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Constitutional Law

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I. INTRODUCTION

This article surveys New Mexico appellate decisions that considered federal and state constitutional issues. Rather than presenting a descriptive narrative of these decisions, this article discusses in depth a few selected cases to highlight the major developments of the year. This article does not review any criminal law cases or procedural issues addressed in other Survey articles.[1]

II. FREE SPEECH AND PRESS

During the Survey year, New Mexico courts considered three cases under the free speech and press clauses of the United States Constitution.[2] The most celebrated of these cases were *Marchiondo v. New Mexico State Tribune Co. (Marchiondo I)*[3] and *Marchiondo v. Brown (Marchiondo II)*,[4] both of which examined the law of defamation. In both cases, William C. Marchiondo, a prominent New Mexico attorney, sought damages against The Albuquerque Journal and The Albuquerque Tribune for four publications alleged to be libelous.

In *Marchiondo I*, the court of appeals considered whether the trial court properly granted defendant's motion for summary judgment on claims involving a paid political advertisement[5] and an editorial.[6] The court examined the law of libel and analyzed the publications under the tra-

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1. *See* Daniels and Storch, *Criminal Law, infra* at 89; Holt, *Criminal Procedure, infra* at 109, and Occhialino, *Civil Procedure, supra* at 17.

2. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I.

3. 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981) [hereinafter cited as *Marchiondo I*].

4. 98 N.M. 394, 649 P.2d 462 (1982) [hereinafter cited as *Marchiondo II*].

5. The publication entitled "Cronies" was one of a series of political advertisements prepared by the Republican Party that appeared in both The Albuquerque Journal and The Albuquerque Tribune. The advertisement asserted that if the Johnson & Lanphere Democratic candidate were elected, individuals like the plaintiff would be appointed to positions of state government. The Albuquerque Tribune, October 31, 1974 at B-11, col. 1-4; The Albuquerque Journal, October 27, 1974 at C-7, col. 5-8.

6. The editorial discussed the legality of the appointment of a state senator to the position of state district judge. The publication mentioned that the senator received financial support from the plaintiff. The Albuquerque Journal, November 3, 1974 at A-4, col. 1-2.

ditional categories of libel per se[7] and libel per quod.[8] The court also discussed the defenses of constitutional privilege and fair comment.[9]

The court of appeals noted that the determination of whether a publication is libelous per se is a question of law.[10] The court then relied on the "innocent meaning" rule that "a per se libelous statement [must] be susceptible of *only* a defamatory meaning without reference to innuendo, colloquium or explanatory circumstances"[11] to find that neither the editorial nor the political advertisement were libelous per se toward the plaintiff.

Next, the court of appeals considered whether the plaintiff properly stated a claim under the theory of libel per quod, recognizing that the determination of this theory of liability presents a triable issue of fact.[12] In his complaint, the plaintiff did not plead special damages. Instead, the plaintiff relied on *Reed v. Melnick*[13] for the proposition that it was sufficient to allege either special damages or that the publisher knew or should have known the necessary extrinsic facts that rendered the publication defamatory.[14] The court agreed with the defendant that the United States Supreme Court in *Gertz v. Robert Welch, Inc.*[15] eroded this alternative ground of pleading by holding that defamation suits by private plaintiffs require a showing of both fault *and* damages.[16] Moreover, the court found other principles enunciated in *Gertz* to hold that as a matter of constitutional law, the publications in question were protected statements of opinion.[17]

The court of appeals distinguished between opinions, which are pro-

7. The term libel per se refers to a publication that, without reference to extrinsic facts and stripped of all insinuating innuendos and explanatory circumstances, tends to render a person contemptible or ridiculous in public estimation, or expose the person to public hatred, contempt, or disgrace. 98 N.M. at 287, 648 P.2d at 326 (citing Monnin v. Wood, 86 N.M. 460, 525 P.2d 387 (Ct. App. 1974)).

