



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MARINA AVILA f/k/a MARIE
AVILA-GOMEZ,

Plaintiff-Respondent,

v.

BUTT THORNTON & BAEHR, P.C.,

No. S-1-SC-40992

Defendant-Petitioner,

and

GREYHOUND LINES, INC.,

Defendant.

On Writ of Certiorari to the Court of Appeals of New Mexico
(Ct. App. No. A-1-CA-41227)

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ORAL ARGUMENT REQUESTED

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Introduction

New Mexico law affords the officers of a corporation, as its agents, a qualified privilege that protects them from liability on claims of retaliatory discharge, interference with contractual relations, or conspiracy brought by an individual who was discharged by the corporation, provided the officer acted within the scope of their employment in the corporation's best interest. New Mexico law also recognizes that an attorney representing a corporation is an agent of the corporate client. This appeal asks whether outside counsel for a corporation are entitled to a qualified privilege the same as, or similar to, that applicable to officers of the corporation.

Respondent Marina Avila brought this action against her former employer, Greyhound Lines, Inc., ("Greyhound") and against Petitioner Butt, Thornton & Baehr, P.C. ("BTB") as Greyhound's retained outside counsel, asserting claims against BTB for conspiracy for retaliatory discharge and intentional interference with contractual or prospective contractual relations. The district court, applying the principles underlying the qualified privilege, dismissed the claims against BTB.

The Court of Appeals reversed in a divided opinion. The majority opinion categorically rejects any form of privilege that would apply to BTB as Greyhound's outside counsel. This Court granted certiorari to determine whether a qualified privilege should bar Avila's conspiracy and contractual interference

claims against BTB.

The Court should recognize and apply the privilege. Its foundations already are present in New Mexico law. It is supported by the substantial weight of authority from other jurisdictions, against which the Court of Appeals decision stands as an outlier. Public policy compellingly supports recognition of the privilege. Accordingly, this Court should reverse the Court of Appeals and uphold the dismissal of Avila's claims against BTB.

Summary of Facts and Proceedings

In this appeal from the grant of a motion to dismiss under Rule 1-012(B)(6) NMRA, BTB's "recitation of facts is based upon the well-pleaded allegations of" Avila's complaint. *Ballard v. Chavez*, 1994-NMSC-007, ¶ 2, 117 N.M. 1.

Avila was employed by Greyhound as manager of its bus terminal in downtown Albuquerque. (1 RP 2 ¶ 11.) The bus terminal contained a number of surveillance cameras that recorded activity – including, at times, criminal activity – in the terminal. (*Id.* ¶ 14.) Avila's job responsibilities included providing copies of surveillance videos when they were requested by law enforcement or by defense counsel. (*Id.* ¶ 15.) Avila failed to preserve certain surveillance videos, purportedly at the direction of a Greyhound security operations manager. (*Id.* at 3 ¶¶ 16, 17.)

Avila was subpoenaed to testify in two judicial proceedings concerning the

loss of the video evidence. (*Id.* ¶ 19.)¹ BTB served as Greyhound’s local counsel. (*Id.* ¶ 18.) Two attorneys from BTB met with Avila to prepare her for her court testimony. (*Id.* ¶¶ 21-23.) The BTB attorneys allegedly “attempted to coach, pressure, and intimidate [Avila] into perjuring herself about” the instructions she received from the Greyhound security manager. (*Id.* ¶ 24.)² Nevertheless, Avila “testified truthfully.” (*Id.* ¶ 26.) Avila was terminated by Greyhound “[l]ess than a month after her court testimony.” (*Id.* ¶ 27.)

¹ The hearings were conducted in two federal criminal prosecutions, *United States v. Ramos-Burciaga* and *United States v. Fernandez* for the purpose of determining whether the failure to retain the video violated the defendants’ due process rights. (See 1 RP 50-64 (memorandum opinions relating to the hearings in each case); see also *id.* at 65-68 (partial transcript of Avila’s testimony in *Fernandez*).) Although the district court based its ruling solely on the contents of Avila’s complaint (see 1 RP 178 ¶ 8), this Court may take judicial notice of these records, the “accuracy [of which] cannot reasonably be questioned.” Rule 11-201(B)(2) NMRA; see *Cartwright v. Pub. Serv. Co. of N.M.*, 1961-NMSC-074, ¶ 7, 68 N.M. 418 (taking judicial notice of “the pleadings, findings of fact, conclusions of law, and the judgment” in a prior case). The federal court in *Ramos-Burciaga* found that Avila did not preserve the videos because she misunderstood the instructions of the security operations manager. (1 RP 51.)

² This allegation need not be accepted even on a motion under Rule 1-012(B)(6). In the federal court proceedings regarding the loss of the Greyhound video, which may be judicially noticed, see *supra* note 1, Avila testified under oath that the BTB attorneys who prepared her for her federal court testimony told her to “[j]ust tell the truth” (1 RP 68), directly contradicting her complaint. “[F]actual allegations that contradict a properly considered document are not well-pleaded facts that the court must accept as true.” *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013) (alteration omitted). Furthermore, Avila’s counsel later conceded at a hearing in this case that the plaintiff had no evidence that Avila was told to commit perjury. (Tr. (5/4/23) 10:14:00-10:14:39.)

Avila brought a claim against both Greyhound and BTB, alleging that the two engaged in a civil conspiracy for retaliatory discharge and that Greyhound terminated Avila “[a]s a result of [her] refusal to commit perjury” and “possibly on the recommendation of its attorneys.” (*Id.* at 4 ¶ 34, 5 ¶ 36.) Additionally, Avila brought claims against BTB for intentional interference with her contractual or prospective contractual employment relationship with Greyhound. (*Id.* at 6-7 ¶¶ 50-63.) She also brought claims against Greyhound for retaliatory discharge (*id.* at 4 ¶¶ 28-32) and for breaching implied contracts “to discharge only for cause” (*id.* at 5 ¶ 39) and “to follow certain [progressive discipline] procedures” before firing her (*id.* ¶ 45).

