

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MARINA AVILA

Plaintiff/Respondent,

vs.

S-1-SC-40992
[Ct. Appeal No. A-1-CA-41227]

BUTT THORNTON & BAEHR, P.C. and
GREYHOUND LINES, INC.,

Defendants/Petitioners.

On Certiorari before the New Mexico Supreme Court

ANSWER BRIEF

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I. Introduction

In this certiorari proceeding, the New Mexico Supreme Court is ultimately presented with a simple legal question. Is the law firm of Butt Thornton & Baehr entitled to “immunity” under existing New Mexico law?

According to the decision below by the Court of Appeals, the answer is clearly “no.”

Would the New Mexico Supreme Court create attorney immunity for the Butt Thornton law firm out of whole cloth? How would the court justify creation of attorney immunity to the public, particularly under the facts presented here? Where Butt Thornton attorneys allegedly “coached, pressured, and intimidated” an employee into perjuring herself in court regarding missing videotape subpoenaed by federal public defenders?

By any measure, this court should proceed carefully and cautiously before giving immunity to such alleged conduct, because it will send a perception to the public that this court is immunizing, condoning, or supporting, questionable conduct by attorneys.

Instead, this court should uphold accountability and the professional and ethical expectations for attorneys licensed in the State of New Mexico, or its credibility may start to falter in the eyes of the public.

II. The decision below by the Court of Appeals is legally and factually sound. It should not be disturbed.

This is a wrongful termination case brought by a former manager of Greyhound against her former employer, Greyhound, as well as its outside counsel, a large New Mexico law firm known as Butt Thornton & Baehr, PC. (hereinafter, “Butt Thornton.”)

In addition to claims against her former employer, Greyhound, plaintiff’s underlying complaint also names the Butt Thornton law firm as a defendant to three causes of action: retaliatory discharge in violation of public policy, intentional interference with contractual relationship, and intentional with prospective contractual relationship, all intentional torts.

As alleged in the underlying complaint, plaintiff met alone with attorneys of Butt Thorton, twice, at their direction, where the attorneys “attempted to coach, pressure and intimidate Plaintiff, a Greyhound employee, into perjuring herself in court” regarding missing Greyhound video surveillance from the Albuquerque bus terminal. The missing video had been subpoenaed by public defenders and is often important to the defense of individuals being charged with crimes and facing significant, decades-long, prison sentences.

As further alleged in the underlying complaint, the Butt Thorton attorneys are alleged to have been involved in plaintiff's termination. Plaintiff was terminated within a month of her testimony in court about the missing Greyhound video; testimony that had been unfavorable to Greyhound and its video retention policies and procedures. As acknowledged by the Court of Appeals decision below, plaintiff's underlying testimony regarding the missing video had been found "credible" by that judge. Slip op. ¶ 36.

On the issue of immunity for attorneys, the Court of Appeals below held that no such immunity exists in this state, stating, "immunity [for attorneys] is not presently supported by New Mexico jurisprudence." Slip. op. ¶ 1.

Following the Court of Appeal's decision, which was overall favorable to plaintiff, this court granted certiorari on whether the law firm of Butt Thornton and its attorneys are "immune" from the consequences of their alleged tortious and intentional conduct.

A. The Court of Appeals decision held that there is no attorney immunity under existing New Mexico law.

As explained by the COA decision below, the district court adopted two separate immunities to immunize the alleged conduct by the Butt Thornton attorneys: intracorporate conspiracy immunity, which dismissed plaintiff's conspiracy claim, and agency immunity, which dismissed plaintiff's intentional interference with contractual relationship and prospective contractual relationship claims. Slip op. ¶ 9 – 10.

In doing so, the district court relied heavily on *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67 and *Deflon v. Sawyers*, 2006-NMSC-025, 139 N.M. 637. *Id.*

The Court of Appeals reversed the district court decision finding immunity for the Butt Thornton law firm and attorneys, holding that such immunity does not exist under New Mexico law. Slip. op. ¶ 1.