8. Libel per quod refers to written communications which, although not actionable on their face, are susceptible of two interpretations, one of which is defamatory and another which is innocent, or communications that may become defamatory when considered in connection with innuendo and explanatory circumstances. 98 N.M. at 288, 648 P.2d at 327.

9. The defenses of constitutional privilege and fairness evolved from three landmark United States Supreme Court decisions: New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Constitutional privilege prohibits a public official or public figure from recovering damages for a false defamatory statement unless he proves the statement was made with actual malice. *Marchiondo I*, 98 N.M. at 290, 648 P.2d at 329. The defense of fair comment applies to a publication that is an expression of opinion on a matter of public interest. The privilege includes expressions of opinion that include inaccurate or misleading statements of facts unless made with actual malice. *Id.* at 294, 648 P.2d at 333. The court did not rely on the defense of fair comment in reaching its conclusion.

10. 98 N.M. at 287, 648 P.2d at 326.

11. *Id.* at 288, 648 P.2d at 327.

12. *Id.*

13. 81 N.M. 608, 471 P.2d 178 (1970).

14. *Id.*

15. 418 U.S. 323 (1974).

16. *Marchiondo I*, 98 N.M. at 290, 648 P.2d. at 328.

17. *Id.*

tected speech under the first amendment, and false statements of fact, which are not given the same protection. Reiterating that there is no such thing as a "false" idea or opinion,[18] the court said that what distinguishes a statement of opinion from a statement of fact must be determined on a case-by-case basis considering the following factors: (1) the context of the entire publication and not merely portions thereof; (2) the degree to which the truth or falsity of a statement can be objectively determined, with any doubt to be resolved in favor of opinion; and (3) whether ordinary persons hearing or reading the matter perceive the statement to be an expression of opinion rather than a statement of fact.[19] Applying these considerations to the case, the court concluded that both the political advertisement and the editorial were constitutionally privileged opinions. Therefore, the trial court had properly dismissed the libel claims relating to these publications.

Marchiondo I adopts the principles set forth in *Gertz* with respect to the considerations in determining what is constitutionally protected opinion. The court left unclear, however, whether a distinction still exists between libel per se and libel per quod in suits between private parties. The case marks an expansion of first amendment protection to publishers, who now have some guidance in determining the limits of their defense of constitutional privilege.

In *Marchiondo II*,[20] the supreme court redefined the New Mexico law of libel in light of *Gertz*, and resolved certain inconsistencies in the law left open by the court of appeals in *Marchiondo I*. The court first addressed the issue of "actual malice," which was central to any allegations of punitive damages.[21] The trial court granted defendants' motion for summary judgment on this issue, but the supreme court reversed, holding that the lower court did not provide the plaintiff with an opportunity to discover the relevant facts critical to this issue. The court held that the defense of constitutional privilege under the first amendment would not prevent the plaintiff from exercising his right to pretrial discovery as to those persons involved in the editorial process.[22]

The supreme court next determined that the plaintiff was not a public figure for purposes of a libel action.[23] This conclusion permitted plaintiff to proceed to prove the defamation upon a standard of ordinary negligence

18. *Id.* at 291, 648 P.2d at 330.

19. *Id.* at 292, 648 P.2d at 331.

20. 98 N.M. 394, 649 P.2d 462 (1982).

21. The supreme court decided to adopt the *Gertz* standard of proof for recovery of punitive damages, which requires the plaintiff to show actual malice. *Id.* at 403, 649 P.2d at 470-71.

22. 98 N.M. at 398, 649 P.2d at 466, citing Herbert v. Lando, 441 U.S. 153 (1979).