Avila explicitly alleged that BTB “[a]t all relevant times . . . acted as a[n] . . . agent . . . of [Greyhound] and acted within the course and scope of said agency.” (*Id.* at 2 ¶ 7.) BTB moved to dismiss Avila’s claims against it on the ground that BTB’s “only alleged role . . . was to act as attorneys for [Greyhound]” and Avila’s claims for civil conspiracy and tortious interference with contractual or prospective contractual relations therefore were “barred under the agent’s immunity rule.” (1 RP 28.) BTB argued that attorneys acting as agents of their client are not subject to direct liability to a third party allegedly injured by the client’s actions. (*Id.* at 31-32.) BTB also argued that attorneys, as agents of their client, together with the client comprise a single actor and are thus legally incapable of engaging in a

conspiracy. (*Id.* at 32-37.) BTB cited supportive authority from a number of jurisdictions, including *Ettenson v. Burke*, 2001-NMCA-003, ¶ 20, 130 N.M. 67, (*see* 1 RP 35, 114) which holds that a corporation’s officers, as agents, are entitled to a qualified privilege against suit for interference with or conspiracy to interfere with the corporation’s contracts, provided they acted “in good faith for the best interests of the corporation.”

The district court granted BTB’s motion and dismissed Avila’s claims against BTB without prejudice. The court held that the so-called intracorporate conspiracy doctrine barred Avila’s civil conspiracy claim (*id.* at 179-80), while a rule the court referred to as agent immunity (which the court suggested might broadly embrace the intracorporate conspiracy doctrine (*see id.* at 181 n.5)) covered Avila’s claims for contractual interference as well as the conspiracy claim (*id.* at 180-86).³

Avila moved for leave to amend her complaint “to add additional allegations” aimed at overcoming the qualified privilege recognized in *Ettenson*. (*Id.* at 188.) BTB argued in opposition that the proposed amended complaint “does not cure the failures of the prior [c]omplaint.” (*Id.* at 207.) The trial court denied

³ The court characterized the intracorporate conspiracy doctrine as a general rule, applicable to civil conspiracies, that a corporation cannot conspire with its agents or employees. (*See* 1 RP 179.) It viewed *Ettenson*’s qualified privilege as expressing the agent immunity rule as that rule is embodied in New Mexico law. (*Id.* at 180, 182-83.)

the motion to amend. (*Id.* at 239.)

Following the dismissal of BTB, Avila's case continued in the district court on her claims against Greyhound. The court ultimately granted summary judgment in Greyhound's favor on Avila's claims of retaliatory discharge, civil conspiracy, and implied contract. (*See* 3 RP 672-4 RP 821 (motions); 6 RP 1420 (order).)

Avila appealed from the resulting final judgment. (6 RP 1537.)

In a divided opinion, the Court of Appeals reversed the district court in part. *Avila v. Butt Thornton & Baehr, P.C.*, No. A-1-CA-41227 (N.M. Ct. App. June 10, 2025) ("slip op."). With respect to Greyhound, the court unanimously upheld the dismissal of Avila's retaliatory discharge claim on the ground that there was no evidence supporting Avila's contention that Greyhound fired her because she testified truthfully or refused to perjure herself in her federal court testimony. (*Id.* ¶ 34.) But the court held that a genuine issue existed as to whether Avila's employment with Greyhound was subject to an implied contract requiring progressive discipline before termination, reversing the summary judgment on that claim. (*Id.* ¶ 31.)⁴

With respect to BTB the court split, with the majority reversing the dismissal of Avila's claims. While acknowledging that *Ettenson* recognizes a qualified

⁴ Avila did not brief and the Court of Appeals did not consider the claim of an implied contract to discharge only for cause. (*See id.* ¶ 24.)

immunity for corporate officers applicable to conspiracy and contractual interference claims like those Avila asserted against BTB (*id.* ¶¶ 10-11), the majority declined to extend that result to “nonemployee attorneys” whom it considered “insufficiently analogous to those individuals whom *Ettenson* [protects]” (*id.* ¶ 12). The majority was unwilling to accept the agency relationship between attorney and client that in *Ettenson* supported “an immunity expressly applicable to only corporate officers” as sufficient “to establish an immunity for attorneys.” (*Id.* ¶ 14 (citation omitted).) Instead, the majority concluded that “the agency relationship between attorneys and their clients is not the equivalent of, even if it is akin to, the relationship of an employee-officer to their corporation.” (*Id.* ¶ 15.)

The majority acknowledged that case law from other courts has recognized a qualified privilege for attorneys acting as agents of their clients. (*Id.* ¶ 16.) But it perceived an “absence of uniformity” in these cases that “does not well lend itself to the creation of such protection in New Mexico.” (*Id.*)

The majority evidently saw the qualified privilege afforded to corporate officers as serving only a narrow purpose that was not furthered by applying the privilege to outside counsel. “Attorneys, even when acting as agents for corporate clients, do not possess any of the powers or duties associated with managing the daily operations of a corporation,” the majority wrote, “and we see no basis to

affirm the district court’s conclusion that an immunity created to protect such activities applies to attorneys.” (*Id.* ¶ 17 (internal quotation marks and citation omitted) (alteration omitted).)

Finally, the majority determined that its flat-out refusal to recognize any form of immunity from suit for attorneys – “even in instances in which they act in good faith and in the best interest of their clients” – was “consistent with the circumstance [of non-immunity from suit] that has been previously in place in New Mexico jurisprudence.” (*Id.* ¶ 18.)

The dissenting opinion explains point-by-point why the reasons given by the majority for its holding do not support categorical rejection of a qualified privilege for attorneys. (*Id.* ¶¶ 44-53 (Ives, J., dissenting in part).) First, while the majority “rais[ed] a question” regarding the applicability of agency principles in the present context, it “d[id] not go on to reach the conclusion that agency law principles are inapplicable here.” (*Id.* ¶ 46.) Saying, as the majority did, that attorney-client relationships are akin, but not equivalent, to officer-corporation relationships did not establish “a legally significant distinction” between the two to justify a result different from *Ettenson*. (*Id.* ¶ 47.) Furthermore, the majority did not criticize the cases from other jurisdictions recognizing a qualified privilege or qualified immunity for attorneys as being “poorly reasoned or . . . incompatible with New Mexico law” and thus failed to explain why the district court erred in relying on

those cases. (*Id.* ¶ 48.) Lack of uniformity among the out-of-jurisdiction decisions was not a reason to reject them; “variety among other jurisdictions is actually helpful to our courts” because “we have an opportunity to learn from the ideas and experiences” of courts elsewhere. (*Id.* ¶ 50.)

