IN THE SUPREME COURT OF NEW MEXICO

JAMES F. BUTTERWORTH,
Plaintiff–Appellee,
v.
ETHAN JACKSON,
Defendant

No. S-1-SC-40623

and

DR. SARAH SMITH,
Intervenor-Appellant.

On Certification From the New Mexico Court of Appeals

APPELLANT'S BRIEF IN CHIEF (JOINED BY DEFENDANT)

Jason Harrow (*admitted pro-hac vice)*
GERSTEIN HARROW LLP
12100 Wilshire Blvd. Ste 800
Los Angeles, CA 90025
(323) 744-529
jason@gerstein-harrow.com
Counsel for Intervenor-Appellant

Charles Gerstein (*admitted pro-hac vice)*
GERSTEIN HARROW LLP
1001 G St. NW, Suite 400E
Washington, DC 20001
(202) 670-4809
charles@gerstein-harrow.com
Counsel for Intervenor-Appellant

Deana M. Bennett
Celina C. Baca
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
500 Fourth Street NW, Suite 1000
Albuquerque, NM 87102
deana.bennett@modrall.com
celina.baca@modrall.com
Counsel for Intervenor-Appellant

Aaron J. Wolf
CUDDY & MCCARTHY, LLP
1701 Old Pecos Trail
Santa Fe, NM 87505
(505) 988-4476
awolf@cuddymccarthy.com
Counsel for Defendant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

STATEMENT OF COMPLIANCE iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

I. Factual Background 3

II. Prior Proceedings 4

ARGUMENT 11

THE TORT OF ALIENTATION OF AFFECTIONS SHOULD BE ABOLISHED AND THE CASE DISMISSED 11

I. The History of Alienation of Affections 11

II. Developments in New Mexico Law Since *Birchfield* Was Decided in 1923 Undermine The Legal Basis For The Tort of Alienation of Affections. 14

III. Other States' Abolition of The Tort Leaves New Mexico in an Anachronistic Minority 18

IV. The Tort Reflects The Retrograde Notion That People Do Not Control Their Own Affections 21

V. The Tort's Practical Problems Alone Justify Abolishing It. 24

CONCLUSION 27

STATEMENT REGARDING ORAL ARGUMENT 29

CERTIFICATE OF SERVICE..... 30

STATEMENT OF COMPLIANCE

We certify that this brief compiles with the type-volume limitation of Rule 12-318(F). The body of the brief is less than 35 pages, and the body contains 5,851 words.

Dated March 14, 2025.

/s/ *Jason Harrow*

Attorney for Appellant

TABLE OF AUTHORITIES

New Mexico Cases

Birchfield v. Birchfield, 1923-NMSC-066, 29 N.M. 19, 217 P. 616 ..... 1, 14, 24, 25

Hakkila v. Hakkila, 1991-NMCA-029, 112 N.M. 172, 812 P.2d 1320 ..... 2, 15, 25, 26

Lovelace Medical Center v. Mendez, 1991-NMSC-002, 111 N.M. 336, 805 P.2d 603 16

Padwa v. Hadley, 1999-NMCA-067, 127 N.M. 416, 981 P.2d 1234 ..... 16, 22, 25

Romero v. Byers, 1994-NMSC-031, 117 N.M. 422, 872 P.2d 840 18

Thompson v. Chapman, 1979-NMCA-041, 93 N.M. 356, 600 P.2d 302 ..... 3, 6, 15, 17

Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't, 1992-NMSC-026, 113 N.M. 593, 830 P.2d 145 20