23. 98 N.M. at 399, 649 P.2d at 467. If plaintiff is a public figure, *Gertz* required a showing of actual malice for plaintiff to recover any damages. If plaintiff is not a public figure, *Gertz* left to the states to decide whether actual malice or some lesser standard of proof was necessary in order to recover. *Id.* at 402, 649 P.2d at 470.

without a showing of actual malice.[24] In enunciating the ordinary negligence standard as the measure of proof necessary to establish liability in the case of private defamation plaintiffs, the court noted that the federal constitution does not require proof of actual malice for private plaintiffs to recover in defamation suits.[25] The court also held that liability is limited to the recovery of actual damages, and that a private plaintiff must plead and prove special damages in order to recover them.[26] In addition, the court announced that a private plaintiff who seeks punitive damages must prove actual malice.[27]

Finally, the supreme court reviewed the trial court's denial of motions to dismiss for failure to state a claim with respect to an editorial: "Our Choice—Joe Skeen,"[28] and an article: "Organized Crime Showing Interest in New Mexico."[29] Like the court of appeals in *Marchiondo I*, the supreme court considered whether the publications were constitutionally privileged opinions or potentially libelous false statements of fact.[30] The court stated that the determination of whether a communication is a statement of opinion or of fact is a question of law for the courts.[31] The supreme court noted, however, that a triable issue of fact is presented where statements are ambiguous and the alleged defamation could be either fact or opinion.[32] The court then set out several guidelines for the courts to use in distinguishing between fact and opinion, similar to the factors enumerated by the court of appeals in *Marchiondo I*.[33] Employing these factors, the supreme court concluded that the Joe Skeen editorial was constitutionally protected opinion, but left to be determined by a jury the question of whether the article on organized crime was constitutionally protected opinion.[34]

Marchiondo II drastically altered the law of defamation in New Mexico

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24. *Id.*

25. *Id.*

26. The supreme court's decision to permit recovery of actual damages overruled the New Mexico libel per quod jury instruction, which required proof of ordinary negligence and proof of special damages. The supreme court also resolved the question raised but not answered by the court of appeals in *Marchiondo I* of whether *Gertz* overruled the mode of establishing a per quod claim as enunciated in Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970). A private plaintiff must now plead and prove special damages in all defamation cases.

27. *Marchiondo II*, 98 N.M. at 402, 649 P.2d at 470-71.

28. The editorial was an endorsement of a gubernatorial candidate which made reference to the plaintiff. The Albuquerque Journal, November 3, 1974, at A-4, col. 1-2.

29. The article appeared in The Albuquerque Journal with a photograph of the plaintiff positioned below the headline. The Albuquerque Journal, March 26, 1977, at B-14, col. 4.

30. 98 N.M. 282, 648 P.2d 321 (Ct. App. 1981).

31. *Marchiondo II*, 98 N.M. at 400, 649 P.2d at 468.

32. *Id.* at 404, 649 P.2d at 472.

33. *See supra* note 19 and accompanying text.

34. On March 11, 1983, after a seven week trial, a jury returned a verdict in favor of defendants on all of plaintiff's claims. The Albuquerque Journal, March 12, 1983 at A-1, col. 1-3.

and made it compatible with the United States Supreme Court decision in *Gertz*. The law now is that the ordinary common law negligence standard of proof applies to private defamation suits brought by private figures and plaintiffs may recover actual damages. Plaintiffs now must plead and prove special damages in order to recover them, and punitive damages are recoverable only if the plaintiff proves that the publication was made with actual malice. The case also gives the courts some guidance in handling defamation suits by setting forth the criteria to be used by the courts in distinguishing between a statement of opinion and a statement of fact. These guidelines are necessary to balance properly the inherent conflict between the first amendment and the law of defamation.

In *Temple Baptist Church, Inc. v. City of Albuquerque*,[35] the supreme court considered whether a sign ordinance regulating the size, height, and number of signs an owner could maintain violated the first amendment.[36] In determining whether the sign ordinance was a "legitimate time, place, and manner restriction on speech,"[37] the court considered (1) whether the restriction served a significant government interest; (2) whether the restriction was justifiable without reference to the content of the regulated speech; and (3) whether the restriction left open ample alternative channels of communication.[38]

Plaintiffs contended, inter alia, that the sign ordinance was invalid because it regulated the content of political and religious signs, and therefore, directly infringed on speech. The supreme court, however, held that the ordinance did not regulate the content of signs maintained by religious organizations, but merely required that the information comply with the general restrictions as to size, height, and number.[39] The court further noted that although the city imposes certain restrictions on political signs, these special restrictions were valid because they furthered significant and valid governmental interests in aesthetics.[40] The court also determined that the sign ordinance met the city's significant interest in traffic safety.[41] Finally, the court concluded that the sign ordinance did not foreclose alternative channels of communication. The court unanimously concurred, therefore, that the ordinance did not violate free speech.