Finally, the dissent observed that the majority’s assertion that its holding was consistent with existing New Mexico jurisprudence “would only be accurate if New Mexico already had precedent rejecting lawyer qualified immunity.” (*Id.* ¶ 52.) But on this first-impression issue “no controlling precedent existed until the Court [of Appeals] issued its opinion in this case.” (*Id.*) By treating the absence of precedent as an expression of prevailing law, the majority did not “merely maintain[] our state’s established jurisprudence” (*id.* (footnote omitted)) but, “[i]nstead, . . . created new jurisprudence” without “provid[ing] a rationale that justifies rejecting” the result reached by the district court (*id.* ¶ 53).

This Court granted BTB’s petition for writ of certiorari to determine whether the qualified privilege applicable to corporate officers under *Ettenson* should apply to a corporation’s outside legal counsel acting to protect the corporation’s legal interests and, if so, to determine the appropriate parameters of the qualified privilege.

Argument

BTB, AS GREYHOUND’S OUTSIDE COUNSEL, IS ENTITLED TO A QUALIFIED PRIVILEGE AGAINST AVILA’S CLAIMS OF TORTIOUS CONTRACTUAL INTERFERENCE AND CIVIL CONSPIRACY

The Court of Appeals dissent validly criticizes the majority for failing to provide “a rationale that supports its categorical rejection of qualified immunity for lawyers.” (Slip op. ¶ 44 (Ives, J., dissenting in part).) The majority does not materially distinguish the agency relationship that exists between a corporation and its officers from the agency that exists between outside counsel and a corporate client. It does not undertake to analyze the numerous judicial decisions from other jurisdictions that afford some form of qualified privilege or immunity to outside corporate counsel, or to examine the public policy basis for those decisions. It treats this issue of first impression as if it were already a matter of settled law. The Court of Appeals decision, if allowed to stand, will profoundly impact the practice of law in this state by deterring lawyers from furnishing frank and uninhibited advice to clients. In the exercise of its “exclusive right to regulate the practice of law” in New Mexico, *United States v. Martinez*, 1984-NMSC-072, ¶ 2, 101 N.M. 423, this Court should recognize a qualified privilege for outside legal counsel retained by a corporation, which would apply to counsel acting within the scope of their responsibilities in the best interest of the corporation. Accordingly, the Court should uphold the district court’s dismissal of the claims against BTB.

The district court granted BTB’s motion to dismiss pursuant to Rule 1-012(B)(6) NMRA. A motion under that rule “tests the legal sufficiency of the complaint,” *Salas v. Guadalupe Credit Union*, 2025-NMSC-006, ¶ 12, 563 P.3d 873, and should be granted if the plaintiff is “not entitled to recover under any theory of the facts alleged in their complaint,” *Callahan v. N.M. Fed’n of Teachers – TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201. As applicable here, the issue is whether the allegations of Avila’s complaint state cognizable claims against BTB, or whether Avila’s claims are barred by a qualified privilege. This Court reviews a dismissal under Rule 1-012(B)(6) de novo. *Salas*, 2025-NMSC-006, ¶ 12.⁵

A. Under New Mexico Law, the Officers of a Corporation, as Its Agents, May Assert a Qualified Privilege Against Claims by Third Parties for Tortious Interference with the Corporation’s Contracts or for Engaging in a Civil Conspiracy with the Corporation.

It is black-letter law that “[c]orporations of every character and kind must necessarily act through and by means of agents.” *Atchison, T. & S.F. R.R. Co. v. Martin*, 1893-NMSC-015, ¶ 5, 7 N.M. 158. Thus, “[a] corporation can act only through its officers and employees” acting “within the scope . . . of [their] employment.” UJI 13-409 NMRA. A corporation acting through its agent may cause harm to a third party, as by breach of a contract or tortious conduct, that

⁵ The issue on appeal was preserved by BTB’s motion to dismiss and the district court’s ruling granting the motion. *See supra* pp. 4-5.

results in claims against the corporation and the agent. *Ettenson* remains the leading, but not the only, New Mexico authority touching on the principles underlying a qualified privilege for corporate agents against claims by third parties alleging injury from a corporation's actions. *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67.

Well before *Ettenson*, this Court touched on themes in a corporate employment case that would later emerge as aspects of the qualified privilege. In *Bourgeois v. Horizon Healthcare Corp.*, 1994-NMSC-038, 117 N.M. 434, a former employee brought suit against a corporation that owned and operated a nursing home, alleging that she had been wrongfully discharged in retaliation for raising concerns about the facility's practices. The plaintiff also sued the administrator of the nursing home and a district director of the corporation, asserting that the corporate officers also were jointly and severally liable for retaliatory discharge. The trial court granted a directed verdict on the claim against the officers, and this Court affirmed. The Court ascribed significance to the fact that the officers were acting as agents, noting that only the corporation could discharge the plaintiff. *Id.* ¶ 11.

A corporation can act only through its officers and employees, and any act or omission of an officer or an employee of a corporation, within the scope or course of his or her employment, is an act or omission of the corporation. It is undisputed that the decision to hire and fire personnel for [the owner/operator] in this action rested with [the corporate officers]. Yet, the discharge of [plaintiff] was within the

scope and duties of [their] employment. Thus, it is difficult to see how a retaliatory discharge cause of action would apply to the individual defendants acting in the course and scope of their employment.

Id. (citation omitted). But the Court “[l]eft open the question whether a retaliatory discharge claim lies against a supervisor, agent, or coemployee if the firing was an intentional act done solely for the supervisor, agent, or coemployee’s own interest and therefore outside the scope of employment.” *Id.* ¶ 12.