Other Cases

Antonelli v. Xenakis, 69 A.2d 102 (Pa. 1949) 13

Bennett v. Bennett, 116 N.Y. 584 (1889) 12

Brown v. Ellis, 678 S.E.2d 222 (N.C. 2009) 18

Dupuis v. Hand, 814 S.W. 2d 340 (Tenn. 1991) 19

Fadgen v. Lenkner, 365 A.2d 147 (Pa. 1976) 13

Feldman v. Feldman, 125 N.H. 102 (1984) 13

Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007) 18

Fundermann v. Mickelson, 304 N.W. 2d 790 (Iowa 1981) 19, 22

Guy v. Livesey, (1619) 79 Eng. Rep. 428; Cro. Jac. 501 23

Heiner v. Simpson, 23 P.3d 1041 (Utah 2001) 18

Hoye v. Hoye, 824 S.W.2d 422 (Ky. 1992) 11, 13

Hunt v. Chang, 594 P.2d 118 (Haw. 1979) 18

Macfadzen v. Olivant, (1805) 102 Eng. Rep. 1335; 6 East 387 23

O'Neil v. Schuckardt, 112 Idaho 472 (1986) 19

Russo v. Sutton, 422 S.E.2d 750 (S.C. 1992) 19

State Farm Fire & Cas. Co. v. Harbert, 741 N.W.2d 228 (S.D. 2007) 18

Wyman v. Wallace, 549 P.2d 71 (Wash. App. 1976) 16

Wyman v. Wallace, 94 Wash. 2d 99 (1980) 19

Statutes

740 ILCS 5/7.1 18

Ala. Code § 6–5–331 18

Ariz. Rev. Stat. Ann. § 26–341 18

Ark. Code Ann. § 16–118–105 18

Cal. Civil Code § 43.5 18

Colo. Rev. Stat. § 13-20-201 ..... 7, 19

Colo. Rev. Stat. § 14-10-106 26

Colo. Rev. Stat. §§ 13–20–201 18

Conn. Gen. Stat. Ann. § 52–572b 18

Del. Code Ann. tit. 10, § 3924 18
Fla. Stat. Ann. § 771.01 18
Ga. Code Ann. § 51–1–17 18
Ind. Code Ann. § 34–4–4–1 18
Kan. Stat. Ann. § 23–208 18
Mass. Gen. Laws Ann. ch. 207, § 478 18
Md. Code Fam. Law Ann. § 3–103 18
Me. Rev. Stat. Ann. tit. 19, § 167 18
Mich. Comp. Laws Ann. § 600–2901 18
Minn. Stat. Ann. § 553.02 18
Mont. Code Ann. § 27–1–601 18
N.D. Cent. Code § 14–02–06 18
N.H. Rev. Stat. Ann. § 460:2 18
N.J. Rev. Stat. § 2A:23–1 18
N.Y. Civ. Rights Law § 80–a 18
Neb. Rev. Stat. § 25–21,188 18
Nev. Rev. Stat. Ann. § 41.380 18
NMSA 1978, § 40-4-1(A) 2, 15, 26
Ohio Rev. Code Ann. § 2305.29 18
Okla. Stat. tit. 3, § 8.1 18
Or. Rev. Stat. § 30.840 18
Pa. Stat. Ann. tit. 23, § 1901 18

R.I. Gen. Laws § 9–1–42 18

Tenn. Code Ann. § 36–3–701 19

Va. Code Ann. § 8.01–220 19

Vt. Stat. Ann. tit. 15, § 1001 19

Wis. Stat. § 768.01 19

Wyo. Stat. § 1–23–101 19

Other Authorities

Bruce V. Nguyen, *Hey, That's My Wife—The Tort of Alienation of Affection in Missouri*, 68 MO. L. REV. 241 (2003) 13

H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckholding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L. REV. 755 (2016) 20, 23, 26

Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930) 12

Judge J. Matthew Martin, *An American Anachronism: The Heartbalm Torts*, J. HONORABLE SOC. OF THE MIDDLE TEMPLE, *available at* https://perma.cc/454W-JJWF 11

Kay Kavanaugh, Note, *Alienation of Affections and Criminal Conversation—an Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323 (1981) 11

Michael Hyland, *'Many Argue It's an Antiquated Law': NC House Speaker Urges State to Repeal Alienation of Affection Law*, CBS17 RALEIGH-DURHAM, June 22, 2023 20

Stealing Love In Tennessee: The Thief Goes Free, 56 TENN. L. REV. 629 (1989) 11

PRELIMINARY STATEMENT

This Court granted certification of this case to determine "whether the common law tort of alienation of affections should be abolished in New Mexico." This case exemplifies why it should be abolished: Plaintiff James Butterworth ("Plaintiff"), while his divorce case was pending in Colorado, alleged no more than that he and Intervenor Dr. Sarah Smith ("Intervenor") were married; that Defendant Ethan Jackson ("Defendant") "initiated" a relationship with Intervenor in which Defendant was "the aggressor"; and that Plaintiff and Intervenor filed for divorce. As a result of these bare-bones allegations, Plaintiff sought for himself the power to compel Intervenor, on pain of contempt, to produce to him every communication she ever had with *or about* Defendant and to answer Plaintiff's questions under oath so that he could attempt to prove to a jury, in an open courtroom, that *Defendant* was at fault for *Plaintiff*'s divorce.

To state that case is to state why a modern judicial system should not allow it. This Court has not considered the tort of alienation of affections since it first recognized it in *Birchfield v. Birchfield*, 1923-NMSC-066, 29 N.M. 19, 217 P. 616, which was decided nearly 102 years

ago. Things have changed since then. Since 1923, New Mexico law has recognized that the legal system ought not to follow people into their homes and bedrooms to adjudicate every possible disagreement they may have. *See, e.g.*, *Hakkila v. Hakkila*, 1991-NMCA-029, 112 N.M. 172, 812 P.2d 1320 (limiting intra-spousal IIED claims). Since 1923, all but five or six states have abolished the tort. *See infra* Part II. Since 1923, the law has recognized marriage as an institution of mutual support and companionship, has rejected the notion that one person is entitled to another's affections, and firmly concluded that consensual intimate relationships are personal, individual choices. In accordance with these principles, New Mexico was among the first states to recognize no-fault divorce. *See* NMSA 1978, § 40-4-1(A). And since 1923, our society has become immeasurably more complex economically and socially, increasing the incentive for people like Plaintiff to bring cases like this in which they seek to use the legal system to threaten, bully, and extort others with whom their disagreements are primarily personal.

Enough is enough. The New Mexico Court of Appeals recognized that "public policy declares that is in the best interest of the people to abolish the remedy [for alienation of affections]." *Thompson v. Chapman*,

1979-NMCA-041, ¶ 10, 93 N.M. 356, 600 P.2d 302. The time has come for the Court to do just that by abolishing the tort of alienation of affections and directing the entry of summary judgment against Plaintiff.