35. 98 N.M. 138, 646 P.2d 565 (1982).

36. *Id.*, Albuquerque, N.M. Rev. Ordinances, ch. 7, art. XIV (1974).

37. *See* Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), *appeal dismissed*, 446 U.S. 930 (1980). The Supreme Court has held that commercial speech is not absolutely protected and, therefore, it can be regulated based upon the time, place, and manner of the speech. Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 91, 97 S.Ct. 1614, 1619 (1977).

38. 98 N.M. at 146, 646 P.2d at 573.

39. *Id.*

40. The court ruled in *Temple Baptist Church, Inc.* that ". . . aesthetic considerations alone do justify the exercise of police power." *Id.* at 144, 646 P.2d at 571.

41. *Id.*

III. DUE PROCESS

The New Mexico appellate courts decided several cases concerning the due process clause of the fourteenth amendment.[42] In addition to the first amendment claims raised in *Temple Baptist Church, Inc. v. City of Albuquerque*,[43] the supreme court also considered whether the sign ordinance constituted a taking of property requiring compensation. The plaintiffs argued that the ordinance violated due process because it pertained to signs that existed prior to enactment of the ordinance, and required existing owners to modify or remove nonconforming signs at the owner's expense.

The supreme court first stated the general rule that a regulation which imposes a reasonable restriction on the use of private property is a valid exercise of police power if the regulation: (1) is reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property.[44] In addressing the first requirement, the supreme court declared that zoning for solely aesthetic purposes is a legitimate exercise of police power.[45] Moreover, the court held that although aesthetics was the predominant consideration of the city in enacting the sign ordinance, traffic safety was also a consideration. The court concluded, therefore, that the sign ordinance was reasonably related to proper zoning purposes.[46]

Addressing the second requirement, the court pointed out that the city provided for a grace period, or an "amortization period," to afford nonconforming sign owners and users five years in which to comply with the new restrictions. The court approved of the amortization provision as an alternative to compensation because it put owners on notice that they have a certain time period in which to make the necessary adjustments to bring nonconforming structures into compliance with new requirements.[47] The court stated, however, that the validity of any amortization provision depends on whether the time period is reasonable.[48] The rea-

42. The fourteenth amendment of the United States Constitution provides in pertinent part as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

43. 98 N.M. 138, 646 P.2d 565 (1982).

44. *Id.* at 145, 646 P.2d at 572 (citing Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979)); *appeal dismissed,* 446 U.S. 930 (1980).

45. 98 N.M. at 144, 649 P.2d at 571.

46. *Id.*

47. The dissent maintained that use of the amortization provision only reinforces the claim of the sign owners that an unconstitutional "taking" has occurred, and that such provisions are a method of avoiding the payment of compensation required under the constitution. *Id.* at 149, 646 P.2d at 576 (Federici & Riordan, JJ., dissenting).

48. *Id.* at 145, 646 P.2d at 572.

sonableness of the period is determined by balancing the public gain against the private loss, considering factors such as the extent of an individual's business affected and the advantage of maintaining a nonconforming structure.[49] The supreme court noted that the lower court did not engage this balancing process and remanded the case for an evidentiary hearing on that issue.[50]

Temple Baptist Church, Inc. represents a significant retreat from the concept that one should be compensated when government interferes with private property. It appears that the court may be more concerned with the potential costs of providing compensation than it is with the constitutional right of due process, as indicated by the justification for its conclusion which is nothing more than a semantic distinction between "amortization" and "taking of property."