In *Ettenson*, a discharged employee sued both his employer corporation and the corporation’s CEO, alleging that the CEO had conspired with the corporation to bring about the breach of an implied contract between the corporation and the employee. The jury returned a verdict against the CEO on a claim of civil conspiracy. The Court of Appeals held that tortious interference with contractual relations could provide the basis for a conspiracy claim, *see id.* ¶ 1, but it reversed the verdict because the jury instructions on tortious interference “omit[ted] the important element of . . . whether [the CEO] had a qualified privilege to interfere,” *id.* ¶ 26. Privileged conduct would not constitute a wrongful act causing harm, which is necessary to give rise to a civil conspiracy claim. *See id.* ¶ 12. The court adopted “[t]he prevailing view . . . that a corporate officer is privileged to interfere with his corporation’s contracts,” provided the officer acts “in good faith and in the best interests of the corporation, as opposed to his own private interests.” *Id.* ¶ 17. Consequently, the court held that, while the CEO “can be sued for tortious

interference with [the corporation's] contractual obligations, or a conspiracy for that purpose," such a suit was "subject to [the CEO's] claim of qualified privilege." *Id.* ¶ 20; *see also id.* ¶ 21 (characterizing privilege as "an affirmative defense").

The *Ettenson* court emphasized that the privilege it recognized "is not absolute, but qualified." *Id.* ¶ 17. The privilege is overcome if a corporate officer acts "to satisfy personal feelings . . . or to serve his own private interest with no benefit to the corporation." *Id.* ¶ 18 (internal quotation marks & citation omitted). Several years after *Ettenson*, the Court of Appeals again addressed a claim of tortious interference by a corporate officer with the corporation's contracts. *Bogle v. Summit Investment Co.*, 2005-NMCA-024, 137 N.M. 80. The court there held that the general manager of a limited liability company was protected by the qualified privilege, and that the self-interest exception did not apply, where there was no showing that the manager caused the company to breach a commission agreement with the plaintiff for the manager's own benefit, even though the manager as well as the company benefited financially from the breach. *Id.* ¶¶ 18-21.

This Court expressly adopted *Ettenson*'s qualified privilege approach in *Deflon v. Sawyers*, 2006-NMSC-025, 139 N.M. 637. *See id.* ¶ 9. As the Court explained:

The idea behind the qualified immunity theory is that an officer acting on behalf of a corporation should have the authority to breach a

corporation's contract, leaving the corporation to answer for the authorized breach in a breach of contract action. An officer acting outside the scope of his or her employment and in his or her own private interest has no authority to breach the corporation's contract, and that officer should not be able to hide behind a corporate shield for unauthorized conduct. . . . In New Mexico, corporate officers may be liable for interfering with corporate contracts if such interference is in bad faith and against the best interests of the corporation.

Id. ¶ 9.

To be sure, “if corporate directors engage in tortious conduct, even though acting within the scope of their corporate duties, they can be personally liable.”

Stinson v. Berry, 1997-NMCA-076, ¶ 18, 123 N.M. 482. For instance, a corporate officer who personally makes fraudulent representations in furtherance of a fraud perpetrated by the corporation has no recourse to a qualified privilege. *See Kaveny v. MDA Enters., Inc.*, 2005-NMCA-118, 138 N.M. 432. But where the claim is that a corporate officer is personally liable for the wrongful or retaliatory discharge of a corporate employee by the corporation or for tortious interference with a corporate contract, either directly or as a co-conspirator with the corporation, it is clear from *Bourgeois*, *Ettenson*, *Bogle*, and *Deflon* that New Mexico law recognizes a qualified privilege that protects the officer from individual liability if the conditions of the privilege are met.⁶

⁶ As *Deflon* itself illustrates, *see supra* p. 14, courts discussing the qualified privilege sometimes speak in terms of immunity. Privilege is the technically correct term. “Immunities . . . differ from privileges. Immunities tend to shield defendants because of their legal status, while privileges tend to shield defendants

B. New Mexico Law Should Extend the Qualified Privilege Available to Corporate Officers to Encompass Outside Counsel Retained by a Corporation.

The argument for extending the *Ettenson/Deflon* qualified agency privilege from corporate officers to a corporation's outside counsel is straightforward: a corporation's attorneys, like its officers, are agents of the corporation and should be entitled to the same liability protections when acting within the scope of their agency relationship.

The Court of Appeals majority refused to equate an officer-corporation relationship with an attorney-client relationship but, as the dissent points out, the majority failed to provide any basis for materially distinguishing one agency relationship from the other. *Supra* pp. 7-8. In fact, there is none. In many instances, courts in other jurisdictions have reached this conclusion and recognized a qualified privilege or immunity as being appropriate, and indeed necessary, in actions asserting tortious interference, retaliatory discharge, conspiracy, and other claims against outside counsel retained by a corporation. The same result should follow here.

- 1. There is no material distinction between corporate officers acting as agents and outside counsel acting as agents of a corporation.**

because their actions were justified in the particular case.” Dan B. Dobbs, *The Law of Torts* § 225 (2000), at 576.

This Court already has recognized that, in an attorney-client relationship, “[t]he clients are principals, the attorney is an agent.” *Marchman v. NCNB Tex. Nat’l Bank*, 1995-NMSC-041, ¶ 56, 120 N.M. 74 (internal quotation marks & citation omitted); *see also id.* (“Plaintiffs’ attorney is an agent of the Plaintiffs.”). This commonplace understanding is beyond reasonable dispute. *E.g., Comstock v. Mitchell*, 1990-NMSC-054, ¶ 2, 110 N.M. 131 (“[T]here is no dispute that [attorney] was [client’s] agent.”). And it is broadly accepted in the law. *See, e.g.,* 1 Geoffrey C. Hazard, Jr., et al., *The Law of Lawyering* § 18.03 at 18-11& 18-13 (“A corporate . . . entity’s officers and employees (as well as its lawyers . . .) are all co-agents of the corporate principal. . . . [T]he officers are co-agents along with the lawyers in terms of their relationship with the entity.” (footnote omitted) (emphasis omitted)).