STATEMENT OF THE CASE

I. Factual Background

Plaintiff and Intervenor married in 2007 and divorced in Colorado in 2022. **[RP 480-483, ¶ 2]** According to the three-page Complaint in this case, Intervenor met Defendant at a party in Colorado, where Plaintiff and Intervenor live, in 2019. **[RP 1-4, ¶ 6]** Defendant, according to the Complaint, "initiat[ed] an intimate relationship" with Intervenor and "was the aggressor in initiating" that relationship. **[*Id.* ¶ 7]** Before this, says the Complaint, Intervenor "loved and had affection" for Plaintiff. After meeting Defendant, "Intervenor brought an action . . . in Colorado for dissolution of [her] marriage [to Plaintiff]." **[*Id.* ¶ 10]** No facts indicating a causal relationship between these two events are pleaded, and indeed Plaintiff does not explicitly plead—nor could he—that Intervenor (now his ex-wife) lacks affection for him. And, in her Affidavit, she averred that the dissolution of their marriage was due in large part to Plaintiff's anger management issues. **[RP 42-43]**

II. Prior Proceedings

In April 2021, Plaintiff, while aggressively litigating the divorce in Colorado, sued Defendant in Taos County, New Mexico, where he lives, alleging alienation of affections and "prima facie tort." **[RP 1-4]** A month later, Defendant moved to dismiss, arguing that "Plaintiff's claim for alienation of affections is the exact claim the Court of Appeals urged the courts to abolish [in *Thompson*]," and that "Plaintiff's allegations that [Defendant] maliciously and aggressively pursued [Intervenor] are irrelevant, because this was an interpersonal decision between [Defendant] and [Intervenor]." **[RP 5-9, at 3]** Plaintiff objected to the motion, arguing that "although the Court [of Appeals] looked with disfavor on the tort [in *Thompson*], the Court concluded that the cause of action is very much alive." **[RP 10-14,¶ 3]** The district court denied Defendant's motion, reasoning that "Defendant did not challenge the legal validity of the tort of alienation of affections" and "the Complaint properly alleges the elements" of the tort. **[RP 29- 30, ¶ 2, 3]**

In August of 2021, Defendant moved for summary judgment, attaching an affidavit from Intervenor. **[RP 31-43]** Intervenor averred that she "filed for dissolution of my marriage to Plaintiff because of

ongoing issues in our marriage which existed prior to my meeting [Defendant]," which issues were "due in large part to the impact of [Plaintiff's] anger management issues on our children and [Intervenor]." **[RP 42-43]** She further averred that "[Defendant] was not an aggressor to the interactions between us" and that he "did not engage in unwelcomed contact . . . ." **[*Id.* ¶ 7]** Defendant argued that the action was no longer legally viable and that regardless Plaintiff could not prove the elements of the cause of action. **[RP 31-41]** In response, Plaintiff attached his own affidavit contesting Intervenor's and arguing that the cause of action remained viable and that he could prove its elements. **[RP 58-66]**

The district court denied the motion for summary judgment, reasoning that although New Mexico courts look on the tort of alienation of affections with "disfavor," and although the tort has been undermined by legal developments since the New Mexico Supreme Court last addressed it over a century ago, the tort has not been formally abolished. **[RP 95-99, at 1-2]** The district court certified the matter to the Court of Appeals for interlocutory review, urging the Court to "address the issue of whether or not the tort of alienation of affections is still a valid cause

of action in New Mexico." **[RP 99]** Perhaps because the Court of Appeals had said it would "abolish[] the common law remedy for alienation of affections . . . *if it had the power to do so*," *Thompson*, 1979-NMCA-041, ¶ 10 (emphasis added), it declined to hear the interlocutory appeal. **[RP 162, 95-99]**

While the parties were litigating this case in district court, on August 3, 2022, the Boulder District Court in Colorado entered a judgment dissolving Intervenor's marriage to Plaintiff after nearly two years of contentious litigation. **[RP 481-483, ¶ 2]** Plaintiff timely appealed that judgment. While that appeal was pending, Plaintiff served Intervenor, now his ex-wife, with a third-party subpoena to be enforced in Colorado, seeking, among other things "[a]ll communications between Intervenor and [Defendant]," "[a]ll communications between Intervenor *and anyone else* regarding any relationship between Intervenor and [Defendant] between January 1, 2018 and May 31, 2023," and "all documents and records from any landline and/or cellular telephone used by [Intervenor] from January 1, 2018, to May 31, 2023." **[RP 799-805]**

Intervenor moved to quash that subpoena, arguing to the Colorado court that although "[t]he divorce is now finalized . . . , [Plaintiff] refuses

to let go of his claim in New Mexico . . . to gain leverage while he appeals the Colorado Dissolution of Marriage Court Ruling," and that Colorado's strict prohibition against alienation-of-affection claims—it is a crime in Colorado to file or even negotiate a settlement of such a claim, Colo. Rev. Stat. § 13-20-201—bars enforcement of the subpoena. **[RP 825-839]** Plaintiff responded that because the action was pending in New Mexico he was permitted to issue a subpoena in New Mexico and enforce it in Colorado, and that "[i]t is immaterial that these parties were involved in dissolution proceedings in Colorado." **[RP 807-823, at 2 n.2.]**

