes outside of the scope of the loan construction agreement. *Id.* The agreement restricted the use of funds to the payment of interest on the loan, payment of financing, and payment of labor and material for the construction of the lodge and restaurant. *Id.*

108. *Id.*

109. *Id.* at 86, 766 P.2d at 930.

for failure to state a claim upon which relief could be granted.[110] The court of appeals reversed, holding that Liberty had a duty to disclose the status of Smith's loan funds.[111]

Adopting an analysis used in other jurisdictions,[112] the court expanded its *Shea* analysis, holding that a bank must disclose a customer's financial status if: (1) the relationship existing between the bank and the third party falls under one or more of the following categories:

> [a]. Where there is a previous definite fiduciary relation between the parties.
>
> [b]. Where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other.
>
> [c]. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. The contract of insurance is an example of this last class;[113]

and (2) one or more of the following "special circumstances" exists:

> (a) One who speaks must say enough to prevent his words from misleading the other party.
>
> (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party.
>
> (c) One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.
>
> . . .
>
> [d] [A] bank [has] actual knowledge that its customer is committing fraud.[114]

The court found that the relationship between Liberty and Peck was based on a contract expressly reposing trust and confidence.[115] The court held that Liberty had a duty to disclose information of a customer's account to prevent misleading Peck and to provide material facts known to Liberty but unknown to Peck.[116] Once Liberty affirmatively involved itself in a capacity other than as a money lender by telling Peck to submit requests for payment and implying that there were loan funds available for payment, it had a duty to disclose all material facts about Smith's account, such as the depletion of the loan funds.[117] The court

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110. *Id.*

111. *Id.* at 91, 766 P.2d at 935.

112. *Id.* at 89, 90, 766 P.2d at 933, 934 (citing Klein v. First Edina Nat'l Bank, 293 Minn. 418, 196 N.W.2d 619 (1972); Macon County Livestock Mkt., Inc. v. Kentucky State Bank, 724 S.W.2d 343 (Tenn. Ct. App. 1986)).

113. *Id.* at 89, 766 P.2d at 933 (quoting *Macon*, 724 S.W.2d at 349).

114. *Id.* at 90, 766 P.2d at 934 (quoting *Klein*, 293 Minn. at 421, 196 N.W.2d at 622; citing Hooper v. Barnett Bank of W. Fla., 474 So. 2d 1253, 1257 (Fla. Dist. Ct. App. 1985)). In Richfield Bank & Trust Co. v. Sjogren, the Minnesota Supreme Court determined that knowledge of a depositor's insolvency does not necessarily constitute knowledge of fraud. 309 Minn. 362, 365, 244 N.W.2d 648, 651 (1976).

115. *Peck*, 108 N.M. at 89, 766 P.2d at 933.

116. *Id.* at 90, 766 P.2d at 934.

117. *Id.* at 91, 766 P.2d at 935. Through these activities, Liberty became "more than a lender," a special circumstance giving rise to a duty of disclosure. Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 864, 447 P.2d 609, 616, 73 Cal. Rptr. 369, 376 (1968).

of appeals noted that finding a duty of disclosure is even more compelling when a bank stands to benefit from nondisclosure.[118] In this instance, Liberty benefited from Peck's "continued construction in the form of enhanced mortgage collateral."[119]

Although the court adopted this test from other jurisdictions, it rejected those jurisdictions' determination that the duty of disclosure must be weighed against "the opposing duty of confidentiality a bank owes its customers."[120] The court stated that weighing these opposing duties is "unworkable" and "meaningless."[121] Foreseeing that a bank may be held liable to both its customer and a third party, the court reasoned that a bank should not be treated any differently than an attorney who may be liable for damages to two clients in a conflict of interest case.[122]

The court rejected the argument that a duty of disclosure will "hamstring" banks or "dry up" normal bank communications, stating that a bank has three choices when faced with an inquiry about a customer's financial status: (1) decline to answer the inquiry; (2) answer the inquiry with the qualification that information is given without responsibility; or (3) answer the inquiry without qualification.[123] If a bank chooses the latter course of action, it should "be prepared to accept responsibility for having withheld material facts that may prove detrimental to the third party."[124]

The court distinguished *Shea v. H.S. Pickrell Co.*,[125] noting that "there was no confidential or fiduciary relationship between the plaintiff and the defendant."[126] Also, there were no allegations that the defendant knew of the seller's insolvency, knew that the "seller was engaged in fraudulent activity," or knew that the "defendant's failure to disclose seller's financial condition induced plaintiff to enter into a purchase agreement with the seller."[127] Therefore, in *Shea* there were no special circumstances giving rise to a duty to disclose.[128]

During the survey period, the court of appeals also addressed the issue of an employee's duty of loyalty to his employer. In *Salter v. Jameson*,[129] the court adopted the reasoning of Judge Lopez in *Las Luminarias of the New Mexico Council of the Blind v. Isengard*[130] that "[a]lthough an

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118. *Peck*, 108 N.M. at 91, 766 P.2d at 935.
119. *Id.*
120. *Id.* at 90, 766 P.2d at 934.
121. *Id.*
122. *Id.* at 91, 766 P.2d at 935.
123. *Id.* at 92, 766 P.2d at 936 (quoting Central States Stamping Co. v. Terminal Equip. Co., 727 F.2d 1405, 1409 (6th Cir. 1984)).
124. *Id.* at 93, 766 P.2d at 937.
125. 106 N.M. 683, 748 P.2d 980 (Ct. App. 1987). In *Shea*, the court of appeals held that a lender had no duty to protect a third party from tortious acts of a customer/vendor. *Id.* at 687, 748 P.2d at 984. *See supra* notes 89-99 and accompanying text.
126. *Peck*, 108 N.M. at 92, 766 P.2d at 936.
127. *Id.*
128. *Id.*
129. 105 N.M. 711, 736 P.2d 989 (Ct. App.), *cert. denied*, 105 N.M. 720, 737 P.2d 79 (1987).
130. 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

employee may lawfully plan to compete with his employer, it is also well established that an employee has a duty not to do disloyal acts in anticipation of future competition."[131] Thus, because an employee may not act for himself and against the interest of his employer,[132] the court held that a dentist breached his duty of loyalty to his employer by winding down his services, copying the names and addresses of patients, inducing patients to have dental work performed after he opened his own office, and taking two staff members to his new office.[133]

In addition, the dentist's acts constituted tortious interference with his employers' prospective contractual relations.[134] Because the defendant induced the plaintiffs' patients to defer dental work until his new office opened, the defendant tortiously interfered with his employers' patients.[135] However, the court reversed the trial court's determination that the defendant tortiously interfered with the plaintiffs' sale of their practice.[136] Although the defendant cautioned a prospective buyer against getting into the defendant's "kind of deal" with the plaintiffs, the prospective buyer decided not to buy the plaintiffs' practice before he spoke with the defendant, and the defendant's "deal" with the plaintiffs did not involve the purchase of the plaintiffs' practice.[137]

B. Several Liability

Affirming New Mexico's common law adoption of several liability,[138] the New Mexico Legislature passed the Several Liability Act.[139] This statute abolishes joint and several liability, except in cases involving: (1) intentional infliction of injury; (2) vicarious liability; (3) strict products

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131. *Salter*, 105 N.M. at 713, 736 P.2d at 991 (quoting *Las Luminarias*, 92 N.M. at 302, 587 P.2d at 449).

132. *Id.* (quoting *Las Luminarias*, 92 N.M. at 302, 587 P.2d at 449).

133. *Id.* The plaintiffs hired the defendant to manage their dental office in Questa. They paid the defendant's and staff members' salaries and maintained control over the office by establishing the fee schedule and office procedures. There was no written contract between the plaintiffs and the defendant. The parties agreed that the employment relationship could have been terminated at will and that no covenant against competition existed. *Id.* at 712-13, 736 P.2d at 990-91.