B. Ettenson, which provides for qualified immunity for corporate officers under some conditions, is “insufficiently analogous” because attorneys are not the same as corporate officers.

As explained by the COA decision below:

Given this case involves retained attorneys and not corporate officers acting as agents of the corporation for which they work, *Ettenson*—as Plaintiff centrally contends—is not on point for our inquiry. To reiterate, the question raised herein, and which the district court took up, is whether nonemployee attorneys are protected agents of their clients in an analogous fashion to corporate officers. We disagree with the answer to this question given by the district court, and conclude *Ettenson* does not stand for that proposition and that attorneys—being neither officers nor employees of the corporation they represent—are insufficiently analogous to those individuals whom *Ettenson* determined were protected by qualified immunity.

Slip op. ¶ 12.

The COA held that extending qualified immunity from corporate officers to attorneys would be inappropriate because attorneys are “insufficiently analogous” to corporate officers. Slip op. ¶ 12.

In other words, the immunity in *Ettenson* and *Deflon* is essentially a corporate-based immunity for corporate officers under corporate law principles, and extending such immunity to attorneys would be inappropriate.

Afterall, corporate officers and attorneys are very different animals. Corporations are a legal fiction intended to limit liability in business transactions. Corporate officers operate at the direction and behest of a board of directors.

On the other hand, attorneys have a completely separate and distinct licensing and regulatory structure. This separate attorneys from a corporate structure. Attorneys are held to higher ethical and competency standards, fiduciary standards, which corporations are not held to. This is true whether an attorney is employed by a corporation or retained as outside counsel for a corporation.

III. The law necessary to decide this case already exists.

The case of *Salazar v. Hassall et al.*, Civ. No. 04-404 JH/WDS, 2006 WL 8431508 (N.M.D. 2006), decided under New Mexico law, is an employment and wrongful termination case factually similar to this case. In *Salazar*, the plaintiff sued an attorney alleged to have been involved in a wrongful termination. The attorney filed a motion to dismiss, which the court denied, holding that there is no “automatic shield” for the “intentional acts” of a lawyer. Here, as in *Salazar*, plaintiff has pled “intentional acts” involving lawyers allegedly involved in a wrongful termination.

In *Shovelin v. Cent. N.M. Elec. Coop.*, 1993-NMSC-015, ¶ 24, 115 N.M,

293, this court cited testifying truthfully in court, or refusing to commit perjury in court, as protected activities sufficient on which to base a wrongful termination claim. Here, these are the same grounds on which plaintiff seeks her protection and remedies for her own termination.

Lastly, in *White v. American Airlines, Inc.*, 915 F.2d 1414, 1419-1424 (10th Circuit 1990), the Tenth Circuit held that a refusal to commit perjury was a protected activity sufficient on which to base a wrongful discharge or wrongful termination claim. *White* dealt with an outside counsel, just like Butt Thorton is to Greyhound. Although not decided under New Mexico law, the *White* decision stands for the proposition that telling the truth in court is vital. Indeed, our whole justice system is based on that foundation. Why would this court immunize conduct that goes against that bedrock legal principle?

This court should follow this existing law, out of principles of stare decisis, rather than create contradictory and ad hoc law under questionable circumstances.

IV. If the NMSC creates attorney immunity, it should be qualified and pled as an affirmative defense.

If this Court decides that some form of immunity for attorneys is appropriate, under any theory, the immunity should be qualified and pled and proven as an affirmative defense, for at least three reasons.

First, because it would be inappropriate to apply the privilege where it would be inappropriate to do so. Second, because that would be consistent with the corporate-based immunity for corporate officers set forth in *Ettenson* and *Deflon*. Third, any attorney “immunity” should be qualified, and not absolute, to ensure public protection against inappropriate application of the immunity.

