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 REPLY BRIEF (JOINED BY DEFENDANT)

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STATEMENT OF COMPLIANCE

We certify that this brief compiles with the type-volume limitation of Rule 12-318(F). The body of the brief contains 3,296 words.

Dated May 23, 2025.

/s/ *Jason Harrow*

Attorney for Appellant

TABLE OF AUTHORITIES

New Mexico Cases

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PRELIMINARY STATEMENT

Plaintiff-Appellee urges this Court to cut against the modern trend and affirm the existence of the tort of "alienation of affections," which this Court adopted in 1923 and has yet to revisit. This Court should decline his invitation to keep New Mexico in the deep minority of states that have maintained this harmful, antiquated, and ineffectual tort.

Plaintiff's brief primarily urges this Court to adopt the reasoning of decisions by the Supreme Courts of Utah and Mississippi, which have taken the outlier position of maintaining the tort. But those decisions continuing to recognize the tort did so for exactly the retrograde reasons discussed in Intervenor-Appellant's Brief in Chief, and their reasoning is flawed besides. Plaintiff also contends that Intervenor "offers no evidence of misuse of the tort in New Mexico" **[AB 2]**, but Plaintiff himself supplied all the evidence of abuse this Court needs when he used the court system to harass his ex-wife and pry sensitive information from her friends, all in a way that would violate the law of the state where Plaintiff and Intervenor live, married, and divorced, and where every event possibly relevant to this case occurred. Finally, Plaintiff asserts without meaningful support that "New Mexico law recognizes similar torts" like

tortious interference with contract, **[AB 11]**, but the reverse is true: New Mexico has *abolished* related torts, and tortious interference with contract is not relevantly similar since courts have made clear time and again that marriage is not a typical contract for purposes of tort law. The bottom line of all this is that Plaintiff has given this Court no good reason to maintain the outdated tort, and none exists. The time has come for this Court to abolish the tort of alienation of affections.

ARGUMENT

Intervenor demonstrated in her Brief in Chief the variety of reasons that the tort of alienation of affection should be abolished. In particular, developments in New Mexico law have undermined the viability of the tort, which reflects the retrograde notion that people do not control their own affections. For this reason, New Mexico is now in an anachronistic minority of just five or six states that permit this tort. *See* **[BIC 11–28]** All of Plaintiff's arguments urging this Court to maintain the tort are meritless.

I. Utah's And Mississippi's Decisions Are Contradictory And Wrong

Plaintiff "does not dispute that the majority of states have abolished the tort." **[AB 2]** But he urges the Court to ignore some 34 legislative

enactments and look only to the "handful of *courts* that have considered abolishing the tort," which, he contends, "have split on the issue[,] with more courts upholding the tort than abolishing it." **[AB 2.]** This is wrong on two levels.

First, the premise is wrong: Plaintiff gives no reason to ignore the dozens of legislative enactments abolishing the tort, and this Court should not do so. Each of those enactments reflects the considered judgment of a sister state that the tort should be abolished. Second, more courts have abolished the tort than upheld it: By Intervenor's count, the score is five or six to four. *Compare O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986) (abolishing tort), *and Fundermann v. Mickelson*, 304 N.W. 2d 790 (Iowa 1981) (same), *and Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992) (same), *and Dupuis v. Hand*, 814 S.W. 2d 340 (Tenn. 1991) (same), *and Wyman v. Wallace*, 94 Wash. 2d 99 (1980) (same), *with Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (upholding the tort), *and Bland v. Hill*, 735 So. 2d 414 (Miss. 1999) (same), *and Brown v. Ellis*, 678 S.E.2d 222, 224 (N.C. 2009) (same), *and State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228, 234 (S.D. 2007) (same); *see also Moulin v.*

Monteleone, 165 La. 169, 115 So. 447 (1927) (declining to recognize the tort in the first place).

Plaintiff then spends the vast majority of his brief reprinting block quotations from the Utah and Mississippi Supreme Courts declining to abolish the tort of alienation of affections. **[AB 1–11** (quoting *Nelson*, 669 P.2d 1207; *Norton v. MacFarlane*, 818 P.2d 8 (Utah 1981); *Bland*, 735 So. 2d 414; *Fitch v. Valentine*, 959 So. 2d 1012 (Miss. 2007))**]**. There is a reason that these cases are in the modern minority: the reasoning in them is wrong. This Court should, as a matter of *New Mexico* law, reject them.