In rejecting a qualified privilege the Court of Appeals majority viewed a corporation’s attorneys as “insufficiently analogous to” corporate officers and the attorney-client relationship as “not the equivalent of” an officer-corporation relationship, *supra* p. 7, without offering any persuasive reason for differentiating between them. The closest the majority comes is to rationalize that the attorneys “do not possess any of the powers or duties” of corporate management and therefore need not share “an immunity created to protect such activities.” *Supra* pp. 7-8. But this purported distinction makes no real difference, because other

compelling reasons exist to extend a qualified privilege to corporate counsel apart from a desire to protect the managerial prerogatives of corporate officers. *See infra* Point B(3). The Supreme Court in *Marchman* relied on a general definition of “agent” that would apply equally to corporate officers and the corporation’s outside lawyers. *See also Am. Credit Card Tel. Co. v. Nat’l Pay Tel. Corp.*, 504 So. 2d 486, 488 (Fla. Dist. Ct. App. 1987) (“[H]ad [corporation] employed in-house counsel there would have been no question but that such counsel would have been an agent. . . . [W]e hold the same to be true for outside counsel.” (citations omitted)). The law of agency does not distinguish between the two in their roles as corporate agents.

2. Courts in many other jurisdictions recognize that counsel for a corporation, as its agents, are entitled to a qualified privilege or qualified immunity against claims that they tortiously interfered with the corporation’s contract with a third party or conspired with the corporation to injure a third party, provided counsel acted within the scope of their authority in the best interest of their corporate client.

Suits against a corporation’s outside counsel by a third party generally involve two types of claims. First, the claimant may allege that counsel tortiously interfered with the claimant’s contractual or prospective contractual relationship with the corporation. Second, the claimant may allege that counsel conspired with the corporation to interfere with the claimant’s contractual relationship or to commit some other wrong. Avila’s lawsuit is no exception, alleging claims of

contractual interference and conspiracy for retaliatory discharge against BTB.

Supra p. 4.

Courts in multiple jurisdictions have held that a corporation's outside counsel acting in that capacity are entitled to a qualified privilege, or a similar defense, against claims of tortious interference with contractual or prospective contractual relations⁷ and civil conspiracy.⁸

The qualified privilege available to corporate counsel in these types of cases stems from the basic proposition that a corporation can act only through its agents

⁷ *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704 (8th Cir. 1993); *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321 (9th Cir. 1982); *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732 (Haw. 2007); *Storm & Assocs., Ltd. v. Cuculich*, 700 N.E.2d 202 (Ill. App. Ct. 1998); *Boyd Real Estate, Inc. v. Shissler Seed Co.*, 571 N.E.2d 1171 (Ill. App. Ct. 1991); *Schott v. Glover*, 440 N.E.2d 376 (Ill. App. Ct. 1982); *Fraidin v. Weitzman*, 611 A.2d 1046 (Md. Ct. Spec. App. 1992); *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166 (Mo. Ct. App. 1996); *Burger v. Brookhaven Med. Arts Bldg., Inc.*, 516 N.Y.S.2d 705 (N.Y. App. Div. 1987); *Wampler v. Palmerton*, 439 P.2d 601 (Or. 1968); *Unarco Material Handling, Inc. v. Liberato*, 317 S.W.3d 227 (Tenn. Ct. App. 2010).

⁸ *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3d Cir. 2003); *Farese v. Scherer*, 342 F.3d 1223 (11th Cir. 2003); *Heffernan v. Hunter*, 189 F.3d 405 (3d Cir. 1999); *Doherty v. Am. Motors Corp.*, 728 F.2d 334 (6th Cir. 1984); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990); *Patterson v. Powell, Goldstein, Frazer & Murphy, LLP*, 332 B.R. 450 (N.D. Ala. 2005); *Am. Credit Card Tel. Co. v. Nat'l Pay Tel. Corp.*, 504 So. 2d 486 (Fla. Dist. Ct. App. 1987); *Storm & Assocs., Ltd. v. Cuculich*, 700 N.E.2d 202 (Ill. App. Ct. 1998); *Salaymeh v. InterQual, Inc.*, 508 N.E.2d 1155 (Ill. App. Ct. 1987); *Havilah Real Prop. Servs., LLC v. Early*, 88 A.3d 875 (Md. Ct. Spec. App. 2014); *Fraidin v. Weitzman*, 611 A.2d 1046 (Md. Ct. Spec. App. 1992); *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166 (Mo. Ct. App. 1996); *Moss v. Parr Waddoups Brown Gee & Loveless*, 285 P.3d 1157 (Utah 2012).

acting within the scope of their responsibilities. *See supra* p. 11. When a corporation acts through its outside counsel, the corporation and its counsel “for all intents and purposes . . . merge and become a single entity.” *Am. Credit Card Tel. Co.*, 504 So. 2d at 488. A claim of contractual interference does not lie against a corporation’s outside counsel acting within the scope of their agency, because “a party (e.g., a corporation) cannot tortiously interfere with its own contract.” *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.E.3d 654, 675 (Tex. App. 2004); *see also Taylor v. McNichols*, 243 P.3d 642, 660 (Idaho 2010) (“[T]he client-attorney relationship is one of agency, and . . . where an agent is acting within the scope of his representation he shall be treated the same as his principal for purposes of tortious interference with a contract.”).

Thus, where claims of tortious contractual interference are at issue, courts elsewhere have recognized a qualified privilege or similar defense for retained corporate counsel. *See supra* note 7. In *Fraidin*, for instance, the plaintiffs claimed that counsel for the defendant corporations had interfered with a contract between the plaintiffs and their clients for representation in a lawsuit against the corporations. The jury was instructed that

tortious interference with contracts does not occur when a defendant attorney simply gives advice to his client in response to the client’s request or acts on the client’s behalf. . . . [T]he plaintiff must prove . . . that the defendant lawyers acted in advising their client with actual malice. . . . Actual malice means a desire to harm the plaintiffs which is independent of and unrelated to the lawyer’s desire to protect his

client.