134. *Id.* at 714, 736 P.2d at 992. New Mexico recognized tortious interference with prospective contractual relations as a cause of action in M & M Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, 452-53, 612 P.2d 241, 244-45 (Ct. App. 1980). The court of appeals adopted the elements of this tort from the RESTATEMENT (SECOND) OF TORTS § 766B (1979):

> Intentional Interference with Prospective Contractual Relation. One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

M & M Rental Tools, 94 N.M. at 453, 612 P.2d at 245.

135. *Salter*, 105 N.M. at 714, 736 P.2d at 992.

136. *Id.*

137. *Id.*

138. The court of appeals adopted the doctrine of several liability in Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

139. N.M. STAT. ANN. §§ 41-3A-1 and -2 (Supp. 1988).

liability;[140] or (4) other cases "having a sound basis in public policy."[141] Under the several liability created by the statute, each tortfeasor is responsible only for the amount of damages corresponding to his percentage of fault.[142] In addition, this statute abolishes the right of contribution among tortfeasors except for a contractual right of indemnity or contribution.[143]

In *Martinez v. First National Bank of Santa Fe*,[144] a case of first impression, the court of appeals addressed the issue of apportionment of fault between a tortfeasor who caused an original injury and a subsequent tortfeasor who aggravated the pre-existing injury.[145] In *Martinez*, a minor's injuries resulting from an automobile accident were enhanced by the subsequent malpractice of a treating physician.[146] The plaintiffs appealed from a jury verdict apportioning damages between the driver of the car, who was not a party to the suit, and the doctor.[147]

Although the court agreed that the doctor was not liable for the original injury, the court reversed the jury's apportionment of liability to the driver because the driver's negligence was not established at trial.[148] "[D]amages [can] be apportioned among those negligently contributing to the injury [only] if that negligence was a proximate cause of the injury. . . ."[149] In dicta, the court suggested that if the driver's negligence had been established, he might have been severally liable for the harm he caused and perhaps also liable for any foreseeable harm caused by the doctor's malpractice.[150] However, because the doctor did not join the driver and prove his negligence, the doctor could not apportion any liability or fault to the driver.[151]

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140. For a discussion of the availability of indemnity in strict products liability cases, see Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App.), *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987) and *infra* notes 189-201 and accompanying text.

141. N.M. STAT. ANN. §§ 41-3A-1(A) & (C) (Supp. 1988). For a thorough discussion of the effect of section 41-3A-1 on New Mexico negligence law, see Schultz and Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M.L. REV. 483 (1988).

142. N.M. STAT. ANN. §§ 41-3A-1(B) & (D) (Supp. 1988).

143. N.M. STAT. ANN. §§ 41-3A-1(E) & (F) (Supp. 1988).

144. 107 N.M. 268, 755 P.2d 606 (Ct. App. 1987), *cert. quashed*, 107 N.M. 308, 756 P.2d 1203 (1988).

145. *Id.* Prior to *Martinez*, New Mexico appellate courts had addressed only comparative negligence cases in which joint tortfeasors caused a single injury. *Id.* at 270, 755 P.2d at 608.

146. *Id.* at 269, 755 P.2d at 607. The automobile driver and the doctor were not concurrent tortfeasors because the additional injury caused by the alleged medical malpractice was separate and distinct from the original injury. *Id.* at 271, 755 P.2d at 609.

147. *Id.* at 269, 755 P.2d at 607.

148. *Id.* at 271, 755 P.2d at 609. The only evidence presented at trial concerning the driver's negligence was the minor's conjecture that the driver was driving too fast and lost control of the vehicle. Although the driver was a "cause in fact" of the minor's injuries, there was not sufficient evidence that the driver aided in bringing about the injuries and thus was a "proximate cause" of the injuries. *Id.* Liability can only be apportioned among tortfeasors who proximately cause an injury. *Id.* at 270, 755 P.2d at 608.

149. *Id.*

150. *Id.* at 271, 755 P.2d at 609 (citation omitted).

151. *Id.* The defendant doctor could have joined the driver as a third party defendant pursuant to SUP. CT. RULES ANN. 1-014 (Recomp. 1986) (N.M.R. Civ. P.).

C. *Respondeat Superior and Premises Liability*

In *Valdez v. Warner*,[152] the court of appeals held that a bar owner may be held vicariously liable for an employee's assault of a patron in the bar's parking lot.[153] The bar's employee assaulted the plaintiff after learning that the plaintiff had struck his car.[154] The trial court directed a verdict in favor of the bar owner and refused to give certain jury instructions.[155] The court ruled that the bar's employee was not acting within the scope of his employment and that the bar owner could not be held liable under a theory of premises liability for injuries occurring in his parking lot.[156] The trial court also refused the plaintiff's request for jury instructions regarding negligent hiring and retention and negligent supervision.[157]

Although the court of appeals stated that the bar's employee was not acting within the scope of his employment when he assaulted the plaintiff,[158] the court held that the trial court should have submitted the issue of premises liability to the jury because the parking lot adjacent to the bar was an area the bar owner might reasonably expect the plaintiff to use.[159] In addition, the automobile owner was a business invitee, and thus the bar owner was responsible for acts of his employee "if, by the exercise of reasonable care, the [bar owner] could have discovered that such acts were being done or [were] about to be done."[160]

Finally, the court determined that the trial court should also have instructed the jury on negligent hiring and retention.[161] There was evidence that the bar's employee had been involved in previous altercations at the bar and in fact had previously been banned from the bar for fighting.[162] Thus, the employee's actions were foreseeable.[163]

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152. 106 N.M. 305, 742 P.2d 517 (Ct. App.), *cert. quashed*, 106 N.M. 353, 742 P.2d 1058 (1987).

153. *Id.* at 307, 742 P.2d at 519.

154. *Id.* at 306, 742 P.2d at 518.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* The employee was acting in his own interest because his actions were not incidental to his employer's business and they arose from his own personal motives. *Id.* (quoting SUP. CT. RULES ANN. 13-407 (Recomp. 1986) (U.J.I. Civ.)).

159. *Id.* at 307, 742 P.2d at 519. A business owner's duty to use ordinary care to keep his premises safe is limited to areas of the premises which the visitor uses or may be reasonably expected to use and to the manner of use which the owner would reasonably expect. *See* SUP. CT. RULES ANN. 13-1311 (Recomp. 1986) (U.J.I. Civ.).

160. Valdez, 106 N.M. at 307, 742 P.2d at 519 (quoting Coca v. Arceo, 71 N.M. 186, 189, 376 P.2d 970, 973 (1962)). In *Coca*, the supreme court held that an innkeeper is liable for personal injuries inflicted upon a guest by a third party if such acts are foreseeable. 71 N.M. at 189, 376 P.2d at 973. In Pittard v. Four Seasons Motor Inn, 101 N.M. 723, 688 P.2d 333 (Ct. App.), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984), the court of appeals held that the term "third party" includes employees acting outside the scope of their employment. 101 N.M. at 728, 688 P.2d at 338 (citing RESTATEMENT (SECOND) OF TORTS § 344 comment b (1965)).

161. *Valdez*, 106 N.M. at 308, 742 P.2d at 520.

162. *Id.*

163. *Id.* Rejecting defendant's argument that his employee's actions were not foreseeable, the court reiterated the rule that "[f]oreseeability does not require that the *particular* consequence should have been anticipated, but rather that some *general* harm or consequence be foreseeable." *Id.* (quoting *Pittard*, 101 N.M. at 730, 688 P.2d at 340) (emphasis added)).