The Colorado court denied the motion to quash in part, while also, just like the District Court here, casting doubt on the wisdom of maintaining the availability of the underlying cause of action. **[RP 416-422]** The Colorado court said that "this claim is outdated and patriarchal, as many other states have found." **[*Id.* at 5]** But the court also noted that it "remains a viable claim in New Mexico, despite the concerns raised about it," and that the Uniform Interstate Depositions and Discovery Act (under which the subpoena was served in Colorado) did not provide a pathway to challenge the substantive law underlying the claim. **[*Id.*]**

On March 8, 2024, Intervenor, faced with the prospect of suffering invasive discovery into her personal communications and intimate private life by way of additional discovery, including a deposition and yet another request for "all written or electronic communications between Intervenor and any other person that makes reference . . . to Defendant," moved to intervene in this action "for the limited purpose of having [the district court] consider her Motion for Judgment on the Pleadings." **[RP 235-238, at 1]** She filed that motion at the same time she moved to intervene, arguing that this case should be dismissed on choice-of-law grounds. **[RP 239-250]** As grounds for intervention, Intervenor argued straightforwardly that she has a sufficient interest to intervene in this action because "this unusual tort case is quite literally about *her* affection."**[RP 235-238, at 3]** The district court agreed and granted Intervenor's motion to intervene for the purpose of considering this issue. **[RP 401]**

The district court converted Intervenor's motion for judgment on the pleadings to one for summary judgment. **[RP 631]** While that motion was pending, Plaintiff contended he needed additional extensive discovery—again, including a deposition of Intervenor—before he could

offer a complete response. **[RP 288-295, at 3]** He reasoned that, although he had no evidence of Defendant and Intervenor meeting in New Mexico, and thus no evidence with which to contest Intervenor's choice-of-law argument, he wanted additional discovery to pinpoint the locations of not just in-person meetings but also where the parties were during electronic communications, on the grounds that those electronic communications could establish a basis for New Mexico law to apply. **[RP 335-341]** The district court ruled that "all communications between the Intervenor and the Defendant should be disclosed." **[RP 899-949 (Tr. 46:22-23)]**

The district court also denied Intervenor's now-converted motion for summary judgment without prejudice. But, for the second time in the case, it also certified the question presented to the Court of Appeals because it "involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation." **[RP 631-632]** The district court explained at a hearing that "the reason for the interloc[utory appeal] is . . . discovery might cause humiliation, pain, all the things that our courts have previously . . . said about this tort." **[RP 947, (Tr. 49:16–23)]**

On October 22, 2024, the Court of Appeals in turn "request[ed] the Supreme Court to exercise its authority to accept" certification of this case for review. In the Court of Appeals' view, although this Court "has not revisited [the tort] since [its decision in] *Birchfield v. Birchfield*, 1923-NMSC-066, 29 N.M. 19, 217 P. 616," the tort "appears to be a legal relic and has been retired by many other states." *Butterworth v. Jackson*, A-1-CA-42095, at 3 (Oct. 10, 2024). The Court of Appeals believed itself to be "without authority to determine whether the tort of alienation of affections should be abolished in New Mexico" because of "vertical stare decisis[] as recognized in the *Alexander* doctrine." *Id.* at 4. The case, then, "raises an issue of substantial public interest that only the Supreme Court can address." *Id.* at 5.

On January 17, 2025, this Court granted Intervenor's application for interlocutory appeal pursuant to its power of superintending control and accepted the certification of the Court of Appeals. This Court ordered that "the briefs shall be limited to addressing the issue as presented in the order of certification from the Court of Appeals filed in this Court on October 22, 2024, i.e., whether the common law tort of alienation of

affections should be abolished in New Mexico." This brief follows, which is submitted by Intervenor and joined by Defendant.

ARGUMENT

THE TORT OF ALIENTATION OF AFFECTIONS SHOULD BE ABOLISHED AND THE CASE DISMISSED

I. The History of Alienation of Affections

The tort of alienation of affections originated at English common law in a time when a wife was considered the property of her husband, whose property rights extended to his wife's services and consortium, *e.g.*, Judge J. Matthew Martin, *An American Anachronism: The Heartbalm Torts*, J. HONORABLE SOC. OF THE MIDDLE TEMPLE, *available at* https://perma.cc/454W-JJWF (2021), and when a wife had no property rights of her own, *e.g.*, Kay Kavanaugh, Note, *Alienation of Affections and Criminal Conversation—an Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 327 (1981). Early common law recognized two distinct actions related to a husband's property interest in his wife: "criminal conversation" and "enticement," sometimes also called "abduction." *See, e.g.*, *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992) (explaining history and citing Comment, *Stealing Love In Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629 (1989)). The tort of "criminal conversation" required

only adultery: because of the premium that early common law put on "pure blood lines," a husband had a cause of action at common law against any man who had sex with his wife, which created questions about the legitimacy of his children. *Id.* (citing Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 655 (1930)). Enticement, meanwhile, "involved assisting or inducing a wife to leave her husband by means of fraud, violence, or persuasion." *Id.* Adultery was not an element of an enticement action, and many in fact did not involve adultery. *Id.*