In *Alber v. Nolle,*[51] the court of appeals considered whether the parental liability statute constituted a deprivation of property without due process of law. The statute imposes liability upon parents for the conduct of their children who maliciously or willfully injure a person or the property of another.[52] The trial court found that Monika Nolle, seventeen, violently attacked the plaintiff, and assessed damages against Monika's parents. On appeal, the court recognized that the claim was a question of substantive due process; the inquiry was whether the statute is a proper exercise of the state's police power.[53]

49. The supreme court rendered its decision in *Temple Baptist Church, Inc.* despite the enactment of a state statute that prohibits municipalities from removing or causing to be removed signs without payment of compensation. *See* N.M. Stat. Ann. § 42A-1-34 (Repl. Pamp. 1981). The court said that the statute was inapplicable to the case because it became effective during the pendency of the action, and was not controlling. The dissent suggested, however, that the statute may control future actions by the city to enforce its sign ordinance. The impact of this statute remains questionable because it does not expressly prohibit the use of amortization provisions in the place of normal forms of compensation.

50. Plaintiffs raised two other constitutional claims. First, they claimed that the sign ordinance operated as an *ex post facto* law because it would impose civil and criminal penalties on pre-existing sign owners. The supreme court said that penalties would not be imposed until after the five-year amortization period expired. The ordinance, therefore, was not *ex post facto*. U.S. Const. art. I, § 10, cl. 1. Second, plaintiffs claimed that the ordinance impaired an obligation of contract in that contracts to perform services on nonconforming signs which must be removed will have to be terminated. The court rejected this claim, and held that existing contracts are also subject to the legitimate exercise of police power. U.S. Const. art. 1, § 10, cl. 1.

51. 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

52. This appeal involved the parental liability section of the Children's Code as that statute existed in 1979:

> Any person may recover damages not to exceed two thousand five hundred dollars ($2,500) in a civil action in a court or tribunal of competent jurisdiction from the parent, guardian or custodian having custody and control of a child when the child has maliciously or willfully injured a person or damaged, destroyed or deprived use of property, real or personal, belonging to the person bringing the action.

N.M. Stat. Ann. § 32-1-46 (Repl. Pamp. 1981).

53. 98 N.M. at 105, 645 P.2d at 461.

The court of appeals set forth the general rule that "a statute is sustainable as a proper exercise of [the police] power if the enactment is reasonably necessary to prevent manifest evil or reasonably necessary to preserve the public safety, or general welfare."[54] The court also stated that property rights are held subject to the fair exercise of the police power, and that a statute enacted in the proper exercise of that power is not a deprivation of property without due process of law, even though the statute may have the effect of limiting or destroying private property.[55] The court pointed to three other jurisdictions upholding similar statutes to demonstrate that the New Mexico statute was not unique.[56] The court further held that the statute was within the state's police power and not a violation of due process because it complied with the overall purpose of the statutory scheme to compensate those parties damaged by the torts committed by insolvent children.[57]

This case demonstrates that courts primarily focus on compensating the injured parties rather than exploring the constitutional principle. Imposing liability on the parents of children, who at age seventeen are practically beyond parental control, imposes strict liability on parents who may not be at fault. Although the court could have required that parents be shown to be negligent before they assume responsibility for their children's conduct, the court apparently determined that the economic interests of injured parties are paramount to the constitutional principle at stake.

In *State ex rel. Human Services Department v. Rael,*[58] the supreme court examined whether, as a matter of procedural due process, an indigent party is entitled to court appointed counsel in a civil contempt proceeding brought to enforce a child support order entered in a paternity suit. The trial court determined that the defendant needed the services of an attorney based on its own finding that defendant did not understand the nature of the proceeding.[59] After the defendant failed to obtain private counsel, he

54. *Id.*

55. *Id.*

56. Gen. Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963); Kelly v. Williams, 346 S.W.2d 434 (Tex. Civ. App. 1961); Mahaney v. Hunter Enter., Inc., 426 P.2d 442 (Wyo. 1967). The court distinguished a Georgia case which had invalidated a similar statute because the Georgia statute did not limit liability, and the New Mexico statute limits damages to $2,500. This would not appear to be a sufficient distinguishing factor upon which the due process claim should rest.