The decisions on which Plaintiff relies reason that because alienation-of-affections actions are now available to spouses of any gender, the tort no longer treats *people* as property and is not, therefore, "obsolete." *Nelson*, 669 P.2d at 1215. But the Utah and Mississippi courts still treat *affection*—and, perhaps worse, sex—as property to which a spouse is entitled by law. *Id.* ("[A]n action for alienation of affections is . . . based on . . . the premise that each spouse has a valuable interest in . . . intimacy . . . and affections."); *Bland*, 735 So. 2d at 418 ("She [he] is entitled to . . . sexual relations . . . of her husband [his wife] as special

rights and duties growing out of the marriage covenant." (quoting *Kirk v. Koch*, 607 So. 2d 1224 (Miss. 1992) (bracketed alterations in *Bland*)). And that notion—the notion that people's affections are the property of their spouses that can be alienated—is wrong. *E.g.*, *Nelson*, 669 P.2d at 1231 (Stewart, J., dissenting) ("'The mutual rights and privileges of home life . . . are not legal in nature and may not be made the subject of commerce and bartered at the counter.'" (quoting *Henson v. Thomas*, 231 N.C. 173, 175 (1949)); *id.* at 1226 ("Ironically, it is this very proprietary interest, rejected by the courts as 'archaic,' which was granted to the wife."); *see also* **[BIC 21–23]**. Neither Plaintiff nor the cases he cites have anything to say about why this Court should countenance the idea that Plaintiff owned Intervenor's affections until Defendant-Appellant allegedly took them away. It should not.

This flaw alone justifies the Court rejecting the Utah and Mississippi decisions, but there are plenty more. *Nelson* reasons that "a suit for alienation of affections does *not* attempt to 'preserve' or 'protect' a marriage from interference, but only to compensate a spouse who has suffered loss . . .," 669 P.2d at 1217 (emphasis added), and, therefore,

whether the tort protects marriages is irrelevant, *id.* But *Fitch* reasons that because

> "[t]he traditional family is under such attack both locally and nationally these days, this Court should not retreat now from the sound view of the tort of alienation of affections . . . entitling a spouse *to protection* of the love, society, companionship, and comfort that form the foundation of a marriage."

959 So.2d at 1019 (quoting *Bland* 735 So.2d at 422 (internal quotations omitted) (emphasis added). The *Fitch* court does not explain what it means by "traditional family," or who, in the court's view, is attacking it.

Plaintiff unsurprisingly does not offer a view on which of these courts is right. Neither is. As a matter of basic legal theory, creating a cause of action for violating a right is supposed to protect that right by deterring people from violating it. *E.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56 (2012) (explaining protective purpose of private law). But there is no evidence anywhere suggesting that alienation-of-affections actions *do* protect marriages.

Next, the defendant in *Nelson* argued that the tort should be abolished because it leads to extortionate "settlements" in which defendants do not resolve genuine legal disputes but rather pay for plaintiffs' silence about their private lives. This concern is severe enough

that it prompted many states to *criminalize* even *trying* to settle such a case—including, notably, Colorado where Intervenor and Plaintiff were married, divorced, and live. *E.g.*, C.R.S. § 13-20-205. In response to this concern, the *Nelson* court reasons that "abolishing a cause of action for alienation of affections will not eliminate or even reduce extortion" because extortion "can still be accomplished by threatening to expose a person to his family or colleagues or publicize his indiscretions in other ways." 669 P.2d at 1216. But where a cause of action exists, negotiating a genuine confidential settlement does not constitute extortion even when doing so extrajudicially would. *E.g.*, *Flatley v. Mauro*, 39 Cal. 4th 299, 332 n.16, 139 P.3d 2, 24 (2006) (distinguishing between pre-litigation settlements and extortion). In other words, *Nelson* ignores that threatening to "expose a person" *is a crime* but threatening to sue a person for alienation of affections is not, and thus that the existence of the cause of action creates a legally protected method of extortion.

Finally, none of the cases Plaintiff cites remedy any of the practical problems Intervenor explained in her opening brief. **[BIC 23–26]** At its core, a cause of action for alienation of affections requires a jury to determine why a marriage ended, which the *Nelson* court concedes to be

"difficult[]." *E.g.*, *Nelson*, 669 P.2d at 1218. But the question isn't "difficult[]"; it's impossible, as evidenced by the *Nelson* court's bare and cursory rejoinder, which reads only that "[w]e prefer to consider the state of the marriage and the actions of both spouses relating to causation and damages," *id.* Utah's preference notwithstanding, "[t]he public policy of New Mexico is to *avoid* inquiry into what went wrong in a marriage." *Hakkila v. Hakkila*, 1991-NMCA-029, ¶ 21, 112 N.M. 172, 812 P.2d 1320 (emphasis added).