American states received the causes of action through the common law in the 18th and 19th centuries. Early American decisions (some predating the name "alienation of affections") recognized a husband's right to recover for loss of consortium caused by third-party interference. *E.g.*, *Bennett v. Bennett*, 116 N.Y. 584, 587 (1889) ("It is well settled that a husband can maintain an action against a third person for enticing away his wife and depriving him of her comfort, aid and society." (collecting cases)). Courts developing the doctrine of alienation of affections began from the premise of a husband's property rights in his wife, and so they concluded that (a) "[t]he wife's consent to, or even

initiation of, the adultery was no defense because 'it was thought at common law that a wife was not competent to give her consent so as to defeat her husband's interest,'" *Feldman v. Feldman*, 125 N.H. 102, 106 (1984) (quoting *Fadgen v. Lenkner*, 365 A.2d 147, 150 (Pa. 1976)), and (b) "[t]he defendant's ignorance of the marriage was irrelevant because '[a] man who has sexual relations with a woman, not his wife, assumes the risk that she is married,'" *id.* (quoting *Antonelli v. Xenakis*, 69 A.2d 102, 103 (Pa. 1949)).

By the late 19th century, though, states began enacting Married Women's Property Acts, which recognized women as people with separate legal identities from their husbands and, thus, the capacity to hold their own property and not to be considered property of others. *See, e.g.*, *Hoye*, 824 S.W.2d at 425. Courts were thus faced with a conceptual problem: alienation of affections actions were based on the idea that husbands owned their wives; now that husbands could no longer do that, should the law abandon the notion that affection was property to begin with, or should it extend the right to sue to women as well as men? *See, e.g.*, Bruce V. Nguyen, *Hey, That's My Wife—The Tort of Alienation of Affection in Missouri*, 68 MO. L. REV. 241 (2003). Over time (as explained in greater

detail below, *see infra. nn.* 1–3) the vast majority of states chose the former course and abolished the torts of alienation of affections and criminal conversation. Those that remained, though, eventually extended the right to sue to women. *Id.*

New Mexico first recognized the tort of alienation of affections in 1923, 11 years after it became a state. *See Birchfield*, 1923-NMSC-066, ¶ 21. To state a cause of action for alienation of affections, the plaintiff need only show "that the opposite spouse did love and had affection for him or her, as the case may be, and that the defendant maliciously caused the alienation thereof by direct interference." *Id.*

II. Developments in New Mexico Law Since *Birchfield* Was Decided in 1923 Undermine The Legal Basis For The Tort of Alienation of Affections.

Since the tort of alienation of affections was first recognized by this Court in 1923, *see Birchfield*, 1923-NMSC-066, several other aspects of New Mexico law have changed in ways that fundamentally undermine the rationales for the tort. New Mexico courts have limited the availability of torts of intentional infliction of emotional distress between spouses and suggested that the rationale for that limitation applies to alienation-of-affections actions as well. In *Hakkila*, the Court of Appeals

considered a suit for intentional infliction of emotional distress (IIED) by one former spouse alleging that the other committed outrageous conduct during the marriage that caused severe emotional distress. 1991-NMCA-029, ¶ 6. The Court of Appeals concluded that there remained, if any, only a "very limited scope for the tort [of IIED] in the marital context." *Id.* ¶ 15. "Not only should intramarital activity not be the basis for tort liability," the court reasoned, "it should also be protected against disclosure in tort litigation." *Id.* ¶ 18. And crucially the court reasoned that "the public policy of New Mexico is to avoid inquiry into what went wrong in a marriage" because "New Mexico was the first state to provide for no-fault divorce on the ground of incompatibility." *Id.* ¶ 21 (citing NMSA 1978, § 40-4-1(A)). While reaching its conclusion, the court noted that "although the tort of [alienation of affections] has not been formally abolished, our courts have expressed dissatisfaction with [it]." *Id.* ¶ 22.

New Mexico courts expressed that dissatisfaction first in *Thompson*, 1979-NMCA-041. There, the Court of Appeals addressed an alienation-of-affections action and held that the plaintiff had not adequately alleged the elements of the cause of action. *Id.* ¶ 9. But after so concluding, the court remarked,

> [w]e look with disfavor on claims for damages based upon alienation of affections. It came to New Mexico in 1923 by way of the common law. Over half a century later, public policy declares it to be in the best interest of the people to abolish the remedy. If we had the power to do so, we would follow in the footsteps of *Wyman v. Wallace*, 549 P.2d 71 (Wash. App. 1976)."

Id. ¶ 10. The *Wyman* court, in turn, had held that

> To us, the action diminishes human dignity. It inflicts pain and humiliation on the innocent, monetary damages are either inadequate or punitive, and the action does not prevent human misconduct itself. In our judgment, the interests which it seeks to protect are not protected by its existence, and the harm it engenders far outweighs any reasons for its continuance.

Wyman, 549 P.2d at 74. This Court favorably cited *Thompson* in *Lovelace Medical Center v. Mendez*, in which it held that parents may recover damages for negligent medical care resulting in unwanted conception. 1991-NMSC-002, ¶ 29, 111 N.M. 336, 805 P.2d 603.