D. Damages

Several important damages issues were decided by New Mexico appellate courts during the past three years. Three of these cases involve the recovery of punitive damages against a tortfeasor under the tortfeasor's liability insurance or the victim's uninsured motorist insurance policy and are covered in the surveys on insurance law in this issue and the previous volume.[164]

In *First Interstate Bank of Gallup v. Foutz*,[165] the supreme court adopted the Restatement (Second) of Torts measure of damages for negligent misrepresentation and rejected a measure of damages based on the benefit of the bargain.[166] First Interstate Bank of Gallup (First Interstate) loaned Robert Berni (Berni), the Foutzes' ex-business partner, $100,000 to pay off Berni's promissory note to the Foutzes.[167] As security for the loan to Berni, the Foutzes placed the $100,000 in a certificate of deposit (CD) and signed a hypothecation agreement.[168] After Berni defaulted on his loan, First Interstate took the Foutzes' CD.[169]

The Foutzes received a jury verdict of $75,000 against First Interstate on a negligent misrepresentation claim based upon a jury instruction stating that the Foutzes' out-of-pocket loss was equal to the value of the loss of the CD plus the value of the loss of the interest on the

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164. These cases are Stewart v. State Farm Mut. Auto. Ins. Co., 104 N.M. 744, 726 P.2d 1374 (1986) (punitive damages recoverable from an uninsured motorist may be recovered from the victim's insurer under the victim's uninsured motorist policy); Baker v. Armstrong, 106 N.M. 395, 744 P.2d 170 (1987) (absent a clause excluding damages awarded for driving in a grossly negligent, reckless, wanton or willful manner, an insurance policy providing coverage for damages for which a covered person becomes legally responsible includes the tortfeasor's liability for punitive damages); and State Farm Mut. Auto. Ins. Co. v. Maidment, 107 N.M. 568, 761 P.2d 446 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988) (an insured cannot recover punitive damages from his insurer under his uninsured motorist coverage when the uninsured motorist who caused the damage dies before an award is made). For a discussion of *Baker* and *Stewart*, see M. Sanders, *Insurance Law*, 19 N.M.L. REV. 717, 729-31 (1989). For a discussion of *Maidment* and its limitation on *Stewart*, see Survey, *Insurance Law*, 20 N.M.L. REV. 341, 360-62 (1990) (this issue).

165. 107 N.M. 749, 764 P.2d 1307 (1988).

166. *Id.* at 751, 764 P.2d at 1309. The Restatement sets forth the measure of damages in negligent misrepresentation cases as follows:

> Damages for Negligent Misrepresentation.
>
> (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
>
> (2) the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.

RESTATEMENT (SECOND) OF TORTS § 552B (1977). "Comments (a) and (b) to Section 552 indicate that damages for negligent misrepresentation are determined by out-of-pocket loss or reliance damages." *First Interstate*, 107 N.M. at 751, 764 P.2d at 1309.

167. *First Interstate*, 107 N.M. at 750, 764 P.2d at 1308.

168. *Id.* "[A] hypothecation agreement gives a creditor a right over personal property belonging to another and the power to take or sell that property to satisfy the creditor's claim." *Id.*

169. *Id.*

CD.[170] First Interstate appealed, arguing that this instruction improperly stated the measure of damages because the value of the CD represented the benefit of the bargain and not the Foutzes' out-of-pocket loss.[171] The court of appeals affirmed.[172] The supreme court agreed with the dissenting opinion of the court of appeals and reversed.[173]

The court determined that declaring out-of-pocket loss as the appropriate measure of damages for negligent misrepresentation logically follows New Mexico's adoption of the tort of negligent misrepresentation as articulated in Restatement (Second) of Torts section 552.[174] In this case, however, the court held that the value of the loss of the CD plus the value of the loss of the interest on the CD represented benefit-of-the-bargain damages, rather than out-of-pocket loss.[175] The court reasoned that at the time of the transaction with First Interstate, the Foutzes had a past due $100,000 unsecured promissory note from Berni.[176] The Foutzes owned the CD only as a result of their transaction with the bank.[177] The loss of the CD represented neither "the consideration they gave for entering into the transaction minus any value they received from that transaction"[178] nor "any pecuniary loss proximately resulting from reliance on the misrepresentation."[179]

In *Consolidated Oil & Gas, Inc. v. Southern Union Co.*,[180] the supreme court held that "[m]ere arithmetic recomputation of prejudgment interest on remand . . . does not preclude accrual of interest on the award from the date of the original judgment."[181] In this case, the trial court originally awarded prejudgment interest of $2,595,989 on July 12, 1985.[182] On appeal, the supreme court affirmed the principal award but remanded the case to the trial court to recalculate the prejudgment interest.[183] The trial court revised the award of prejudgment interest to $2,177,695 on March 9,

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170. *Id.* at 750-51, 764 P.2d at 1308-09. The verdict for $75,000 represented the value of the CD less 25% fault apportioned to the Foutzes and Berni. *Id.* at 752, 764 P.2d at 1310.

171. *Id.* at 751, 764 P.2d at 1309.

172. *Id.*

173. *Id.* at 752, 764 P.2d at 1310.

174. *Id.* at 751, 764 P.2d at 1309. *See* Stotlar v. Hester, 92 N.M. 26, 582 P.2d 403 (Ct. App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978) (adopting tort of negligent misrepresentation).

175. *First Interstate*, 107 N.M. at 752, 764 P.2d at 1310.

176. *Id.*

177. *Id.*

178. *Id.* The court of appeals dissent characterized this as "the difference between the value of their $100,000 promissory note as of the date of the transaction and its value when Berni defaulted to the bank." *Id.* at 754, 764 P.2d at 1312 (Walters, J., specially concurring and adopting No. CA 9235 (Bivens, J., dissenting)). The court of appeals majority characterized this as "[t]he difference between what the plaintiffs gave, a $100,000 certificate of deposit plus unpaid interest, and what they received, nothing." *Id.* at 757, 764 P.2d at 1315 (Sosa, J., dissenting and adopting No. CA 9235 (Alarid, J.)).

179. *Id.* at 752, 764 P.2d at 1310. The CD "cannot be a pecuniary loss because the Foutzes would not have had the CD if they had not entered into the transaction with the bank." *Id.*

180. 107 N.M. 602, 762 P.2d 889 (1988).

181. *Id.* at 603, 762 P.2d at 890.

182. *Id.* at 602, 762 P.2d at 889.

183. *Id.* The award was correctly calculated at six percent simple interest but was incorrectly calculated using monthly compounding. *Id.* n.1.

1988.[184] On this appeal, the supreme court held that postjudgment interest on the prejudgment interest accrued from the original award on July 12, 1985.[185]

The general rule governing the award of postjudgment interest is that when an appellate opinion requires only a modification of a former judgment, interest accrues from the date of the original judgment.[186] Remanding a case solely to correct a computation error, rather than to correct the legal standard used by the trial court to measure damages, constitutes "modification" of the original award and is thus a *pro tanto* affirmance of the award.[187] In such a case, postjudgment interest should be paid on the prejudgment interest award from the date of the original judgment.[188]

IV. PRODUCTS LIABILITY

Although New Mexico appellate courts decided relatively few products liability cases during the survey period, the court of appeals did address two important products liability issues: (1) indemnity and (2) liability arising from a product injuring itself.

A. Indemnity in Strict Liability Cases

In *Trujillo v. Berry*,[189] the court of appeals held that a retailer who is strictly liable in tort for supplying a defective product may seek indemnity from the manufacturer of the defective product.[190] The issue arose in the wake of the supreme court's adoption of comparative negligence in 1981[191] and the court of appeals' abolishment of joint and several liability in 1982.[192] The trial court dismissed the retailer's crossclaim against the manufacturer, holding that indemnity is not a remedy in a pure comparative negligence jurisdiction.[193] The court of appeals reversed, holding that "[n]otwithstanding the adoption of the comparative negli-

184. *Id.* at 602, 762 P.2d at 889.

