



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)

REPLY BRIEF

DIXON•SCHOLL•CARRILLO•PA
Gerald G. Dixon
James C. Wilkey
6700 Jefferson NE, Building B, Suite 1
Albuquerque, NM 87199
Telephone: (505) 244-3890

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Edward Ricco
Jocelyn Drennan
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

Attorneys for Petitioner

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Argument

AVILA OFFERS NO VALID REASON WHY NEW MEXICO, UNIQUELY, SHOULD REJECT A QUALIFIED PRIVILEGE FOR OUTSIDE CORPORATE COUNSEL AGAINST THIRD-PARTY CLAIMS

A. A Qualified Privilege Protects the Essential Function of Attorneys in Modern Society.

The district court concluded that Avila’s claims against BTB are barred by a qualified privilege applicable to outside corporate counsel who, while acting in the course of their responsibilities in the interest of their client, allegedly bring about corporate action that injures a third party. That decision is supported by case law from every jurisdiction that has considered the question of qualified privilege (also referred to as qualified immunity) for outside corporate counsel – except the Court of Appeals below. But the majority opinion of that divided court is deeply flawed, as the dissent points out and as BTB’s opening brief discusses in greater detail.

Avila’s answer brief provides no basis to uphold the Court of Appeals decision. It does not even acknowledge, let alone grapple with, the important public policy concerns that weigh against impairing the uninhibited advice and zealous advocacy that attorneys are duty-bound to provide their clients in a society in which business transactions and administrative and judicial proceedings often “require . . . the assistance of a lawyer.” *Reynolds v. Schrock*, 142 P.3d 1062, 1068 (Or. 2006). (BIC at 26.)

Posing numerous rhetorical questions but providing barely any argument,

Avila suggests that recognizing a qualified privilege would appear to “condon[e] . . . questionable conduct by attorneys.” (AB at 4; *see also id.* at 12-13.) No court has considered the risk of attorney misconduct sufficient to outweigh the harm that would flow from impairing the lawyer’s essential societal role as counselor and advocate. (BIC at 25-27.) The fact that the privilege is qualified itself limits the possibilities for abuse. A qualified privilege does not shield from individual liability an attorney who personally engages in wrongful conduct. Nor does it protect an attorney who is not acting in the client’s interest. And where a qualified privilege does apply, an offending lawyer still is subject to judicial sanctions or professional discipline, which courts have deemed adequate means of deterring unprofessional behavior. (BIC at 25.)

A legal system that recognizes a qualified privilege for outside corporate counsel, while providing for sanctions and disciplinary measures, strikes the proper policy balance between enabling attorneys to represent their clients fearlessly and discouraging unethical attorney conduct. This Court should follow the path marked out by every other jurisdiction to have considered the question and extend a qualified privilege to outside corporate counsel when they act within the scope of their representation to protect their client’s interests.

B. A Corporation’s Outside Lawyers Are at Least as Entitled to a Qualified Privilege as a Corporation’s Officers.

Avila contends that qualified immunity applies to “corporate officers under

corporate law principles” and should not extend to outside attorneys who are not employed by the corporation. (AB at 8.) Avila’s premise is incorrect. Qualified immunity does not arise from the law governing corporate enterprises; it stems from agency law principles (*see* BIC at 19-20, 22) and is applicable to corporate agents regardless of whether they are corporate employees or outside lawyers (*id.* at 17-18).

Avila further argues that attorneys are “not the same” as corporate officers and therefore should not benefit from a qualified privilege. (AB at 8.) But corporate counsel and corporate officers are alike in the material sense that protecting both corporate counsel and corporate officers from liability to third parties furthers important societal interests. The Court of Appeals recognized that a qualified privilege serves to protect the autonomy of corporate officers who are responsible for managing the business. (BIC at 7-8.) But the Court of Appeals did not consider, and Avila’s answer brief does not address, the equal or greater importance of a qualified privilege in enabling counsel representing a corporation to act zealously and independently, free of the conflict of interest that would result if counsel faced the threat of individual liability resulting from the corporation’s actions. (*See* BIC at 17-18.)