611 A.2d at 1078. Upholding a verdict for the defendants on the tortious interference claim, the court held that the instruction “is a proper statement of law.” *Id.* at 1079. *See also Schott*, 440 N.E.2d at 380 (affirming dismissal of contractual interference claim against bank’s outside counsel where complaint contained no allegations “from which actual malice may reasonably be said to exist. . . . Such allegations . . . would necessarily include a desire to harm, which is independent of and unrelated to the attorney’s desire to protect his client.” (citations omitted).)

In *Maness*, the plaintiff claimed to have been fired by the defendant corporation because he supported another employee’s lawsuit against the corporation and refused to cooperate in the corporation’s defense. He brought a retaliatory discharge claim against the corporation and a tortious interference claim against the corporation’s defense counsel. Counsel prevailed at trial. Affirming, the appellate court cited the rule that “an attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain.” 7 F.3d at 709. *See also Burger*, 516 N.Y.S.2d at 707-08 (“Inasmuch as the relationship created between an attorney and his client is that of principal and agent, an attorney is not liable for inducing his

principal to breach a contract with a third person, at least where he is acting on behalf of his principal within the scope of his authority.” (citation omitted)).

Under the same principle that a corporation can act only through agents acting within the scope of their agency, claims that a corporation’s outside counsel conspired in the commission of a wrongful act by the corporation have been rejected because a civil conspiracy requires the participation of “two or more individuals.” *Ettenson*, 2001-NMCA-003, ¶ 12 (internal quotation marks & citation omitted). “Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation.” *Doctors’ Co. v. Superior Court*, 775 P.2d 508, 511 (Cal. 1989) (internal quotation marks & citation omitted) (alteration omitted); *see also Am. Credit Card Tel. Co.*, 504 So. 2d at 488 (“[C]ourts have long held that a corporation cannot agree, combine, or conspire with its officers, employees, or agents.”); *Gen. Refractories Co.*, 337 F.3d at 313 (“Under [the intracorporate conspiracy doctrine], an entity cannot conspire with one who acts as its agent.”). Only when corporate counsel exceed the scope of their agency by acting “as individuals for their individual advantage,” *Doctors’ Co.*, 775 P.2d at 511 (internal quotation marks & citation omitted), rather than in the interest of the corporation, do counsel forfeit the qualified privilege and associated protections afforded by these principles.

Thus, where claims alleging a conspiracy between a corporation's retained counsel and the corporation are at issue, a qualified privilege or similar defense also is broadly recognized. *See supra* note 8. *Fraidin*, for instance, besides involving a claim for tortious interference, also involved a second claim that corporate counsel conspired to interfere with the plaintiff's contract. The court upheld a defense verdict on that claim as well, holding that "there can be no conspiracy where an attorney's advice or advocacy is for the benefit of his client and not for the attorney's sole personal benefit." 611 A.2d at 1080.

The plaintiff in *Doherty* alleged that the corporation that employed him engaged in coercion, fraud, and duress to induce him to enter a false no-contest plea in a criminal matter and that the corporation conspired in this conduct with its outside law firm. The court reversed a verdict against the firm and held that the firm was entitled to judgment as a matter of law, citing the rule that a corporation and its agent constitute a single entity that is legally incapable of conspiring. 728 F.2d at 339-40. The plaintiff argued that the rule "does not apply . . . to outside counsel." *Id.* at 340. The court rejected that argument, noting that it "fails of any support." *Id.*

In *Salaymeh*, the court held that the complaint failed to state a claim of conspiracy between a hospital and its outside law firm to deprive the plaintiff physician of his hospital staff privileges, given "[t]he privilege accorded an

attorney when advising his client.” 508 N.E.2d at 1160. The plaintiff did not plead allegations sufficient to overcome the privilege, which “would necessarily include a desire to harm . . . independent of and unrelated to the attorney’s desire to protect his client.” *Id.*

In *General Refractories*, the plaintiff alleged that a corporation entered into a conspiracy with its outside counsel to abuse process. The court held that “the intracorporate conspiracy doctrine in the context of attorney-client conspiracies” barred that claim, where the complaint did not “contain allegations that the attorney[s] . . . acted outside of their scope of representation.” 337 F.3d at 313-14. Similarly, *Havilah* included a claim that the defendant attorneys conspired with a former client to commit malicious prosecution. The court held that the claim was properly dismissed based on qualified privilege where the complaint did not allege that the attorneys acted “with actual malice, bad intent, or for the attorneys’ personal benefit.” 88 A.3d at 887.

These example cases reflect an even broader acceptance across jurisdictions of the principles underlying the qualified privilege against tortious interference and conspiracy claims afforded to corporate counsel acting within the scope of their agency. And, as observed in *Doherty*, the contrary view – that outside corporate counsel should be excluded from the privilege available to employee-agents of a corporation – “fails of any support.” 728 F.2d at 340. The Court of Appeals

decision in the present case is very much an outlier.

3. Public policy favors protecting corporate counsel from third-party claims of contractual interference and civil conspiracy so that counsel are free to perform their essential functions.

A qualified privilege is a mechanism for balancing conflicting societal interests. A privilege protects an actor whose conduct allegedly injures another. It arises when the interest the actor seeks to advance is deemed to be of greater public import than the interest that is invaded. *See generally* 2 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *Harper, James & Gray on Torts* § 6.12, at 412 (3d ed. 2006). In the circumstances in which a qualified privilege arises in favor of corporate counsel on claims of contractual interference or conspiracy, “[t]he fiduciary duty owed by an attorney to his client is such an interest.” *See Schott*, 440 N.E.2d at 379. Notably, although in such cases counsel acting within the scope of their representation for the benefit of the client are protected from individual liability, a plaintiff still has a remedy against the corporate principal for any breach of contract or tortious act committed by the corporation. *See, e.g., Deflon*, 2006-NMSC-025, ¶ 9. Furthermore, counsel remain subject to court-imposed sanctions and to disciplinary action by state licensing authorities, which operate as deterrents to unprofessional conduct. *See Heffernan*, 189 F.3d at 413; *see also Unarco*, 317 S.W.3d at 240.