Finally, in *Padwa v. Hadley*, the Court of Appeals addressed an IIED action against someone who repeatedly initiated sexual encounters with many of the same man's romantic partners. 1999-NMCA-067, 127 N.M. 416, 981 P.2d 1234. Citing *Lovelace*, *Thompson*, and *Hakkila*, the *Padwa* court concluded that "the foregoing cases . . . share the common concern, grounded in sound public policy, against undue interference in consensual sexual relations between adults." *Id.* ¶ 19. Explaining the

application of these concepts to alienation-of-affections actions, the court reasoned that "[a] spouse's love or a lover's companionship is not property that is subject to theft or trespass, and plaintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own." *Id.* (citations and quotations omitted). Alienation-of-affections actions, the court continued, "denigrate[] the institution of marriage by making a forced sale of spousal affections." *Id.* (citation and quotations omitted). Summarizing its holding, the court finally reasoned that

> It is difficult to envision how the [plaintiff] . . . could successfully state a claim in tort against the third party, whatever the label, without simultaneously trammeling the privacy rights and liberty interests of the other spouse, or the former spouse or partner. We do not see how we could recognize such conduct as tortious and not, in effect, create a legal right in a husband or paramour to the affections and loyalty of his partner. A person may have such a moral claim to marital loyalty, or a lover's fidelity, and a moral right to be free of the sexual blandishments of an interloper. However, the morals of mankind are more perfectly judged by a court having final and eternal jurisdiction.

Id. ¶ 20 (citation and quotation omitted).

Together, these cases show that this Court and the Court of Appeals have done everything but formally abolish the tort of alienation of affections, speaking of it with "disfavor," *Thompson*, 1979-NMCA-041, ¶

10, and explaining that it ought to be formally abolished, *Padwa*, 1999-NMCA-067, ¶ 20. This Court should take the last step and formally abolish this legal relic.

III. Other States' Abolition of The Tort Leaves New Mexico in an Anachronistic Minority

New Mexico law looks to the law of other states in determining whether to recognize or abolish tort actions. *See, e.g.*, *Romero v. Byers,* 1994-NMSC-031, ¶ 7, 117 N.M. 422, 872 P.2d 840. And all but five or six other states[1] have abolished the tort by legislation[2] or common-law

---

[1] The tort remains viable in Mississippi, *Fitch v. Valentine*, 959 So. 2d 1012, 1020 (Miss. 2007); North Carolina, *e.g.*, *Brown v. Ellis*, 678 S.E.2d 222, 224 (N.C. 2009); South Dakota, *State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228, 234 (S.D. 2007); and Utah, *Heiner v. Simpson*, 23 P.3d 1041, 1043 (Utah 2001). It has not been formally abolished in Hawaii but its status is unclear because courts have not addressed it since 1979. *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979).

[2] At least thirty-four states have abolished the tort by legislation. Alabama, Ala. Code § 6–5–331; Arizona, Ariz. Rev. Stat. Ann. § 26–341; Arkansas, Ark. Code Ann. § 16–118–105; California, Cal. Civil Code § 43.5; Colorado, Colo. Rev. Stat. §§ 13–20–201, 202; Connecticut, Conn. Gen. Stat. Ann. § 52–572b; Delaware, Del. Code Ann. tit. 10, § 3924; Florida, Fla. Stat. Ann. § 771.01; Georgia, Ga. Code Ann. § 51–1–17; Illinois, 740 ILCS 5/7.1; Indiana, Ind. Code Ann. § 34–4–4–1; Kansas, Kan. Stat. Ann. § 23–208; Maine, Me. Rev. Stat. Ann. tit. 19, § 167; Maryland, Md. Code Fam. Law Ann. § 3–103; Massachusetts, Mass. Gen. Laws Ann. ch. 207, § 478; Michigan, Mich. Comp. Laws Ann. § 600–2901; Minnesota, Minn. Stat. Ann. § 553.02; Montana, Mont. Code Ann. § 27–1–601; Nebraska, Neb. Rev. Stat. § 25–21,188; Nevada, Nev. Rev. Stat. Ann. § 41.380; New Hampshire, N.H. Rev. Stat. Ann. § 460:2; New Jersey, N.J. Rev. Stat. § 2A:23–1; New York, N.Y. Civ. Rights Law § 80–a; North Dakota, N.D. Cent. Code § 14–02–06; Ohio, Ohio Rev. Code Ann. § 2305.29; Oklahoma, Okla. Stat. tit. 3, § 8.1; Oregon, Or. Rev. Stat. § 30.840; Pennsylvania, Pa. Stat. Ann. tit. 23, § 1901; Rhode Island, R.I. Gen. Laws § 9–1–42; Tennessee, Tenn.

decision.[3] New Mexico thus should follow suit and join the vast majority of states rejecting this anachronistic tort.

Some states, notably Plaintiff and Intervenor's home state of Colorado, have criminalized attempting to settle an alienation-of-affections action because such settlements present such a high risk of extortion and fraud. *See, e.g.*, Colo. Rev. Stat. Ann. § 13-20-201 ("[A]lienation of affections [actions] . . . have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds."). Indeed Plaintiff likely brought this Action in New Mexico because he could not bring it in Colorado, the state where his marriage was supposedly harmed by Defendant.

Code Ann. § 36–3–701; Vermont, Vt. Stat. Ann. tit. 15, § 1001; Virginia, Va. Code Ann. § 8.01–220; Wisconsin, Wis. Stat. § 768.01; and Wyoming, Wyo. Stat. § 1–23–101.