Avila contends that corporate counsel are distinguishable from officers employed by a corporation because counsel are subject to a “separate and distinct

licensing and regulatory structure” which imposes “higher ethical and competency standards” on them. (AB at 9.) But this distinction only underscores why a qualified privilege should be at least as applicable to corporate counsel as to the officers of a corporation. As one court reasoned:

The right of a litigant to independent and zealous counsel is at the heart of our adversary system Counsels’ conduct within the scope of representation is regulated and enforced by disciplinary bodies established by the courts. Abuses in litigation are punishable by sanctions administered by the courts This regulatory framework provides third parties with protection that is lacking in the corporate field. Despite the absence of such safeguards in the business setting, most courts nevertheless apply the intracorporate conspiracy ban. That being so, it follows all the more that we should enforce the ban on conspiracies in the attorney-client context where even more compelling policy concerns exist.

Heffernan v. Hunter, 189 F.3d 405, 413 (3d Cir. 1999) (footnote omitted).

C. Avila Offers No Authority Supporting Her Position.

Remarkably for a case presenting an issue of first impression to the state’s highest court, the answer brief fails to cite a single case from any jurisdiction involving the qualified privilege at issue here. By failing to present any out-of-state authority categorically rejecting a rule of qualified privilege for outside corporate counsel, Avila’s brief confirms that the Court of Appeals decision is truly the outlier it appears to be. (BIC at 24-25.)

The three cases Avila cites as supportive of the Court of Appeals decision (AB at 9-10) do not assist her. In *Salazar v. Hassall*, Civ. No. 04-404 JH/WDS,

2006 WL 8431508 (D.N.M. Feb. 14, 2006), the plaintiff sued in-house counsel for a state agency who allegedly was involved in the agency's discriminatory termination of the plaintiff's employment. The defense argued that the attorney owed no duty to the plaintiff, basing its position on *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, 106 N.M. 757 (holding that a lawyer does not owe a duty to an adverse party in litigation). The court rejected the no-duty argument because in the plaintiff's case "there were no formalized legal proceedings and therefore no clearly adverse party." 2006 WL 8431508, at *8.

The court in *Salazar* evidently viewed the claim against the agency's lawyer as alleging personal participation in unlawful conduct that exceeded the lawyer's role as legal counsel and "involved . . . efforts to terminate [the plaintiff's] employment" as one of a group of individuals who "evaluated, reprimanded, and terminated" the plaintiff illegally. *See id.* In that light the court appropriately held that serving as the agency's counsel "d[id] not automatically shield that individual from all liability for his alleged intentional acts of discrimination." *Id.* While Avila relies on this statement (AB at 9), the statement is not a rejection of qualified privilege, which was not invoked and was not at issue in *Salazar*. BTB does not contend that acting as outside counsel to a corporation automatically immunizes a lawyer against any liability for personally participating in unlawful conduct. Such absolute immunity based simply on attorney status is not the rule relied on by the

district court and is not the result sought by BTB. Hence, *Salazar* is inapplicable.¹

Shovelin v. Central New Mexico Electric Cooperative, Inc., 1993-NMSC-015, 115 N.M. 293, contains dicta indicating that an employee's refusal to commit perjury could provide a public policy basis for a retaliatory discharge claim. *Id.* ¶ 30. And *White v. American Airlines, Inc.*, 915 F.2d 1414 (10th Cir. 1990), concludes that an employee's refusal to perjure himself would support a claim of retaliatory discharge under Oklahoma law. Both cases, however, involve claims by an employee against the employer. In neither case does the court address a claim for civil conspiracy or contractual interference against the employer's outside corporate counsel. These cases also are of no value in deciding the issue at hand.

In deciding a first-impression issue, this Court will look to other jurisdictions whose decisions are consistent with New Mexico public policy. *See Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 1997-NMSC-011, ¶ 13, 122 N.M. 800. New Mexico already has accepted the principles underlying a qualified privilege in the case of corporate officers. (BIC at 11-15.) And New Mexico law also recognizes that an attorney's "undivided loyalty" and "exclusive and

¹ Avila seems to attach significance to the fact that she "pled 'intentional acts'" of conspiracy and contractual interference. (AB at 9.) But these are the very claims for which courts have repeatedly held that qualified privilege protects outside corporate counsel. (*See* BIC at 18-25.)

paramount duty must be to the client alone” and that an attorney’s fear of suit by a third party “would detrimentally interfere with the attorney-client relationship.” *Garcia*, 1988-NMSC-014, ¶¶ 13-14. New Mexico policy thus is firmly aligned with the multitude of jurisdictions that have recognized a qualified privilege for outside corporate counsel. This Court should be guided by that body of sound and persuasive precedent.