185. *Id.* at 603, 762 P.2d at 890.

186. *Id.* (quoting Varney v. Taylor, 81 N.M. 87, 88, 463 P.2d 511, 512 (1969)). *See also* Bank of N.M. v. Earl Rice Constr. Co., 79 N.M. 115, 440 P.2d 790 (1968) (appropriate question is whether remand was an actual reversal that "wiped out" the original judgment or was a *pro tanto* affirmance of the judgment).

187. *Consolidated Oil & Gas*, 107 N.M. at 603, 762 P.2d at 890.

188. *Id.*

189. 106 N.M. 86, 738 P.2d 1331 (Ct. App.), *cert. denied sub nom.* H & P Equip. Co. v. Berry, 106 N.M. 24, 738 P.2d 518 (1987). For a previous discussion of this case, see J. & M. Hart, *Products Liability*, 19 N.M.L. REV. 743, 746-47 (1989).

190. *Trujillo*, 106 N.M. at 90, 738 P.2d at 1335. The doctrine of strict products liability was adopted by the New Mexico Supreme Court in Stang v. Hertz Corp., 83 N.M 730, 497 P.2d 732 (1972). Under this doctrine, liability for an injury caused by a defective product is imputed to the seller "with or without the presence of negligence on his part." *Trujillo*, 106 N.M. at 88, 738 P.2d at 1333 (citing Aalco Mfg. Co. v. City of Espanola, 95 N.M. 66, 618 P.2d 1230 (1980)).

191. *See* Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

192. *See* Bartlett v. N.M. Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

193. *Trujillo*, 106 N.M. at 87, 738 P.2d at 1332. The trial court held that "under a pure comparative negligence system, traditional indemnity principles have been superseded." *Id.*

gence doctrine, . . . New Mexico still adheres to traditional indemnity principles in some circumstances."[194]

The court decided *Trujillo* in the same year that the New Mexico legislature statutorily adopted several liability.[195] Both the court and the legislature recognized there are exceptions where joint and several liability continues to apply.[196] Strict liability, like vicarious liability, is imputed without the presence of fault.[197] Apportionment of the damages is, therefore, not possible absent apportionment of fault.[198]

Under the statute, the right of indemnity is expressly preserved.[199] In *Trujillo*, the court stated that the right of indemnity exists only when a retailer's liability results "solely from its passive role as the retailer of the product furnished it by the manufacturer."[200] If a retailer is negligent in supplying a defective product, the doctrine of comparative negligence applies and a retailer may not seek indemnification for its percentage of fault.[201]

B. Product Injuring Itself

In a second significant products liability case, *Utah International v. Caterpillar Tractor Co.*,[202] the court of appeals held that a party in a commercial setting may not recover purely economic loss resulting from a defective product injuring itself.[203] The plaintiff, Utah International, Inc. (Utah), used a coal hauler designed, manufactured and sold by the defendant, Caterpillar Tractor Company (Caterpillar).[204] While in use, a hydraulic hose on the coal hauler ruptured, causing the machine to catch fire.[205] Utah sued Caterpillar for replacement costs and loss of use under theories of strict products liability and negligence.[206] The trial court granted Caterpillar's motion to dismiss, determining that the plaintiff's losses were not recoverable under tort theories of strict products liability or negligence.[207]

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194. *Id.* at 88, 738 P.2d at 1333.

195. 1987 N.M. Laws, ch. 141 (codified in pertinent part at N.M. STAT. ANN. § 41-3A-1 (Repl. Pamp. 1989)). For a discussion of the act from the view of two of its drafters, see Schultz & Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M.L. REV. 483 (1988).

196. N.M. STAT. ANN. § 41-3A-1(C) provides that joint and several liability applies to intentional wrongdoers, vicarious liability, strict liability, and other situations which have "a sound basis in public policy." *See* Schultz & Occhialino, *supra* note 195, at 487-94.

197. *Trujillo*, 106 N.M. at 89, 738 P.2d at 1334.

198. *See id.*

199. N.M. STAT. ANN. § 41-3A-1(F) (Repl. Pamp. 1989).

200. 106 N.M. at 90, 738 P.2d at 1335 (citing Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970)).

201. *Id.* at 89, 738 P.2d at 1334 (citing *Bartlett*, 98 N.M. at 158-59, 646 P.2d at 585-86).

202. 108 N.M. 539, 775 P.2d 741 (Ct. App.), *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989).

203. *Id.* at 540, 775 P.2d at 742.

204. *Id.* at 541, 775 P.2d at 743.

205. *Id.*

206. *Id.*

207. *Id.* at 540, 775 P.2d at 742.

Adopting the rationale of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[208] the court of appeals affirmed the trial court's decision and held that Utah could recover its economic loss only in a contract action.[209] This rule applies "in commercial transactions, when there is no great disparity in bargaining power of the parties."[210] The court did not determine whether the rule also applies to non-commercial consumers.[211] In addition, the court held that "economic loss from a product injuring itself due to negligent failure to warn" is also not recoverable.[212]

V. IMMUNITY[213]

The New Mexico Legislature recently created immunity from civil liability for nonprofit sports association volunteers resulting from their negligent acts or omissions in rendering "services as a manager, coach, athletic instructor, umpire, referee or other league official . . . to the extent not otherwise covered by insurance."[214] However, these volunteers are not immune from liability if (1) their conduct falls "substantially below" the general standards followed by similar persons in similar circumstances; (2) it is "reasonably foreseeable" that the conduct creates "a substantial risk of injury or death"; and (3) the harm does not ordinarily occur in the particular sport involved.[215] In addition, the statute does not affect liability arising from the transportation of sport participants.[216]

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208. 476 U.S. 858 (1986). The Supreme Court reasoned that economic loss resulting from a product's injury to itself may not be recovered in a tort action because "the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law." *Id.* at 870.

209. *Utah Int'l*, 108 N.M. at 543, 775 P.2d at 744. Two Tenth Circuit cases held that recovery for economic loss arising from a product injuring itself can only be obtained in a contract action. *See* Colonial Park Country Club v. Joan of Arc, 746 F.2d 1425 (10th Cir. 1984); Allen v. Toshiba Corp., 599 F. Supp. 381 (D.N.M. 1984).

The Supreme Court's *East River* decision undermined another Tenth Circuit decision allowing recovery in negligence if the defective product created an unreasonable risk of injury to persons or property. *See* Sharon Steel Corp. v. Lakeshore, Inc., 753 F.2d 851 (10th Cir. 1985). The New Mexico Court of Appeals, expecting other jurisdictions to follow the trend adopted in *East River*, followed the *East River* rule disallowing tort recovery for economic loss caused by a product injuring itself instead of the *Sharon Steel* rule. *Utah Int'l*, 108 N.M. at 543, 775 P.2d at 744.

In addition, the court also followed *East River* by refusing to sever the coal hauler into its component parts to determine if one component injured another component. *Utah Int'l*, 108 N.M. at 543-44, 775 P.2d at 744-45 (citing *East River*, 476 U.S. at 867).

210. *Utah Int'l*, 108 N.M. at 543, 775 P.2d at 744 (citing *East River*, 476 U.S. at 873). In *East River*, the Supreme Court stated that a product's damage to itself is naturally understood as a warranty claim. *East River*, 476 U.S. at 872. Contract law allows parties to disclaim warranties or limit remedies by agreement. Contract law and warranty law are well-suited to defective product issues and there is no reason to intrude into the parties' allocation of the risk in commercial transactions which generally do not involve large disparities in bargaining power. *Id.* at 872-73.

211. *Utah Int'l*, 108 N.M. at 543, 775 P.2d at 744.