Avoiding that inquiry is especially important where, here as in many marriages, children are involved. This Court has observed that "[c]hildren are also both directly and indirectly the beneficiaries of the statutory benefits and protections available to a married couple," *Griego v. Oliver*, 2014-NMSC-003, ¶ 65, 316 P.3d 865, 888, yet Plaintiff ignores that "the impact of the [alienation of affection] proceedings upon any children peripherally involved has not been calculated," *Wyman*, 15 Wash. App. at 400. Maintenance of such an action "may cause lasting emotional injury to such innocent bystanders, and the possibilities of destroying the relationship between a parent and child are great." *Id.* The court noted that this unique action puts intimate details of adult

relationships "upon the public record to the detriment of all concerned," and meanwhile "any involved children are, for most purposes, without a voice." *Id.* Plaintiff and the decisions on which he relies do not address these harms, because they cannot: they are intrinsic to the tort.

For all these reasons, this Court should abolish the tort of alienation of affections—even if it were to do as Plaintiff suggests and merely count the opinions of other state courts, and even if it were to conclude (as he incorrectly does) that more have preserved the tort than abolished it. On the merits, the decisions of Utah and Mississippi courts in *Nelson* and *Bland* provide affirmative support for abolition by demonstrating a jurisprudence that this Court ought to reject as inconsistent with New Mexico's public policy. **[BIC 21–28]**

II. Marriage Is Not a Contract For Relevant Purposes, And Treating Alienation of Affections Like Tortious Interference Does Not Make Sense

Plaintiff next argues that the Court ought to allow alienation-of-affections actions just as it allows tortious-interference-with-contract actions because "marriage is a form of civil contract" and "[t]here is no public policy reason to treat the person interfering with a contract relationship differently than the person interfering with a marriage

contract." *See* **[AB at 11** (citing *Dominguez v. Cruz*, 1980-NMCA -132, ¶ 4, 95 N.M. 1, 617 P.2d 1322)]. But marriage has none of the relevant features of a typical commercial contract that would justify such a cause of action, and treating alienation of affections like tortious interference does not make sense anyway.

To state a cause of action for tortious interference with contract, a plaintiff must allege, among other things, that the defendant breached the relevant contract. *E.g.*, *Wolf v. Perry*, 1959-NMSC-044, ¶¶ 19-21, 65 N.M. 457, 339 P.2d 679. But spouses do not breach contracts with each other when they cease to be affectionate towards each other, or even when they commit adultery. *E.g.*, Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 72 & nn. 15, 17 (2021) (explaining that "contracts . . . involving sex and . . . domestic services" are "off the table"). That is because, contrary to Plaintiff's out-of-context, one-line quotation, marriage is licensed by the state and governed by a variety of laws and regulations that make it quite a bit more complicated than an ordinary contract. *Id.* at 71 & n.6 ("[M]any discussions have addressed whether marriage . . . can best be understood through status or contract." (citing Elizabeth S. Scott & Robert E. Scott, *From Contract to Status:*

Collaboration and the Evolution of Novel Family Relationships, 115 COLUM. L. REV. 293, 300–01, 328, 342 (2015); Janet Halley, *Behind the Law of Marriage: From Status/Contract to the Marriage System* (pt. 1), 6 UNBOUND: HARV. J. LEGAL LEFT 1, 14–28 (2010); Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 16–34 (2012)).

Plaintiff's proposed analogy would thus create a bizarre anomaly in the law. A spouse who pursues an extramarital relationship may not be sued by the other spouse for anything other than divorce, because intra-spousal emotional harm from extramarital affairs is beyond the reach of tort or contract law. *E.g.*, Antognini, *supra*; *see also Hakkila*, 1991-NMCA-029. But, in a world with the alienation of affection tort, the spouse who did not conduct the affair is able to plead a cause of action for alienation of affections *against the third-party* to the extramarital affair. This anomaly supports abolishing the tort, not maintaining it as Plaintiff suggests.[1]

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[1] Another anomaly: Plaintiff here would be alleging an equivalent of tortious interference with a *Colorado* "marriage contract," not a New Mexico one. Although choice of law is not at issue before this Court, the fact that Plaintiff purports to be able to bring such an action for interference with a non–New Mexico marriage

Regardless, the tortious-interference analogy does not take Plaintiff nearly as far as he thinks it does. To state a claim for tortious interference with contract, plaintiffs must allege that defendants did something *independently wrongful* to induce breach. *E.g.*, *Ettenson v. Burke*, 2001-NMCA-003, ¶ 14, 130 N.M. 67, 17 P.3d 440 ("In causing one to lose the benefits of a contract, the tort-feasor must act either with an improper motive or by use of improper means."). Although alienation-of-affections claims sometimes parrot the word "malicious" to allege the defendant's motives, *e.g.*, **[RP 5–9, at 3]**, it is unclear whether simply desiring a plaintiff's spouse's companionship is sufficiently "malicious." Is the law really to presume that falling in love with someone who is in an unhappy marriage is independently wrong? In this case, as in many others, there is no allegation that Defendant acted out of a desire *to harm the Plaintiff*, or even that Defendant used any independently improper means to do so. The tort, then, serves no valid purpose in a modern legal framework.