D. BTB Does Not Disagree That the Privilege Applicable To Outside Corporate Counsel Is a Qualified Privilege and Should Be Treated as an Affirmative Defense.

Any adoption of “immunity” for corporate counsel, Avila argues, “should be *qualified and pled and proven* as an affirmative defense.” (AB at 11.) BTB has no quarrel with adopting for outside corporate counsel the qualified privilege recognized for corporate officers in *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67, and the other New Mexico cases discussed in the brief in chief, in harmony with the uniform trend across other jurisdictions, or with treating the qualified privilege as an affirmative defense. (*See generally* BIC.)

Avila complains that her claims against BTB were dismissed without discovery or the development of a factual record “from which to assess the privilege.” (AB at 12.) It is true that affirmative defenses, including qualified privilege, may require factual development before they can be established. *See Ettenson*, 2001-NMCA-003, ¶ 21. But it also is the case that a complaint may be

dismissed under Rule 1-012(B)(6) NMRA based on an affirmative defense where “the facts supporting the defense . . . appear plainly upon the face of the complaint.” *Universal Life Church v. Coxon*, 1986-NMSC-086, ¶ 8, 105 N.M. 57. Avila had free rein, within the limits of good faith, to set out the factual allegations underlying her claims, which the district court was obligated to accept in assessing whether a qualified privilege applies. *Salas v. Guadalupe Credit Union*, 2025-NMSC-006, ¶ 12, 563 P.3d 873. The complaint alleges that BTB entered into a civil conspiracy with Greyhound and intentionally interfered with Avila’s contractual or prospective contractual relations while at all relevant times acting as Greyhound’s outside counsel and agent within the scope of its agency. (BIC at 3-4.) The district court correctly concluded that, as framed by Avila, the allegations against BTB fall within the scope of qualified privilege.²

² The facts available when Avila’s complaint was filed, or soon afterwards, establish that Avila’s claims against BTB not only are barred by qualified privilege but also are groundless. Avila’s answer brief fails to address, and therefore implicitly acknowledges, her sworn testimony that when preparing her for her federal court appearance the BTB lawyers counseled her to “tell the truth.” Nor does Avila’s brief deny her counsel’s later concession that Avila had no evidence that she was instructed to commit perjury. (BIC at 3 n.2.) Despite these failings, Avila’s brief includes an uncalled-for attack on the character of one of the BTB attorneys by reference to Avila’s improper attempt to introduce on appeal irrelevant character evidence that was never presented to the district court and was rejected by the Court of Appeals. (AB at 13 n.1; *see* Order Denying Judicial Notice of Disciplinary History, filed July 3, 2024, in No. A-1-CA-41227.) The reference serves no legitimate purpose in this appeal and should be disregarded.

E. Avila’s Attempted Amendment of Her Complaint Did Not Plead an Exception to Qualified Privilege.

Avila does not explain how the denial of her motion for leave to amend her complaint has been properly presented for review by this Court. (See BIC at 29-30.) Assuming it has been, Avila merely asserts that she sought to amend her complaint “to plead generally-accepted exceptions to immunity doctrines,” but she presents no developed argument on the subject – advancing only the bald assertion that “[t]hose exceptions are pled here.” (AB at 13-14.) The Court need not consider this issue. See *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating that the Court “will not review unclear arguments, or guess at what a party’s arguments might be” (internal quotation marks & citation omitted) (alteration omitted)). Furthermore, Avila’s contention that the additional allegations in her amended complaint are sufficient to avoid qualified immunity is incorrect. (BIC at 30-33.)

Conclusion

For the reasons stated above and those set forth in the brief in chief, this Court should reverse the Court of Appeals and reinstate the district court’s dismissal of Avila’s claims against BTB.

Respectfully submitted,

DIXON•SCHOLL•CARRILLO•PA

Gerald G. Dixon

James C. Wilkey

6700 Jefferson NE, Building B, Suite 1

Albuquerque, NM 87199

Telephone: (505) 244-3890

jdixon@dsc-law.com

jwilkey@dsc-law.com

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco

s/ Jocelyn Drennan

By _____

Edward Ricco

Jocelyn Drennan

P.O. Box 1888

Albuquerque, NM 87103

Telephone: (505) 765-5900

Fax: (505) 768-7395

ericco@rodey.com

jdrennan@rodey.com

Attorneys for Petitioner

C E R T I F I C A T E O F S E R V I C E

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 6th day of February, 2026.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco

By _____

Edward Ricco