212. *Id.* at 544, 775 P.2d at 745.

213. For a discussion of immunity in legal malpractice cases, see *supra* notes 29-58 and accompanying text.

214. N.M. STAT. ANN. §§ 41-12-1 to -2 (Repl. Pamp. 1989).

215. *Id.* §§ 41-12-1(A)-(C).

216. *Id.* § 41-12-2.

Another development in immunity from tort liability was the court of appeals' determination in *Duffey v. Consavage*[217] that the supreme court's 1981 abolition of parental immunity in *Guess v. Gulf Insurance Co.*[218] applied retrospectively.[219] Because the defendant in *Duffey* stipulated that she was negligent in the 1970 auto accident which injured her children and acknowledged the existence of adequate insurance coverage, the court decided that applying the supreme court's *Guess* decision retrospectively would not result in any hardship to the defendant.[220] Thus, the *Guess* decision will be applied retrospectively "where the existence of a valid claim for negligence is conceded and the presence of adequate insurance coverage is acknowledged."[221]

VI. FRAUD

A. *Statute of Limitations*

The four-year statute of limitations in fraud actions[222] begins to accrue after the injured party discovers the fraud.[223] According to *Ambassador East Apartments, Investors v. Ambassador East Investments*,[224] "discovery" occurs when a party should have constructive knowledge of the fraud, based upon the party's expertise.[225] Therefore, the court of appeals held in *Ambassador* that investors with experience in real estate investment, financing, and purchase should have discovered the fraudulent misrepresentation of the square footage of the apartments around the time they purchased the apartments, rather than five years later.[226]

B. *Remedies*

Contrary to the rule that a cause of action for fraud does not exist for fraudulent promises that future events will take place, the supreme court, in *Register v. Roberson Construction Co.*,[227] held that a fraud claim does lie if "the promises are based on contrary facts peculiarly within the promisor's knowledge, . . . the promise is based on a con-

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217. 106 N.M. 372, 743 P.2d 128 (Ct. App. 1987).

218. 96 N.M. 27, 627 P.2d 869 (1981).

219. *Duffey*, 106 N.M. at 374, 743 P.2d at 130. In *Guess*, the supreme court did not state whether its decision would apply retrospectively or prospectively. *Id.* at 373, 743 P.2d at 129.

220. *Id.* at 373-74, 743 P.2d 129-30. The court reached its decision applying the rule that the retroactive effect of a court decision must be determined on a case-by-case basis. *Id.* at 373, 743 P.2d at 129 (quoting Lopez v. Maez, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982)). Thus, because of the specific facts of this case, the court's holding is actually very narrow; it adopted *modified prospectivity* for the *Guess* abolition of parental immunity. *Id.* at 374, 743 P.2d at 130.

221. *Id.* at 374, 743 P.2d at 130.

222. N.M. STAT. ANN. § 37-1-4 (1978).

223. *See* N.M. STAT. ANN. § 37-1-7 (1978).

224. 106 N.M. 534, 746 P.2d 163 (Ct. App. 1987).

225. *Id.* at 536, 746 P.2d at 165. More specifically, in the absence of actual knowledge of fraud, constructive knowledge of fraud exists if a reasonable person with the plaintiff's expertise would have discovered the fraud upon reasonably diligent investigation. *Id.*

226. *Id.* at 537, 746 P.2d at 166.

227. 106 N.M. 243, 741 P.2d 1364 (1987).

cealment of known facts, . . . [or] the promise . . . is part of an overall pattern designed to lead a party to act to his/her detriment."[228] Therefore, a home builder was liable for fraudulently representing to home purchasers that a community pool would be built, a homeowner's association would be activated, security services would be provided, and their home would have a resale value of approximately $250,000.[229] When the home builder made these representations, he had no intention of building the pool or completing the community project since, in fact, the builder had insufficient funds.[230]

Generally, damages in fraud cases follow the benefit-of-the-bargain rule which allows the defrauded party to "recover the difference between the actual and represented values of the property purchased."[231] However, in this case, the trial court correctly adopted a measure of damages granting the Registers recovery of the damages resulting from their reliance upon the builder's misrepresentations.[232] Thus, the supreme court affirmed the Registers' damages award, which was based on their downpayment plus their mortgage payments, minus the rental value of their house.[233]

In *Levy v. Disharoon*,[234] a case of first impression, the trial court awarded the plaintiff money damages for fraud in an equity suit for a partnership accounting. In *Levy*, the plaintiff sued for fraud after dissolution of the partnership but before the final partnership accounting.[235] Generally, one partner cannot sue another partner for transactions relating to the partnership unless there has been a final partnership accounting.[236] However, the court of appeals affirmed the trial court's award of damages because the fraud claim was raised in an equity suit for a partnership accounting.[237]

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228. *Id.* at 246, 741 P.2d at 1367 (citing Eade v. Reich, 120 Cal. App. 32, 7 P.2d 1043 (1932); Cockrill v. Hall, 65 Cal. 326, 4 P. 33 (1884); Patterson v. Western Loan & Bldg. Co., 155 Or. 140, 62 P.2d 946 (1936)). Defendants argued that a breach of warranty claim would be more appropriate. *Id.*

Fraud is "a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment." *Id.* (quoting Unser v. Unser, 86 N.M. 648, 653-54, 526 P.2d 790, 795-96 (1974)).

229. *Id.* at 245, 741 P.2d at 1366. The court cites numerous examples of broken promises, summarized by quoting Mrs. Register's deposition testimony: "We purchased a lifestyle that was serene, quiet. We didn't get that. We got a slum that was totally abandoned by the builder." *Id.*

230. *Id.*

231. *Id.* at 246-47, 741 P.2d at 1367-68 (citations omitted).

232. *Id.* at 247, 741 P.2d at 1368 (quoting Indus. Supply Co. v. Goen, 58 N.M. 738, 276 P.2d 509 (1954)).

233. *Id.*

234. 106 N.M. 699, 749 P.2d 84 (1988). For further discussion of *Levy*, see Survey, *Commercial Law*, 20 N.M.L. REV. 239, 248-50 (1990) (this issue) and Survey, *Evidence*, 20 N.M.L. REV. 329, 332-33 (1990) (this issue).

235. *Levy*, 106 N.M. at 703, 749 P.2d at 88.

236. *Id.* at 704, 749 P.2d at 89 (quoting Willey v. Renner, 8 N.M. 641, 646, 45 P. 1132, 1134 (1896)).

237. *Id.* "A court of equity has power not only to state the account between the parties, but to enter judgment in favor of one and against another as the state of the account may require." *Id.* at 702, 749 P.2d at 87 (quoting Holman v. Cape, 45 Wash. 2d 205, 206, 273 P.2d 664, 665 (1954)).

All claims between partners may be raised during a partnership accounting because "[t]he governing motive of equity is to grant full relief and to adjust in one suit the rights and duties of all parties, which flow out of or are connected with the subject matter of the suit."[238] Thus, "[w]hen there is a partnership accounting and defendant is charged with fraud and misconduct, defendant is answerable in that proceeding for all damages sustained by plaintiff on account of defendant's breach of duty to the firm."[239]

VII. DRAMSHOP LIABILITY AND THE RIGHT TO FULL TORT RECOVERY

In *Richardson v. Carnegie Library Restaurant, Inc.*,[240] the supreme court held that the dramshop liability cap was unconstitutional.[241] In *Richardson*, the plaintiff, as personal representative of the estate of Wade Richardson (Richardson), sued Carnegie Library Restaurant, Inc. (Carnegie) after Billibob Lewis became intoxicated at a bar owned by Carnegie, stole a dump truck, and crashed into Richardson's car.[242] The trial court found that the plaintiff was entitled to recover $250,000 from Carnegie; however, the court reduced the award to $50,000, the maximum allowable recovery under the Dramshop Act.[243]

The plaintiff appealed the award, arguing that the cap on dramshop liability denied her the right to equal protection and to a trial by jury.[244] The court of appeals affirmed the trial court.[245] The supreme court refused to consider the jury trial issue because the plaintiff waived her right to a trial by jury by failing to demand a jury trial.[246]

In an opinion written by Justice Walters, the supreme court discussed the three standards for reviewing equal protection attacks upon statutes: (1) the minimum scrutiny or rational basis test; (2) the strict scrutiny test; and (3) the heightened scrutiny or intermediate scrutiny test.[247] The

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238. *Id.* at 704, 749 P.2d at 89 (citing Maruca v. Phillips, 139 Conn. 79, 90 A.2d 159 (1952)).

