



IN THE SUPREME COURT OF  
THE STATE OF NEW MEXICO

JAMES F. BUTTERWORTH,  
Plaintiff-Appellee,

v.

No. S-1-SC-40623

ETHAN JACKSON,  
Defendant

and  
DR. SARAH SMITH,  
Intervenor-Appellant.

PLAINTIFF-APPELLEE'S ANSWER BRIEF

TRIAL COURT: EIGHTH JUDICIAL DISTRICT COURT  
COUNTY OF TAOS

TRIAL JUDGE: HONORABLE JEFFREY SHANNON

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The brief contains no citations to the transcript.

The brief does not exceed the page limitation in Rule 12-318(F)(2).

## II. Table of Authorities

### A. Cases

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None

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COMES NOW Plaintiff-Appellee James F. Butterworth and submits his  
Response Brief.

III. ARGUMENT

The Court instructed the parties to address one issue only. Should the alienation of affections tort continue to be recognized in New Mexico? Plaintiff-Appellee (“Husband”) submits that the tort should have continued viability and limits his brief to that single issue.

A. Other States Support Continued Recognition.

Intervenor-Appellant (“Wife”) relies heavily on the proposition that most other states have abolished the alienation of affections tort. Husband does not dispute that the majority of states have abolished the tort but Wife glosses over an important reality. The vast majority of states that have abolished the tort have done so by legislative act. The handful of courts that have considered abolishing the tort have split on the issue with more courts upholding the tort than abolishing it.

Wife suggests that only North Carolina has continued the viability of the alienation of affections tort and that one of the reasons for this Court to abolish it is the fact that some North Carolina lawyers have made an industry out of collecting large judgments. Wife offers no evidence of misuse of the tort in New Mexico and Wife’s position ignores well-reasoned decisions from other states. The Court should continue the validity of the tort in New Mexico because the continued viability of the tort in other jurisdictions is based on sound modern reasoning and consistent with the sound application of good public policy as determined by the state courts that have considered abolishment.

1. Utah

Two decisions of the Utah Supreme Court provide an excellent inventory of the reasons that the tort should remain viable. In *Nelson v. Jacobson*, 669 P.2d 1207

(Utah 1983) (hereafter “*Nelson*”), the Court considered a series of arguments made by the Defendant to encourage the Court to abolish the tort. The Court rejected each of those arguments with sound reasoning and in the context of a modern analysis of the viability of the tort.

The *Nelson* Court first addressed the argument that the tort should be abolished because it is an archaic vestige of an old notion that a wife is one of the husband’s chattels and his relationship with his wife is his property. Wife alludes to that argument here. The Court rejected the argument because the modern version of the tort extends to both spouses.

Moreover, an action for alienation of affections is no longer based on the premise that either spouse constitutes the “property” of the other, but on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection.

*Nelson* at 1215.

The Court went on to state that the law recognizes many relational interests including the right to recover for the loss of prospective economic relations, intentional interference with a contractual relationship, the right to recover damages for the loss of relationships with family members or even the loss of consortium in personal injury claims. The Court concluded that the marital relationship is entitled to as much protection as these other relationships. *Nelson* at 1215.

The Defendant in *Nelson* argued that the tort does not achieve its intended purpose of protecting and preserving marriage. The Court rejected the argument as being based on a false foundation that the purpose of the alienation of affections tort is intended to preserve marriages. Instead, the Court concluded that the purpose of the tort is to provide compensation for losses suffered by Plaintiffs just as the law provides compensation for losses suffered by, for example, the victim of an intentional interference with a contractual relationship. The purpose is not to force the parties to perform a contract but rather to compensate the victim. Actions for wrongful death are not intended to bring back the deceased but rather to compensate those who had a relationship with the deceased for their losses. *Nelson* at 1215-16.

The Defendant argued that the alienation of affections tort should be abolished because it is a powerful tool of extortion that has a potential to damage reputations. The *Nelson* Court concluded that there is no more potential for extortion from an alienation of affections case than there is from public light cases, defamation claims, or child custody cases based on misbehavior of one parent. The Court reasoned that the possibility of the Plaintiff's own short comings being brought to light in an alienation of affections case should provide some measure of restraint. *Nelson* at 1216.

The Court also concluded that abuse of alienation of affections cases do not support abolishment of the tort.

First, the very purpose of courts is to separate the just from the unjust causes; second, if the courts are to be closed against actions for ... alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions.

*Nelson* at 1216, quoting *Wilder v. Reno*, 43 F. Supp. 727, 729 (D. Pa. 1942).

The Court concluded that procedural limitations and judicial discretion are better means to deter extortionate claims than abolishment of the tort which would leave the courthouse doors closed to at least some deserving plaintiffs. *Nelson* at 1216.