[3] At least five states have abolished the tort by judicial decision. Idaho, *O'Neil v. Schuckardt*, 112 Idaho 472 (1986); Iowa, *Fundermann v. Mickelson*, 304 N.W. 2d 790 (Iowa 1981); South Carolina, *Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992); Tennessee, *Dupuis v. Hand*, 814 S.W. 2d 340 (Tenn. 1991); and Washington, *Wyman v. Wallace*, 94 Wash. 2d 99 (1980).

North Carolina appears to be the only state where alienation-of-affections cases are appreciably common, and that state's experience with the tort gives this Court all the more reason to abolish it. In North Carolina, judges and juries routinely award seven-figure damages awards in alienation-of-affections cases, and the bar has accordingly made an industry of litigating alienation-of-affections cases alongside the divorce proceedings of the spouses. *See* H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckholding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L. REV. 755, 756–57 (2016) (hereinafter "Bruton"); Michael Hyland, *'Many Argue It's an Antiquated Law': NC House Speaker Urges State to Repeal Alienation of Affection Law*, CBS17 RALEIGH-DURHAM, June 22, 2023.

Although many states have abolished the tort by legislation, *see infra* n.2, the silence of the legislature here is, as a matter of New Mexico law, no justification for keeping the tort. The New Mexico legislature did not create this tort; this Court did. And this Court maintains primary responsibility for the common law. *See Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't*, 1992-NMSC-026, ¶¶ 19-20, 113 N.M. 593, 830 P.2d 145 (rejecting contention that legislative

inaction justifies this Court in maintaining a common-law rule and concluding that "the legislature simply failed to express its will on this subject."). Indeed, this Court affirmed the existence of the tort in 1923, so it would be firmly within this Court's power to abolish it given the intervening judicial decisions and legal developments in New Mexico and around the country. That holding would end this case.

IV. The Tort Reflects The Retrograde Notion That People Do Not Control Their Own Affections

This case is about Intervenor's affections. *See, e.g.*, Order on Motion to Intervene. **[RP 401]** Defendant is alleged to have done no more than be the "aggressor" in a concededly consensual relationship with Intervenor and, as a result, to have allegedly alienated Intervenor's affections. If this suit is allowed to proceed, it will declare that Intervenor does not—indeed cannot—decide to whom she will provide affection.

This Court should not allow that, not as to Intervenor and not as to anyone else. This Court needs no citation for the proposition that since 1923, attitudes about marriages and intimate personal relationships have evolved. Nor does the Court need a citation for the proposition that a person's love is hers to give, or to withhold. The tort of alienation of affections requires the law to treat love as quite literally the opposite of

what we all know it to be: inalienable. *E.g.*, *Padwa*, 1999-NMCA-067, ¶ 19 (recognizing that alienation of affections requires courts to treat affection as a property right belonging to a spouse that can be taken from him); *cf. Funderman v. Mickelson*, 304 N.W. 2d 790, 794 (Iowa 1981) ("In the last analysis we think the action should be abolished because spousal love is not property which is subject to theft.").

And indeed the tort requires the law to treat the end of a marriage as conclusive evidence that the parties lost "affection" for each other, when marriage and divorce are far more complicated than that—the Colorado divorce action between Plaintiff and Intervenor did not determine that Intervenor lost affection for Plaintiff, but rather that the two wanted to live separately; Intervenor's affection remained, and should remain, hers alone to judge and assign as she sees fit. The false assumption behind Plaintiff's complaint is that Intervenor's "affections" were alienated at all; there is no evidence that she lacks affection for her ex-husband. Further, she avers that the dissolution of their marriage was due in large part to the impact of Plaintiff's anger management issues on her and her children, not on a supposed lack of affection for her ex-husband. **[RP 42-43, ¶¶ 1-4]**

Worse still, the tort originated from the idea that wives were no more than property of their husbands, who were entitled to their affections just as they would be entitled to the work of people they employed or even enslaved. *E.g.*, *Macfadzen v. Olivant*, (1805) 102 Eng. Rep. 1335, 1336; 6 East 387, 389–90 ("No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife *per quod consortium amisit*."); *Guy v. Livesey*, (1619) 79 Eng. Rep. 428, 428; Cro. Jac. 501, 502 ("[T]he action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this action, as the master shall have for the loss of his servant's service."), *cited in* Bruton, *supra* at 762 n.54. Although the law now does not explicitly discriminate based on the gender of the plaintiff and the person whose affections are alleged to be alienated, *see generally id.*, the tort's misogynistic origins reflect themselves in its retrograde application today, causing it to presume that human affection is a property right that can be held by anyone other than the person giving the affection.

This Court should reject these outdated and sexist notions, and with them the tort of alienation of affections.

V. The Tort's Practical Problems Alone Justify Abolishing It.

As explained above, legal developments since 1923 have undercut the tort, almost all other states have abolished it, and it is conceptually antiquated—for these reasons alone, this Court should abolish it. But the tort also presents a host of practical problems that would each alone justify its abolition.