239. *Id.* (citing McIntosh v. Ward, 159 F. 66 (7th Cir. 1907)).

240. 107 N.M. 688, 763 P.2d 1153 (1988).

241. *Id.* at 699, 763 P.2d at 1164. The Dramshop Act limited recovery from a negligent tavernkeeper to $50,000. N.M. STAT. ANN. § 41-11-1(I) (Repl. Pamp. 1986).

242. 107 N.M. at 689-90, 763 P.2d at 1154-55.

243. *Id.* at 690, 763 P.2d at 1155.

244. *Id.*

245. *Id.*

246. *Id.* at 692, 763 P.2d at 1157 (citing SUP. CT. RULES ANN. 1-038(D) (Cum. Supp. 1989)).

247. *Id.* at 692-94, 763 P.2d at 1157-59. Under the minimum scrutiny test, a statute is upheld unless it "is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere caprice." *Id.* at 693, 763 P.2d at 1158. The strict scrutiny test applies whenever a statute infringes fundamental rights or involves suspect classes. *Id.* In such a case, the statute "must support a compelling state interest to escape judicial invalidation." *Id.* (citing State v. Edgington, 99 N.M. 715, 718, 663 P.2d 374, 377 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645, *cert. denied*, 464 U.S. 940 (1983)). The heightened scrutiny test applies to "legislative classifications infringing important but not fundamental rights, and involving sensitive but not suspect classes." *Id.* Under this test, a statute is invalidated when its classifications, usually based upon gender or illegitimacy, are unreasonable and arbitrary and do not have "a *fair and substantial relation* to the object of the legislation." *Id.* at 693-94, 763 P.2d at 1158-59 (emphasis in original).

court adopted the intermediate scrutiny test for this case because the right to full tort recovery is a substantial and important individual interest.[248] When a substantial and important interest is infringed, the intermediate scrutiny test

> best strikes the balance between the legislature's constitutional prerogative to deliberate over and counterbalance the variety of interests involved in social and economic issues [which are subject to minimum scrutiny], and the judiciary's constitutional responsibility to strictly scrutinize legislation that either infringes upon fundamental rights or impacts upon suspect classes.[249]

Applying the intermediate scrutiny test, the supreme court held that the dramshop liability cap violated equal protection.[250] The cap created three classifications:

> [1] a class of victims suffering from injuries resulting from the negligence of a tavernkeeper as distinguished from victims of another tortfeasor's negligent conduct; [2] a class of victims suffering from the negligence of tavernkeepers whose injuries amount to less than $50,000 lumped together with those victims whose injuries resulting from the same cause are in excess of that damage limitation; and [3] a class of tortfeasors accorded the benefit of the $50,000 cap as distinguished from all other tortfeasors, most of whom are liable for the full amount of damages they cause.[251]

Under the intermediate scrutiny test, Carnegie had the burden of proving that these classifications "substantially related to an important governmental interest."[252] Carnegie did not meet this burden, and the plaintiff presented a prima facie showing that the cap infringed upon her right to be compensated fully for her injuries.[253]

VIII. MALICIOUS PROSECUTION

In *Zamora v. Creamland Dairies*,[254] the court of appeals held that a private investigator's submission of an investigation report to the district attorney's office does not constitute the institution of criminal proceedings for purposes of malicious prosecution.[255] The plaintiff sued his employer and a private investigator for malicious prosecution following the plain-

248. *Id.* at 698, 763 P.2d at 1163.
249. *Id.*
250. *Id.* at 699, 763 P.2d at 1164.
251. *Id.* at 698, 763 P.2d at 1163.
252. *Id.* at 695, 763 P.2d at 1160 (citing Craig v. Boren, 429 U.S. 190 (1976)).
253. *Id.* at 699, 763 P.2d at 1164. In addition, the supreme court itself was unable to find a legitimate reason for limiting the liability of a tavernkeeper. *Id.*
254. 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987). For a further discussion of *Zamora*, see Survey, *Evidence*, 20 N.M.L. REV. 329, 336-37 (1990) (this issue).
255. *Zamora*, 106 N.M. at 633, 747 P.2d at 928. Initiation of criminal proceedings occurs when: "(1) process is issued; (2) an indictment is returned or information filed; or (3) there is a lawful arrest on a criminal charge." *Id.* at 632, 747 P.2d at 927 (citing RESTATEMENT (SECOND) OF TORTS § 654 (1977)).

tiff's acquittal on embezzlement, larceny, and conspiracy charges.[256] Zamora was tried on these charges as a result of investigations conducted by the private investigator and the district attorney's office after the employer received a tip implicating the plaintiff.[257]

To establish a prima facie case of malicious prosecution, plaintiff must prove that: (1) the defendant initiated criminal proceedings against him without probable cause; (2) the defendant initiated criminal proceedings against him for a malicious purpose; and (3) he was not convicted of the charges.[258] Because the district attorney's office conducted its own investigation and made its own decision to prosecute the plaintiff, the private investigator did not "initiate" the proceedings against the plaintiff when he submitted his report to the district attorney.[259] In addition, the private investigator did not initiate criminal proceedings because "[t]he mere act of calling the police does not rise to the level of instituting criminal proceedings."[260] The court stated that holding otherwise would have a chilling effect on private citizens, important sources of information about crime.[261] The necessity of avoiding this chilling effect outweighs the policy of preserving the accused's freedom and reputation, especially when the private citizens act in good faith.[262]

VIII. DEFAMATION[263]

"Defamation is a wrongful and unprivileged injury to a person's reputation."[264] A defamation claim is established if a plaintiff proves that: (1) the defendant published a communication containing a false statement about the plaintiff; (2) the communication was defamatory and persons receiving it understood it to be defamatory; (3) the defendant knew that the communication was false, negligently failed to recognize the falsity of the communication, or acted with malice; (4) the communication injured the plaintiff's reputation; and (5) the defendant abused a publication privilege.[265] During the survey period, New Mexico appellate courts analyzed the defamation issues of publication, statement of opinion, and privilege.