The Defendant in *Nelson* next argued that the alienation tort should be abolished because it can be used to victimize innocent and unsuspecting Defendants. The Court answered this complaint by noting that the alienation of affections tort is an intentional tort. Blameless or merely negligent Defendants would not be at risk. *Nelson* at 1216-17.

The Defendant argued that the alienation of affections tort should be considered to be an invasion of privacy that contravenes the Defendant's constitutional rights to privacy of personal and sexual relations between individuals. The *Nelson* Court rejected the argument for two reasons. First, sexual relations are not a necessary element of the alienation tort. Second, the constitutional right of



privacy applies only to governmental action and has no application to a claim between private individuals. *Nelson* at 1217.

The Defendant next argued that the tort should be abolished because damages are difficult to quantify and subject the process to abuse. Wife in this case similarly relies on what she calls the “practical” problems associated with the tort. The *Nelson* Court concluded that damages in an alienation case are no more difficult to quantify than damages in pain and suffering cases, wrongful death cases, or claims for the intentional infliction of emotional distress. The Court concluded that it would be unjust to deny recovery to a Plaintiff that can prove entitlement to damages just because determining the amount of those damages would be difficult. *Nelson* at 1217. The same reasoning applies to Wife’s claims about other practical problems with the alienation tort.

The Defendant’s final argument in *Nelson* was that the only marriages which are vulnerable to the interference of third parties are those in which there is already discord from other causes. Defendant relied on the difficulty of proving causation and argued that recovery is not appropriate where the Plaintiff was at fault to any extent. The Court responded:

We are unwilling to adopt a rule of law that would foreclose all remedies on the questionable assumption that any plaintiff whose marriage has gone aground “must have deserved it.” We prefer to consider the state of the marriage and the actions of both spouses as relating to causation and damages.

*Nelson* at 1218. This reasoning applies with equal force to Wife's complaints about the practicalities of the tort.

Instead of abolishing the tort, the Utah Court determined that the issues raised would be better addressed by limiting the tort in two important ways:

First, the requirement that the defendant's acts must have constituted the "controlling cause" of the alienation of affections means that the causal effect of the defendant's conduct must have outweighed the combined effect of all other causes, including the conduct of the plaintiff spouse and the alienated spouse. For this purpose, a defendant is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship.

Second, in trying to make the damages "proportionate" to the loss of the injured spouse, the trier of fact should consider the duration and quality of the marriage relation, including the extent to which genuine feelings of love and affection existed between the spouses prior to the intervention of the defendant.

*Nelson* at 1218.

As the Utah Court concluded, the alienation tort should be appropriately applied rather than completely abolished.

The Utah Court added to the arguments in favor of retaining the alienation of affections tort in *Norton v. MacFarlane*, 818 P.2d 8 (Utah 1991) (hereafter "*Norton*"). The Court started by affirming the reasoning in *Nelson*. *Norton* at 10. The Court then addressed the new arguments advanced for abolishment of the tort.

The Court began by specifically rejecting the notion, asserted by Wife here,

that the tort is an historical anachronism.

The argument that the tort of alienation of affections is an historical anomaly is incorrect. Certainly, many of the common-law concepts concerning the nature of the marriage relationship and the jural rights of spouses with respect to each other and to family property are no longer accepted by any court. . . . The obsolete procedural and property theories that once attended the tort . . . have long been abandoned; if applied today, they would be unconstitutional.

*Norton* at 12.

The Court then addressed the argument that the tort has been abused by collusion or otherwise. Consistent with *Nelson*, the Court rejected the argument finding that society has moved beyond the sexual notions of the Victorian era and the possibility of public claims was no longer the taboo that existed before. The Court determined that they had not found abuse of the tort in Utah and the changes in society had diminished this argument. *Norton* at 12. Wife in this case makes no argument that there has been abuse of the tort in New Mexico and there is no evidence in this record of any such abuse.

The *Norton* Court supported its conclusion by pointing out that the tort protects marriage from all types of assault and not just from sexual contact with third parties. The universal application of the tort removes it from the claims that it should be abolished because of its antiquity. *Norton* at 12-13.

The Court suggested that, rather than focusing on the many legislatures that have abolished the tort, a proper analysis ought to consider the relatively few number

of states that have abolished the tort through judicial decision. As the Court observed, the Restatement adopts the alienation tort. *Norton* at 13; Restatement (Second) of the Law of Torts, §683 (1977).

The Utah decisions provide persuasive and well-articulated responses to all of Wife's arguments for abolishment of the alienation of affections tort and many others. The modern, articulate, well-reasoned decisions support the continued viability of the tort.

## 2. Mississippi

Mississippi also recognizes the alienation of affections tort. The Mississippi Supreme Court's approach was simpler and much more direct than the Utah approach but equally persuasive.