The *Deflon* court found the applicability of qualified corporate immunity to be a factual question, “We do not decide whether Plaintiff has met her burden to show that Defendants were acting outside the scope of their authority. This is in part a *question of fact* which we leave for the district court to determine.” *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 9, Fn. 1.

In *Ettenson*, the court stated, “We also observe that the question of privilege is often fact specific; so much so that we cannot pass judgment in this opinion on

whether [defendant's] interference was privileged.” *Id.* at ¶ 21.

Ettenson further noted that qualified immunity should be plead and proven as with any affirmative defense, “We note, however, that it is [defendant's] burden to plead and prove privilege as an affirmative defense.” *Id.*

Here, any attorney “immunity” created by this court should be qualified, in order to assess its applicability, and because that would be the responsible thing to do. Here, Butt Thornton was improperly and immediately dismissed from this case. No discovery was obtained from it, and there is no factual record from which to assess the privilege.

V. Policy considerations and the problems with implementing attorney immunity.

According to Butt Thorton, the creation of immunity for attorneys is vital for zealous representation by attorneys of their clients. Have attorneys in the this state not been zealously representing their clients up to now? Is lack of zealous representation an acknowledged problem on which to base attorney immunity, according to this court? Where is the evidence for that?

Moreover, the creation of attorney immunity under the facts of this case

smacks of favoritism by the New Mexico Supreme Court, among other things. If immunity for attorneys is so important, why is the court only now considering implementing it for one of the largest law firms in the state? Is that appropriate? Why now?

Lastly, this court should be concerned with *increasing* accountability for attorneys and those professionals that form our justice system, not decreasing it.¹

VI. There are exceptions to most doctrines of qualified immunity and those exceptions apply here.

Plaintiff has been diligent in the prosecution of her case against Butt Thornton.

As noted by the Court of Appeals, plaintiff sought leave to amend her complaint early on in the litigation. The proposed amended complaint is part of the record. “Plaintiff moved to amend her complaint against BTB, which, following briefing and a hearing, the district court declined to permit.” Slip op. ¶ 5 Plaintiff sought leave to amend to amend her complaint to plead generally-

¹ In fact, in a motion titled, “Motion for Judicial Notice of the disciplinary history of attorney Phillip W. Cheves of defendant/appellee Butt Thornton & Baehr, P.C.,” filed on May 24, 2024, plaintiff sought to inform the appellate court of the existing disciplinary history of one of the attorneys that met alone with plaintiff, Phillip W. Cheves. The motion was denied. Nonetheless, the denied motion continues to underscore the pending significance of this court’s decision, because attorneys are expected to follow the law, and bad behavior should not be excused, certainly not by the New Mexico Supreme Court, the highest court in the state.

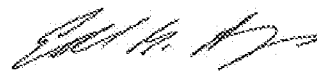
accepted exceptions to immunity doctrines, including the “independent personal stake exception” to intercorporate immunity, acknowledged by many courts, as well as a general crime-fraud exception. [Record at 1 RP 187-201]

Furthermore, plaintiff sought interlocutory review of the district court’s grant of immunity to Butt Thornton, which was supported by the district court itself, but interlocutory review was denied without explanation. See, docket No. A-1-CA-38920, filed April 24, 2020.

Even assuming this Court believes some form of qualified immunity is appropriate for attorneys, the privilege is qualified, and most jurisdictions also have exceptions. Those exceptions are pled here and, if this court is to be fair, plaintiff should be permitted her day in court against the Butt Thornton law firm.

DATED: January 28, 2026

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Statement of Compliance

Pursuant to Rule 12-502(E), this brief complies with the type-volume limitation set forth in Rule 12-502(D), because it is prepared in a proportionally-spaced typeface, 14-point Times New Roman, and the body of the brief contains 1,878 words, according to LibreOffice version 25.8.4.2.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was electronically filed through the New Mexico Odyssey File & Serve system on January 28, 2026, which caused a copy to be served on counsel of record and any other service contacts.

/s/ Edward M. Anaya
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