A. Publication

Defamation is established only if the plaintiff proves that the defendant published a defamatory statement.[266] "Publication is an intentional or

256. *Id.* at 630, 631, 747 P.2d at 925, 926.
257. *Id.*
258. *Id.* at 632, 747 P.2d at 927 (citing RESTATEMENT (SECOND) OF TORTS § 653 (1977); Hughes v. Van Bruggen, 44 N.M. 534, 105 P.2d 494 (1940)).
259. *Id.* (citing *Hughes*, 44 N.M. at 540, 105 P.2d at 498).
260. *Id.* at 633, 747 P.2d at 928 (citing Ziemba v. Fo'cs'le, Inc., 19 Mass. App. Ct. 484, 475 N.E.2d 1223, *appeal denied*, 394 Mass. 1104, 478 N.E.2d 1274 (1985)).
261. *Id.* at 634, 747 P.2d at 929 (citing La Fontaine v. Family Drug Stores, Inc., 33 Conn. Supp. 66, 360 A.2d 899 (Super. Ct. 1976)).
262. *Id.* (citing, *e.g.*, McHale v. W.B.S. Corp., 187 Conn. 444, 446 A.2d 815 (1982)).
263. An original draft of this section was prepared by Robert D. Kidd, Jr.
264. SUP. CT. RULES ANN. 13-1001 (Recomp. 1986) (U.J.I. Civ.).
265. *Id.* 13-1002.
266. *Id.*

negligent communication to one other than the person defamed."[267] In *Chico v. Frazier*,[268] the court of appeals held that publication does not occur if the defamatory statement is sent only to the plaintiff but is intercepted and read by a third person.[269]

In *Chico*, the plaintiff sued the sponsor of a conference for libel,[270] alleging that the sponsor circulated a memorandum accusing the plaintiff of "dishonest and criminal behavior."[271] The defendant mailed the memorandum only to the plaintiff; however, the plaintiff's supervisor, and perhaps the supervisor's secretary, intercepted and read the memorandum before the plaintiff received it.[272] The court of appeals held that under such circumstances the defendant did not actually publish the memorandum.[273]

B. *Statements*

To establish defamation, the plaintiff must prove that the defendant's communication "contain[s] a statement of fact . . . [because] statements of opinion alone cannot give rise to a finding of defamation."[274] The court of appeals reaffirmed this rule in *Saenz v. Morris*.[275] Saenz, the New Mexico Secretary of Corrections, sued the *Santa Fe Reporter* after the newspaper published an article in which a State Department source claimed that Saenz had worked for a government agency in Latin America "closely linked to brutal police torture,"[276] and that Saenz "must have known what was going on."[277] Although the article did not accuse Saenz of personally participating in the torture, Saenz alleged that "'[t]he plain and obvious import of this [article], or its innuendo, as understood by the ordinary reader' is that plaintiff engaged in torture in South America, or was fully aware of torture occurring, or was involved in torture and its cover-up."[278] The court of appeals held that the article was a protected

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267. *Id.* 13-1003.

268. 106 N.M. 773, 750 P.2d 473 (Ct. App. 1988).

269. *Id.* at 775, 750 P.2d at 475.

270. Traditionally, libel is written defamation; however, the supreme court has abolished the distinction between libel and slander and jury instructions refer only to "defamation." SUP. CT. RULES ANN. 13-1001 (Recomp. 1986) (U.J.I. Civ.) (committee comment).

271. *Chico*, 106 N.M. at 774, 750 P.2d at 474.

272. *Id.* at 774-75, 750 P.2d at 474-75.

273. *Id.* at 775, 750 P.2d at 475.

274. SUP. CT. RULES ANN. 13-1004 (Recomp. 1986) (U.J.I. Civ.).

275. 106 N.M. 530, 746 P.2d 159 (Ct. App. 1987).

276. *Id.* at 532, 746 P.2d at 161.

277. *Id.* at 533, 746 P.2d at 162.

278. *Id.* at 532, 746 P.2d at 161. The court of appeals considered plaintiff's allegations a claim for libel per quod. "Libel per quod consists of written expressions which, although not actionable on their face, are either susceptible of two reasonable interpretations, one of which is defamatory and another of which is innocent, or may become defamatory when considered in connection with innuendo and explanatory circumstances." *Id.* (citing Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981), *overruled on other grounds*, Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982)).

Another category of defamatory publication is libel per se. Libel per se "tend[s] to render the plaintiff contemptible or ridiculous in public estimation, or expose him to public hatred, contempt, or disgrace." *Id.* (citing Monnin v. Wood, 86 N.M. 460, 525 P.2d 387 (Ct. App. 1974)). Publications not libelous per quod or libelous per se are not actionable. *Id.*

statement of opinion because it disclosed the facts upon which the author based his opinion and specifically disclaimed any knowledge that Saenz was involved in torture.[279]

In *Mendoza v. Gallup Independent Co.*,[280] the court of appeals held that an editorial column was an expression of opinion and therefore was protected under the *Saenz* rule.[281] Mendoza, a Gallup City Councilman, sued *The Gallup Independent* for libel, alleging that a column appearing on the newspaper's opinion-editorial page "imputed his involvement in corruption, dishonesty and criminal activity."[282] The column, entitled "The Week's Wash," described a conversation between two "swarthy suit-and-tie types" and a tourism counselor and implied that the Gallup City Council had been taken over by the "Mexican Mafia."[283]

The court of appeals held that the column was an expression of opinion because: (1) the column appeared on the opinion page of the paper where readers would expect to find columnists' opinions rather than factual stories;[284] (2) the column constituted "pure opinion" because it fully disclosed the underlying facts and permitted the reader to develop his own opinion;[285] and (3) "[t]he tongue-in-cheek style used by the author alert[ed] all but the most careless readers that the descriptions were no more than rhetorical hyperbole."[286] In addition, the facts underlying the author's opinion were undisputed and the column did not specifically accuse Mendoza of a crime.[287] Moreover, the court noted that the right to free political debate is one of the most fundamental first amendment privileges.[288]

In *Newberry v. Allied Stores*,[289] the supreme court held that the statement "I don't trust you" spoken during an argument was an expression of opinion.[290] Ballard, Newberry's manager, made the statement after discovering that Newberry had violated company policy on two separate occasions by failing to complete charge slips for merchandise he took

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279. *Id.* at 533, 746 P.2d at 162.
280. 107 N.M. 721, 764 P.2d 492 (Ct. App. 1988).
281. *Id.* at 723, 725, 764 P.2d at 494, 496.
282. *Id.* at 722, 764 P.2d at 493.
283. *Id.*
284. *Id.* at 723, 764 P.2d at 494.
285. *Id.* at 724, 764 P.2d at 493.
286. *Id.* The court relied on the test established in Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982). A court, when determining whether a statement is an opinion, should consider: "(1) the entirety of the publication; (2) the extent that the truth or falsity of the statement may be determined without resort to speculation; and (3) whether reasonably prudent persons reading the publication would consider the statement to be an expression of opinion or a statement of fact." *Mendoza*, 107 N.M. at 723, 764 P.2d at 494 (quoting *Marchiondo*, 98 N.M. at 401, 649 P.2d at 469, and citing SUP. CT. RULES ANN. 13-1004 (Recomp. 1986) (U.J.I. Civ.)).
287. *Mendoza*, 107 N.M. at 725, 764 P.2d at 496. The court distinguished this case from Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980). In *Cianci*, the defendant's publication accused the plaintiff of specific criminal acts. *Mendoza*, 107 N.M. at 725, 764 P.2d at 496.
288. *Mendoza*, 107 N.M. at 725, 764 P.2d at 496.
289. 108 N.M. 424, 773 P.2d 1231 (1989).
290. *Id.* at 430, 773 P.2d at 1237.

from the store.[291] Under these circumstances, the statement was not actionable.[292]

On the other hand, the supreme court held that Ballard's statement to the spouse of the manager of another company store that Newberry "was fired for stealing" was not a statement of opinion and therefore was an actionable defamatory statement.[293] The court remanded the case for a determination of actual and punitive damages against Ballard.[294] However, Ballard's employer, Allied Stores, was not liable for actual or punitive damages because Ballard made the statement outside of the scope of his employment.[295]

C. *Privilege*

1. Fair Report Privilege

The court of appeals examined the fair report privilege in *Stover v. Journal Publishing Co.*,[296] a case of first impression. Under the fair report privilege, "no liability will attach for the republication of defamatory statements so long as the republication is a fair and accurate report of an official or public proceeding."[297] The *Stover* court held that the reproduction of false statements made at judicial proceedings are privileged even when a reporter knows that the statements are false.[298]

In *Stover*, the plaintiff sued *The Albuquerque Journal* (*Journal*) and a *Journal* reporter for defamation after the *Journal* published statements from an affidavit filed in a separate defamation action against the paper.[299] The statements implied that Stover, a candidate for Bernalillo County

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291. *Id.*

292. *Id.*

293. *Id.* The court did not explain its rationale for this decision; it simply stated that there was substantial evidence supporting the jury's determination that the statement was defamatory. *Id.*

294. *Id.* at 431, 773 P.2d at 1238. A court can award actual damages for defamation if the plaintiff proves that the defendant's negligent publication of the defamatory communication actually injured the plaintiff. *Id.* at 429-30, 773 P.2d at 1236-37. For a discussion of the appropriate measure of compensatory damages in New Mexico, see the committee commentary to SUP. CT. RULES ANN. 13-1010 (Recomp. 1986) (U.J.I. Civ.). A court can award punitive damages if the plaintiff proves by clear and convincing evidence that the defendant "made the statement with actual malice (knowledge of its falsity or with a reckless disregard for whether it was false or not)." *Newberry*, 108 N.M. at 431, 773 P.2d at 1238.