First, alienation-of-affections cases unsurprisingly require that the plaintiff show that the defendant alienated the plaintiff's spouse's affections. *Birchfield*, 1923-NMSC-066. To do this, the plaintiff must prove by a preponderance of the evidence the reason for the demise of a marriage. This question—why did one person want to end an intimate romantic relationship with another?—is beyond reasonable proof in a courtroom, and indeed it is likely beyond the concept of truth or falsity. And there can be no reasonable limit to the evidence one could seek to support an answer to that question. This case presents exactly this problem: Plaintiff appears to be using this proceeding not as a means to secure financial recovery for any harm he may have suffered at

Defendant's hand but rather as a device to harass his ex-wife with burdensome and invasive discovery requests, which New Mexico courts have rejected. *See, e.g.*, *Hakkila*, 1991-NMCA-029, ¶ 21 ("[T]he public policy of New Mexico [is] to avoid inquiry into what went wrong in a marriage."); *Padwa*, 1999-NMCA-067, ¶ 20 (expressing concern about this tort because it "simultaneously trammel[s] the privacy rights and liberty interests of the other spouse, or the former spouse or partner").

Second, the tort of alienation of affections invites inaccurate jury verdicts. In an alienation-of-affections case, the jury must be charged that "the burden is upon the plaintiff to show that the opposite spouse did love and had affection for him or her, as the case may be, and that the defendant maliciously caused the alienation thereof by direct interference." *Birchfield*, 1923-NMSC-066, ¶ 21. There is no requirement that any fault be found on the part of the *spouse* or absence of fault on the part of the *plaintiff*; on the contrary, to rule for the plaintiff the jury must conclude that the defendant "caused the alienation," *not* the spouse or the plaintiff. *Id.* But in cases in which a romantic relationship is alleged between the defendant and the plaintiff's spouse, there is no way to limit the jury's consideration of the wisdom or morality of either

spouse's conduct. Adultery is both extremely common and extremely unpopular, *see* Bruton, *supra* at 756–77, and thus the risk that a jury may unjustly enter a verdict motivated not by the evidence and the law but by prejudice against the parties is unacceptably high.

Finally, as the Court of Appeals explained in *Hakkila*, New Mexico was the first state in the nation to allow for no-fault divorce on the ground of incompatibility. 1991-NMCA-029, ¶ 21 (citing NMSA 1978, § 40-4-1(A)). "The public policy of New Mexico," the court explained, "is to avoid inquiry into what went wrong in a marriage." *Id.* Indeed this is now true of all of the other states, including of course Colorado, where Plaintiff and Intervenor divorced. Colo. Rev. Stat. § 14-10-106 (permitting dissolution of marriage where the court finds that "the marriage is irretrievably broken"). In a purely no fault state such as Colorado, the question of *why* the parties divorced is totally irrelevant, and for good reason. *See, e.g.*, *Hakkila*, 1991-NMCA-029, ¶ 21. Allowing alienation-of-affection actions risks complicating the straightforward and proper litigation in divorce proceedings by needlessly introducing fault into a no-fault regime. Maintaining the tort means litigating fault in a regime of no-fault divorce. To continue to permit that would violate strong policy concerns.

Given this compelling history, precedent, and policy, this Court should hold that the tort of alienation of affections is not available under New Mexico law. This Court should also clarify that any common-law torts necessarily based on that non-viable tort are also unavailable. That would dispose of both the primary "alienation of affections" claim in this case and the overlapping claim for "prima facie tort" which is based entirely on the primary claim for alienation of affections.

CONCLUSION

For the foregoing reasons, the decision of the district court denying summary judgment against Plaintiff, certified for interlocutory appeal to this Court, should be reversed and summary judgment should issue against Plaintiff on the grounds that the tort of alienation of affections, and any related common law torts necessarily overlapping with that tort such as the "prima facie tort" here, are abolished.

Respectfully submitted,

/s/ *Jason Harrow (admitted pro-hac vice)*
Jason Harrow
GERSTEIN HARROW LLP
12100 Wilshire Blvd. Ste 800
Los Angeles, CA 90025
(323) 744-529
jason@gerstein-harrow.com
Counsel for Intervenor-Appellant

/s/ *Charles Gerstein (admitted pro-hac vice)*
Charles Gerstein
GERSTEIN HARROW LLP
1001 G St. NW, Suite 400E
Washington, DC 20001
(202) 670-4809
charles@gerstein-harrow.com
Counsel for Intervenor-Appellant

/s/ *Deana Bennett*
Deana M. Bennett
Celina C. Baca
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
500 Fourth Street NW, Suite 1000
Albuquerque, NM 87102
deana.bennett@modrall.com
celina.baca@modrall.com
Counsel for Intervenor-Appellant

/s/ *Aaron Wolf*
Aaron J. Wolf
CUDDY & MCCARTHY, LLP
1701 Old Pecos Trail
Santa Fe, NM 87505
(505) 988-4476
awolf@cuddymccarthy.com
Counsel for Defendant

STATEMENT REGARDING ORAL ARGUMENT

Consistent with this Court's order, Intervenor-Appellant remains available for oral argument at the Court's direction.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed and served through the Court's electronic system, and emailed to the following counsel of record this 14th day of March 2025:

Gary W. Boyle
Mark D. Freudenheim
BOYLE AND FREUDENHEIM
12 Spirit Court
Santa Fe, NM 87506
Gary.boyle.boylelawoffice@gmail.com

Aaron J. Wolf
Post Office Box 4160
Santa Fe, New Mexico 87502-4160
awolf@cuddymccarthy.com

By: *Celina C. Baca*