We believe that the marital relationship is an important element in the foundation of our society. To abolish the tort of alienation of affections would, in essence, send the message that we are devaluing the marriage relationship. We decline the invitation to abolish the tort of alienation of affections.

*Bland v. Hill*, 735 So. 2d 414, 418 (Miss. 1999).

In *Fitch v. Valentine*, 959 So. 2d 1012 (Miss. 2007) (hereafter "Fitch"), the Court affirmed *Bland* and relied heavily on the reasoning included in a special concurrence to that decision.

While I agree that it appears society's moral values have changed during modern times, I do not believe Mississippi should get aboard this runaway

train. I would also not take away an offended spouse's only legal means to seek redress in our courts for the wrongful conduct of a third party who wilfully and intentionally interferes in and aids in destroying a marriage.

*Fitch* at 1019.

The Court recounted the reasons that the tort had originally been recognized and again relied on the prior special concurrence for a reasoned case for the continuation of the tort.

Should an individual be allowed to intrude upon a marriage to such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative.

*Fitch* at 1019.

In *Fitch*, the Court relied on the protections for the alienation of affections Defendant provided by the requirement that the acts of alienation be accompanied by intent.

In tort cases where a spouse is injured, the other spouse often has a separate claim for loss of consortium. Most of these losses are caused by a defendant's negligence. In alienation of affection—an intentional tort—a defendant's intentional conduct causes the loss. It is inconsistent [if] the law compensates for negligent conduct causing a loss of consortium, but ... does not compensate for intentional conduct causing the same loss.

*Fitch* at 1020 (citations omitted).

The *Fitch* Court declined to abolish the tort because it presented the only means for an injured spouse to seek recovery of his or her losses caused by a third-party's intentional act. *Fitch* at 1020.

The Court should follow the persuasive and sound decisions of the Utah and Mississippi Courts and continue the viability of the alienation tort.

B. New Mexico Law Recognizes Similar Torts.

The alienation of affections tort is similar in many dimensions to the intentional interference with contractual relations tort. Those who intentionally interfere with the marriage contract should be subjected to the same civil liability as those who intentionally interfere with a contract.

At the outset, it is quite clear that marriage is a form of civil contract. *E.g.*, *Dominguez v. Cruz*, 1980 NMCA 132, ¶4, 95 N.M. 1, 617 P.2d 1322. Contractual rights are protected from intentional outside interference by the tort of intentional interference with contractual relationships. *Fogleson v. Wallace*, 2017 NMCA 089, ¶62, 406 P.3d 1012. Because the marital relationship is contractual in nature, it follows that a contracting party who suffers damages because of interference with a marital relationship ought to have the same right to recover that a party to a civil contract would have.

The alienation tort and the contractual interference tort have many parallels. Both of the torts are based on intentional interference. Both require a showing of a causal relationship between the intentional act and the break down of the relationship either through breach of contract or divorce. Both require knowledge of the

existence of the contract on the part of the tortfeasor. *Compare Fogleson v. Wallace*, 2017 NMCA 089, ¶62, 406 P.3d 1012 *with Thompson v. Chapman*, 1979 NMCA 041, ¶7, 93 N.N. 356, 600 P.2d 302. The alienation tort is more limited than the contractual interference tort because the alienation tort requires intent or malice. The alienation tort includes greater protection for the innocent tortfeasor.

The Utah Court recognized that the reason to recognize the alienation of affections tort is the same as the reason to recognize the contractual interference tort. The point is to provide an injured party with an opportunity to recover real damages in an appropriate case. That comparison is sound and should be considered by the Court. *Nelson v. Jacobson*, 669 P.2d 1207, 1215-16 (Utah 1983).

There is no public policy reason to treat the person interfering with a contract relationship differently than the person interfering with a marriage contract. The Court should recognize the alienation of affections tort because the spouse whose contractual interest in the marriage has been intentionally destroyed has real damages just like the contractual party. The state has a recognized interest in assuring that its citizens can rely on the legal sanctity of both relationships. Recognizing both torts addresses many of the policy arguments addressed by the Utah Supreme Court and this Court should choose to follow those well-reasoned opinions.

#### IV. Conclusion

The alienation of affections tort, like the contractual interference tort, is the only way a damaged party can recover losses sustained as the result of an intentionally wrongful interference with the relationship. The tort and the damaged spouse should not lose his or her right to recover those damages simply because a number of legislators in other states have decided to abolish the tort. The reasoning of the Courts that have addressed the abolishment of the tort is persuasive and should be joined by this Court.

The Court should affirm the recognition of the alienation of affections tort and return this case to the District Court for further proceedings.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief was emailed this 5th day of May 2025, to the following counsel of record:

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A handwritten signature in black ink, appearing to read "Gary W. Boyle", is written over a horizontal line.

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