57. The defendants also argued that the parental liability statute denied them equal protection of the law because it imposed liability on them solely because of their status relationship to their daughter. The court of appeals rejected this argument. The court held that the statute applies equally among parents of children who cause willful damage, and the parents of such children do not constitute an improper class. 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

58. 97 N.M. 640, 642 P.2d 1099 (1982). For an excellent discussion of the issue of the sixth amendment's application to civil contempt proceedings, see Hermann and Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings,* 14 N.M. L.Rev. 275 (1984).

59. 97 N.M. at 642, 642 P.2d at 1101.

moved for court-appointed counsel on the ground of indigency.[60] The trial court denied his motion, and the supreme court granted review on interlocutory appeal.

A threshold issue for the supreme court was whether the contempt proceeding was civil or criminal. The court concluded that the proceeding was civil in nature and, therefore, the sixth amendment right to appointed counsel did not apply.[61] The court recognized, however, that the due process clause of the fourteenth amendment was implicated and required fundamental fairness in the proceeding because the defendant faced the threat of imprisonment.[62]

Applying the balancing test developed by the United States Supreme Court in *Lassiter v. Department of Social Services*,[63] the New Mexico Supreme Court considered the defendant's personal liberty interest and determined that his interest was not as strong as it would have been if he had been criminally prosecuted. The court said that he would lose his liberty only if it were proven that he had the ability to comply with the child support order but failed to comply.[64] The court also noted that the defendant had only a limited property interest at stake because the court previously adjudicated this interest in the original paternity and support suit.[65] Next, the court determined that there was little risk that the procedures used in the contempt hearing would lead to an erroneous decision, noting that the information sought was typically straightforward and easily resolved by reference to court records.[66] Finally, the court pointed out that the government's interest in the proceeding was primarily financial.[67]

After balancing these factors, the supreme court concluded that due process did not require that the state provide appointed counsel in every instance in which an indigent faces civil contempt charges that might subject him to incarceration.[68] The court did state, however, that there may be some instances where due process would require appointed counsel:

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60. *Id.*

61. The court said that the contempt proceeding was an enforcement action and was remedial in nature and that the defendant could avoid contempt by complying with the court's order. The civil penalty alone, therefore, did not invoke the sixth amendment. *Id.* at 642, 642 P.2d at 1101.

62. *Id.* at 643, 642 P.2d at 1102.

63. 452 U.S. 18 (1981). *Lassiter* established that in determining whether due process entitles an indigent party to court appointed counsel, the court must consider the following factors: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27. These factors must be evaluated and balanced with the historical presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his personal liberty. *Id.*

64. *Rael*, 97 N.M. at 643, 642 P.2d at 1102.

65. *Id.* at 644, 642 P.2d at 1103.

66. *Id.*

67. *Id.*

68. *Id.*

> The trial court is the proper evaluator of the need for counsel on a case-by-case basis, considering factors such as the indigent's ability to understand the proceeding, the complexity of the legal and factual issues, and the defenses that might be presented. We hold that the trial court must make a case-by-case determination, based on articulated reasons, whether fundamental fairness requires the appointment of counsel to assist an indigent defendant in a nonsupport civil contempt proceeding, and may, in the exercise of its sound discretion, appoint counsel in the proper case.[69]

The case was remanded to the district court for the proper determination because the trial court did not consider these factors.