Stated differently, the qualified privilege is intended to protect the integrity

of the attorney-client relationship. “[S]afeguarding the lawyer-client relationship . . . is integral to the protection of the legal system itself.” *Reynolds v. Schrock*, 142 P.3d 1062, 1068 (Or. 2006). Lawyers play an essential societal role which, by its nature, invites claims stemming from their clients’ interactions with third parties. “Myriad business transactions, as well as civil, criminal, and administrative proceedings, require that the client have the assistance of a lawyer.” *Id.* A qualified privilege ensures that lawyers can provide this assistance effectively and without inhibition when acting within the scope of their responsibilities to their clients.

Courts recognize a qualified privilege “because attorneys are duty-bound to competently, diligently, and zealously represent their clients’ interests while avoiding any conflicting obligations or duties to themselves or others.” *Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 79 (Tex. 2021). The privilege “exists to promote such loyal, faithful, and aggressive representation by alleviating in the mind of the attorney any fear that he or she may be sued by or held liable to a non-client for providing such zealous representation.” *Id.* (internal quotation marks & citation omitted).

“The privilege is designed to further certain societal interests by fostering uninhibited advice by agents to their principals.” *Los Angeles Airways*, 687 F.2d at 328. Imposing liability on an attorney to a third party based on legal advice given

to a client “would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney’s fiduciary duty to his client.” *Schott*, 440 N.E.2d at 379. Treating consultation between a corporation and its counsel as the basis for a civil conspiracy “would discourage corporations from obtaining legal advice before acting, hardly a sound step to take.” *Travis*, 921 F.2d at 111.

As another court put it:

Allowing a third party to sue one’s attorney because his attorney advised him to terminate his contract with that person would bring chaos. Zealous advocacy would be chilled in the shadow of the constant threat of liability – bringing, as it would, almost unlimited liability exposure to the Bar. Since its founding, our system of justice has held the attorney-client relationship in a near sacred posture and placed upon the attorney a fiduciary-like responsibility. . . . In order to live up that responsibility, attorneys must be free to render honest, candid advice in the best interest of their clients.

Patterson, 332 B.R. at 453 (citations omitted). In sum, “[p]ublic policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons.” *Boyd Real Estate, Inc.*, 571 N.E.2d at 1174.

C. The District Court Correctly Held That Qualified Privilege Bars Avila’s Claims Against BTB.

Avila’s claims against BTB, as alleged, fall squarely within the ambit of the qualified privilege and are barred. The district court’s denial of leave to amend the complaint is not an issue presented to this Court. But if the Court considers the

district court's ruling, it should hold that Avila's proposed amendment of the complaint would have been futile and the district court properly denied amendment.

1. The claims against BTB, as pleaded in Avila's complaint, are barred by the qualified privilege.

Avila's claims against BTB, as alleged in her complaint, are barred by qualified privilege. The complaint alleges that BTB engaged with Greyhound in a civil conspiracy for retaliatory discharge and intentionally interfered with Avila's contractual or prospective contractual relations with Greyhound.⁹ These claims, as pleaded, are not legally cognizable in light of the qualified privilege, particularly in

⁹ The Court need only consider Avila's contractual interference claims, because her claim of civil conspiracy is precluded by law of the case. The Court of Appeals affirmed the district court's summary judgment on Avila's retaliatory discharge claim against Greyhound, holding that Avila failed to present evidence sufficient to create a genuine factual issue as to whether she was fired, as she claimed, for testifying truthfully or refusing to commit perjury. *Supra* p. 6. Avila did not seek this Court's review of that ruling and, as the ruling has not been presented for review, the unchallenged ruling of the Court of Appeals constitutes the law of the case. "Right or wrong, it must control our further consideration of the question presented." *Williams v. McAdoo*, 1954-NMSC-005, ¶ 4, 58 N.M. 37. Elimination of the retaliatory discharge claim disposes of Avila's claim that BTB participated in a conspiracy for retaliatory discharge, because "a civil conspiracy by itself is not actionable . . . [and] must actually involve an independent, unlawful act that causes harm." *Ettenson*, 2001-NMCA-003, ¶ 12. Without a retaliatory discharge, there can be no claim of an alleged civil conspiracy for retaliatory discharge. *See id.* The law of the case thus provides an independent, alternative ground to affirm the dismissal of the civil conspiracy claim. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536 ("[T]he district court . . . will be affirmed if right for any reason.").

light of Avila’s express acknowledgement that BTB “[a]t all relevant times . . . acted as a[n] . . . agent . . . of [Greyhound] and acted within the course and scope of said agency.” *Supra* p. 4.

The allegations of the complaint fall squarely within the protections of the qualified privilege recognized in *Ettenson* and *Deflon* as well as in the law of numerous other jurisdictions. There is no allegation in the complaint that BTB acted in pursuit of its individual interest, separate from and independent of the interest of its client Greyhound, that would negate the qualified privilege. *See supra* Point B(2). Consequently, the complaint is legally insufficient to state a claim for relief against BTB. *See Salas*, 2025-NMSC-006, ¶ 12. Because Avila is not entitled to recover under the allegations of the complaint, the district court correctly dismissed the claims against BTB under Rule 1-012(B)(6). *Callahan*, 2006-NMSC-010, ¶ 4.

2. Avila did not properly seek review of the denial of her motion to amend the complaint.

After the district court dismissed Avila’s claims against BTB, Avila moved to amend her complaint, seeking to add new allegations to plead around the qualified privilege. *Supra* p. 5. The district court denied the motion. *Supra* p. 6. The Court of Appeals reinstated Avila’s original claims against BTB and consequently did not consider the denial of leave to amend.