295. *Newberry*, 108 N.M. at 431, 773 P.2d at 1238.

296. 105 N.M. 291, 731 P.2d 1335 (Ct. App.), *cert. quashed*, 105 N.M. 290, 731 P.2d 1334, *cert. denied*, 484 U.S. 897 (1987).

297. *Id.* at 294, 731 P.2d at 1338. The supreme court adopted the fair report privilege in Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919). The public interest is greater than the defamed person's interest in his reputation because: (1) a reporter is the agent of citizens absent from public proceedings; (2) the public has a duty to scrutinize official conduct; and (3) a self-governing society must be fully apprised of public concerns. *Stover*, 105 N.M. at 294, 731 P.2d at 1338 (citing Hughes v. Washington Daily News, 193 F.2d 922 (D.C. Cir. 1952); Del Rico Co. v. New Mexican, Inc., 56 N.M. 538, 246 P.2d 206 (1952), *overruled on other grounds*, Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979)).

298. *Stover*, 105 N.M. at 294, 731 P.2d at 1338 (citing Ricci v. Venture Magazine, 574 F. Supp. 1563 (D. Mass. 1983)).

299. *Id.* at 293, 731 P.2d at 1337.

Sheriff, had associated with an underworld crime figure.[300] Stover alleged that the *Journal* reporter knew that the affidavit statements were false.[301] The trial court denied the *Journal's* motion for summary judgment, ruling that the fair report privilege did not apply, but certifying the privilege issue for interlocutory appeal.[302]

The court of appeals held that the *Journal* article was protected by the fair report privilege because it "fairly and accurately reported the statements of a witness whom the *Journal* had located in the course of preparing for litigation in which the *Journal* was a defendant."[303] The court stated that the privilege exists even if a reporter knows that the statements made in the proceedings are false.[304] The reporter's knowledge is irrelevant because: (1) "the public is best served by exposure to the actual content of the official proceedings" and (2) "requir[ing] a reporter to ascertain the truth or falsity of every statement uttered or published in an official or public proceeding would impose an intolerable burden on the press."[305] However, publication of such defamatory statements is not protected if the fair report privilege is abused and the news article does not present a fair and accurate report of the proceeding.[306] The court of appeals also held that the self-reported statement exception to the fair report privilege did not apply in *Stover* because the original defamatory publication (the affidavit) was not made by the *Journal* and because the *Journal* did not instigate the judicial proceeding in which the affidavit was filed.[307]

2. Attorney Privilege

An attorney's defamatory statement "is absolutely privileged if [it] is made during the course of and as a part of judicial proceedings and is related to those proceedings."[308] In *Gelinas v. Gabriel*,[309] the court of appeals held that this privilege applied to an attorney's statements to claims representatives about a physician's competence.[310] The attorney, Gabriel, told claims representatives that she did not want Dr. Gelinas to examine her personal injury clients because Dr. Gelinas was incompetent

300. *Id.* at 292, 731 P.2d at 1336.
301. *Id.* at 293, 731 P.2d at 1337.
302. *Id.* The trial court applied the self-reported statement exception to the fair report privilege. *See infra* note 307.
303. *Id.* at 293-94, 731 P.2d at 1337-38.
304. *Id.* at 294, 731 P.2d at 1338 (citing *Ricci*, 574 F. Supp. 1563; RESTATEMENT (SECOND) OF TORTS § 611 comment a (1977)).
305. *Id.* at 294-95, 731 P.2d at 1338-39.
306. *Id.* at 295, 731 P.2d at 1339.
307. *Id.* at 295-96, 731 P.2d at 1339-40. The self-reported statement exception to the fair report privilege provides that "[a] person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated." *Stover*, 105 N.M. at 293, 731 P.2d at 1337 (quoting RESTATEMENT (SECOND) OF TORTS § 611 comment c (1977)).
308. Romero v. Prince, 85 N.M. 474, 476, 513 P.2d 717, 719 (Ct. App. 1973).
309. 106 N.M. 221, 741 P.2d 443 (Ct. App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987).
310. *Id.* at 222, 741 P.2d at 444.

and unfair.[311] Because the statements were directly related to Gabriel's representation of her clients, the statements were absolutely privileged.[312]

IX. WRONGFUL DEATH[313]

The supreme court decided one significant wrongful death case during the survey period. In *Hall v. Regents of the University of New Mexico*,[314] the supreme court held that a hospital can assert a lien on damages recovered by a personal representative in a wrongful death action.[315] Barry Hall was treated at the University of New Mexico Hospital for injuries he received in a car accident.[316] After Hall's death, the personal representative of his estate sued a third party for Hall's wrongful death and received an $80,000 judgment.[317] The trial court refused to allow the hospital to assert its previously filed lien against Hall's estate, holding that the lien could not be satisfied from the proceeds of the wrongful death action.[318]

Under section 48-8-1(A) of the Hospital Lien Act,[319] a hospital is entitled to assert a lien upon a judgment awarded in a wrongful death action.[320] However, a hospital is precluded from asserting such a lien under the Wrongful Death Act.[321] The supreme court held that the Hospital Lien Act superseded the Wrongful Death Act because it was enacted after the Wrongful Death Act.[322] In addition, the specific provision of the Hospital Lien Act allowing assertion of such a lien modifies the Wrongful Death Act's general prohibition against satisfying the debts of the deceased from the proceeds of a wrongful death action.[323] Finally, because New Mexico's wrongful death statute allows the plaintiff to recover hospital and medical expenses, the hospital should be allowed to assert a lien against these damages.[324]

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311. *Id.* at 221, 741 P.2d at 443.
312. *Id.* at 222, 741 P.2d at 444.
313. An original draft of this section was prepared by Robert D. Kidd, Jr.
314. 106 N.M. 167, 740 P.2d 1151 (1987).
315. *Id.* at 169, 740 P.2d at 1153.
316. *Id.* at 167, 740 P.2d at 1151.
317. *Id.* at 168, 740 P.2d at 1152.
318. *Id.* at 167, 740 P.2d at 1151.
319. N.M. STAT. ANN. §§ 48-8-1 to -7 (Repl. Pamp. 1987).
320. *Id.* § 48-8-1(A).
321. *Id.* §§ 41-2-1 to -4 (Repl. Pamp. 1989). "The proceeds of any judgment obtained in [a wrongful death action] shall not be liable for any debt of the deceased. . . ." *Id.* § 41-2-3.
322. *Hall*, 106 N.M. at 168, 740 P.2d at 1152 (citing Clothier v. Lopez, 103 N.M. 593, 711 P.2d 870 (1985)).
323. *Id.*
324. *Id.* (citing Stang v. Hertz Corp., 81 N.M. 348, 467 P.2d 14 (1970)).