The case adopts a new test in New Mexico for the right to appointed counsel in civil contempt proceedings. Applying these factors to any particular case, however, it is hard to imagine an occasion when an affected party would not be entitled to court appointed counsel when he is required to know the defenses that may be applicable to what may or may not be a complex proceeding. As a practical matter, the test is unworkable because of the time it will take to determine each party's right to counsel by considering the required factors. The least expensive and most efficient resolution probably would be to provide appointed counsel in every case.[70]

IV. THE SUPREMACY CLAUSE

In *Wells v. County of Valencia*,[71] the supreme court considered whether the New Mexico Tort Claims Act (the "Act")[72] was the exclusive remedy for instituting judicial action against state governmental entities or employees. The plaintiff originally filed suit in federal district court under the Civil Rights Act[73] seeking damages for cruel and unusual punishment in violation of the eighth amendment and for personal injury under the

69. *Id.* at 645, 642 P.2d at 1104.

70. Hermann and Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. Rev. 275 (1984).

71. 98 N.M. 3, 644 P.2d 517 (1982).

72. N.M. Stat. Ann. §41-4-1-27 (Repl. Pamp. 1982).

73. 42 U.S.C. §1983 (Supp. III 1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Act.[74] The plaintiff alleged that he was placed in a completely dark prison cell with an uncovered hole in the center of the floor and, as a result, he tripped and fell in the hole sustaining permanent neurological injuries.[75]

The federal district court certified the question concerning the exclusiveness of the state remedy under the Act to the New Mexico Supreme Court for its resolution.[76] Interpreting the Act,[77] the court reasoned that the Legislature did not intend to make the Act the exclusive remedy for constitutional violations because not all tortious conduct amounts to a deprivation of constitutional rights.[78] The court then contrasted the remedies under the Federal Civil Rights Act and the state Act, and concluded that the federal remedy and the state remedy were two distinct concepts compensable under different legal theories.[79] Section 1983 is intended to compensate only for deprivations of constitutional rights, but the Act creates a remedy and waives sovereign immunity for other kinds of tortious conduct that do not amount to constitutional violations.[80]

The county had argued that the Legislature conditioned its waiver of sovereign immunity under the Act only as to those actions litigated in accordance with the state remedy. Under this reasoning, the plaintiff's civil rights action would be thwarted by the sovereign immunity defense. The supreme court rejected this interpretation of the Act, however, and held that by waiving sovereign immunity in certain kinds of tort cases, the New Mexico Legislature had not emasculated the Federal Civil Rights Act. The court said that such a denial by the state would violate the

74. N.M. Stat. Ann. § 41-4-12 (1978) provides:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

75. 98 N.M. at 5, 644 P.2d at 519.

76. N.M. Stat. Ann. § 34-2-8 (Repl. Pamp. 1981) authorizes certification of questions to the New Mexico Supreme Court from the federal courts.

77. N.M. Stat. Ann. § 41-4-17(A) reads in pertinent part:

> The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim.

78. The Tort Claims Act waives immunity for torts occurring in connection with certain specified activities [N.M. Stat. Ann. §§ 41-4-5 to 41-4-12]. Only § 41-4-12 waives immunity for deprivations of constitutional rights.

79. 98 N.M. at 6, 644 P.2d at 519-20.

80. *Id.* at 6, 644 P.2d at 520.

supremacy clause,[81] and declared that the Act does not prohibit a plaintiff from bringing an action in tort for damages and at the same time pursuing his federal civil rights remedies. The court cautioned, however, that the plaintiff would not be permitted a double recovery.[82]

Wells is significant because it allows a plaintiff two bites of the apple. If a plaintiff fails in a state tort action brought under the Act, the plaintiff is free to try again under the federal remedy for acts which arise out of the same transactions or occurrences and vice-versa. Principles of res judicata and collateral estoppel, however, would impact on the litigation with respect to those matters decided on the merits in any previous litigation.

81. U.S. Const. art. VI, cl. 2, states in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

82. 98 N.M. at 7, 644 P.2d at 521. Presumably, the court is referring to the fact that if both claims—civil rights and tort—sought compensation for the same injury, the defendant, having only been injured once, would only be compensated once, even though the wrongful conduct was both a violation of the defendant's civil rights and a tort.