The Rules of Appellate Procedure provide a mechanism through which

Avila could have obtained this Court's review of the district court's denial of amendment: Avila could have filed a conditional cross-petition for writ of certiorari in response to BTB's petition, asking this Court to review the district court's denial of amendment in the event the Court were to grant BTB's petition and were to uphold the district court's dismissal of the complaint against BTB. *See* Rule 12-502(G) NMRA. Avila did not do so, and this Court consequently did not grant a writ of certiorari, conditional or otherwise, on the question whether leave to amend the complaint should have been granted. That issue therefore has not been properly presented to the Court. *See State v. Morales*, 2010-NMSC-026, ¶ 19, 148 N.M. 305 (declining to review issue presented by respondent without first filing conditional cross-petition).

3. Were the issue to be considered, the district court's denial of leave to amend should be upheld because Avila's proposed amendment would be futile.

In her proposed first amended complaint, Avila attempted to plead around the qualified privilege that barred her original complaint by alleging that BTB's conduct fell within an exception to the qualified privilege. Specifically, Avila claimed that BTB "had an independent personal stake in the actions alleged . . . because [BTB] had been cc'd" along with Greyhound "on the . . . requests" by the defense lawyers in *Ramos-Burciaga* and *Fernandez* "for video surveillance, and did not themselves want to be blamed for the loss of the missing video." (1 RP

191-92 ¶ 3; *see also id.* at 195 ¶¶ 37-39, 197 ¶ 66, 200 ¶¶ 95 & 103.)¹⁰ BTB opposed the amendment, arguing that the new allegations “d[id] not plead an exception to the agent’s immunity rule/intracorporate conspiracy doctrine.” (*Id.* at 214).

Avila’s amended complaint also is barred by qualified privilege. “[A] request to amend a pleading may be properly denied when the insufficiency or futility of the pleading is apparent on its face.” *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020, ¶ 27, 282 P.3d 758. Even taking Avila’s blame-avoidance theory at face value, the amended complaint fails to allege that BTB acted for its “sole personal benefit,” *Gen. Refractories*, 337 F.3d at 313 (internal quotation marks & citation omitted), for a purpose that was “independent of the desire to protect [its] client,” *Fraidin*, 611 A.2d at 1080, and “totally unrelated . . . to the principal’s interests,” *Storm & Assocs.*, 700 N.E.2d at 210. In other words, the amended complaint does not allege that BTB acted “to serve [its] own private interest with no benefit to” Greyhound. *Deflon*, 2006-NMSC-025, ¶ 10 (internal

¹⁰ Avila also alleged that BTB’s actions were “in furtherance of a crime and/or fraud – in particular, perjury – and are thus subject to the crime/fraud exception.” (1 RP 191 ¶ 2. But crime/fraud provides an exception to attorney-client confidentiality in order to prevent or ameliorate the consequences of a crime or fraud perpetrated by the client. *See* Rule 16-106(B)(2) & (3) NMRA. Neither confidentiality nor crime/fraud is at issue here. Furthermore, the district court appropriately questioned how Avila could plausibly plead the exception (Tr. (1/28/20) 5) given Avila’s position that she had refused to perjure herself and had testified truthfully in federal court (*see* 1 RP 192 ¶ 11.) *See supra* note 2.

quotation marks & citation omitted).

Avila alleges that both BTB and Greyhound received requests for the surveillance video and “[n]either . . . wanted to be blamed” for the loss of the evidence. (1 RP 197 ¶ 66.) Thus, under Avila’s theory the interests of Greyhound and BTB were identical and both would have been served if, as alleged, the two had conspired to terminate Avila or BTB had recommended Avila’s termination to make her a scapegoat for the loss. Mixed motives, however, are insufficient to overcome the privilege. *See Los Angeles Airways*, 687 F.2d at 327 (“If the protection of the privilege were denied every time that an advisor acted with such mixed motive, the privilege would be greatly diminished and the societal interests it was designed to promote would be frustrated.”).¹¹

The liberality with which requests to amend a complaint are often treated does not extend to amendments that would be futile. *See Lenscrafters*, 2012-NMSC-020, ¶¶ 26-27. Because the allegations of blame-avoidance that Avila added to the amended complaint do not allege acts by BTB that served BTB’s sole interest without also protecting its client, the allegations of the amended complaint, even if taken as true, do not avoid the qualified privilege. The amendment

¹¹ At the hearing on Avila’s motion to amend, her counsel appeared to recognize the identity of interests between Greyhound and BTB without conceding the consequences: “[I]t’s not clear to me . . . whether independent personal stake is the same as having the same personal stake. Does ‘independent’ mean ‘same’?” (Tr. (1/28/20) 16.)

proposed by Avila was futile, and the district court did not err in denying leave to amend.

Conclusion

Both the majority and the dissent in the Court of Appeals point out the need for this Court to address the question of qualified privilege presented by this appeal. (Slip op. ¶¶ 18 (majority) & 52 (Ives, J., dissenting in part).) The Court should recognize a qualified privilege applicable to a corporation's outside counsel when counsel act within the scope of their responsibilities to promote the interest of their corporate client. The foundational principles for such a privilege already exist in New Mexico law, and the privilege itself enjoys broad acceptance in other jurisdictions. The Court of Appeals decision rejecting the qualified privilege, in contrast, lacks support from other courts or even – as the dissent makes clear – in the majority's own reasoning.

Protecting counsel who meet the conditions of the qualified privilege is vital to maintaining the fiduciary relationship between attorney and client and promoting the zealous advocacy that are vital to the functioning of our society. Hence, public policy strongly favors recognition of a qualified privilege. The scope of the privilege and the conditions applicable to it, as described herein, are appropriate to achieving the purposes of the privilege while avoiding abuse.

For the foregoing reasons, this Court should hold that Avila's claims of civil

conspiracy and contractual interference against BTB are barred by a qualified privilege. The Court should reverse the Court of Appeals and uphold the district court's ruling dismissing those claims.

Statement Regarding Oral Argument

Petitioner believes that oral argument may be of assistance to the Court in apprehending and evaluating the arguments of the parties and may facilitate the decisional process. Petitioner therefore requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that the foregoing pleading was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy to be served automatically on all counsel of record this 15th day of December, 2025.

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