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highlights that the outer bounds of this tort can be hard to police. That is yet another reason to abandon the tort.

III. Plaintiff Ignores His Own Case, Which Is All The Evidence of Abuse This Court Needs

As Intervenor explained in her Brief in Chief, the tort of alienation of affections is one that permits an ill-willed plaintiff to engage in both legally sanctioned extortion and harassing and abusive litigation, perhaps as part of a contentious divorce proceeding. *E.g.*, **[BIC 1]**. In response to this, Plaintiff contends that Intervenor "offers no evidence of misuse of the tort in New Mexico." **[AB 2]** As a preliminary matter, this does not make sense: As explained above, part of the problem with the tort of alienation of affections is that it allows for *confidential*, legally sanctioned extortion. *See supra* pp.7–8. So Intervenor and this Court could not know whether that is happening.

But more fundamentally, this very case exhibits the kind of abuse that ought to concern this Court. Plaintiff has used New Mexico's courts to bring an action that is criminalized in the state where every relevant event took place, including the marriage and divorce at issue here, *see* C.R.S. § 13-20-205, and he has used this litigation as no more than a cudgel to settle his divorce action and harass his ex-wife and her friends.

Plaintiff and Intervenor got married in Colorado, lived together in Colorado while married, and now both live separately in Colorado after

their divorce. Everything relevant to this case is alleged to have happened in Colorado—there is no allegation that Intervenor and Defendant ever saw each other anywhere else. In Colorado, merely sending a demand letter threatening an alienation-of-affections action *is a crime*. C.R.S. § 13-20-205. And yet, because Defendant's domicile in Taos unquestionably allows New Mexico to exercise general personal jurisdiction over him, the tort of alienation of affections in New Mexico has, in Plaintiff's incorrect view, given him the power to use the judicial process to do what his home state would forbid. This case exhibits one of the risks of remaining in the small minority of states maintaining the tort: New Mexico could become a forum for aggrieved ex-spouses to pursue cases their home states forbid.

Further, the purpose and effect of this case are abusive. Plaintiff appears to have brought this case not to vindicate his own legal rights but rather to pry loose a better settlement of his divorce action by threatening invasive discovery. Just a few weeks before this brief was filed, Plaintiff sought again to delay this case because he was supposedly focused on resolving his divorce action, which is currently pending in the Colorado Supreme Court. Throughout the case, Plaintiff sought, 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." *E.g.*, *Butterworth v. Jackson*, No. 23CV38 (Colo. Dist. Ct. Boulder County, 9/11/23) (enforcing subpoena issued in court below). Plaintiff has repeatedly delayed this matter so that he could continue using it to attempt to get a better settlement. And, worst of all, Plaintiff's divorce was caused by his own anger-management issues, not Defendant's actions **[RP 31–43]**, an allegation in support of which Plaintiff offers no more than a self-serving declaration **[RP 58–66, and Ex. A]**. No wonder Plaintiff's brief does not include any reference to the facts or procedural history of this case.

Finally on this point, Plaintiff cites not a single example of the tort being used for any productive purpose in the 102 years it has been recognized in this state. Forty-six years ago, the Court of Appeals declared that

> To us the action diminishes human dignity. It inflicts pain and humiliation upon the innocent, monetary damages are

> either inadequate or punitive, and the action does not prevent human misconduct itself. In our judgment, the interests which the action seeks to protect are not protected by its existence, and the harm it engenders far outweighs any reasons for its continuance.

Thompson v. Chapman, 1979-NMCA-041, ¶ 10, 93 N.M. 356, 600 P.2d 302 (quoting *Wyman*, 549 P.2d at 74). After a diligent search, Intervenor has been unable to find a recorded New Mexico decision or judgment on alienation of affections since. The tort of alienation of affections will not be missed if this Court abolishes it.

CONCLUSION

For the foregoing reasons, this Court should abolish the tort of alienation of affections and dismiss this case with prejudice.

Respectfully submitted,

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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 to the following counsel of record this 23rd day of May 2025:

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