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TORT LAW—Fair Report Privilege—Does the Self-Report Exception Apply When a Newspaper Defendant Fairly Reports Statements Made by a Witness During Its Own Litigation? *Stover v. Journal Publishing Co.*

I. INTRODUCTION

The “fair report” privilege grants the right to report defamatory statements made in official or public proceedings without liability, provided the report is fair and accurate.¹ The “self-report exception” to this privilege, however, holds a party liable for making a defamatory statement and then “reporting” the defamation to others.² *Stover v. Journal Publishing Co.*³ is a case of first impression, in New Mexico or any other jurisdiction, with regard to the self-report exception.⁴ In *Stover*, the New Mexico Court of Appeals⁵ did not decide whether the self-report exception is to be settled New Mexico law. Instead, the court held that, assuming the self-report exception is valid, it would not apply to the facts of *Stover*.⁶ Therefore, Journal Publishing Company, through its newspaper, the *Albuquerque Journal*,⁷ was protected by the fair report privilege when it printed an article accurately reporting statements of a witness, even though the *Journal* was a defendant in the suit.⁸

1. RESTATEMENT (SECOND) OF TORTS § 611 (1977) defines the privilege:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

2. The exception provides that “a person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated.” RESTATEMENT, *supra* note 1, at comment (c). This Note uses the term “self-report exception,” and the court of appeals refers to it as the “self-reported statement exception.”

3. 105 N.M. 291, 731 P.2d 1335 (Ct. App. 1985), *cert. quashed*, 105 N.M. 290, 731 P.2d 1334 (1987), *cert. denied*, 108 S.Ct. 230 (1987).

4. *Id.* at 292, 731 P.2d at 1336. The court of appeals agreed with the parties that the precise question had not been previously decided in New Mexico or any other jurisdiction “at least in terms of applying a self-reported statement exception to a member of the media who is also a party to a lawsuit.” *Id.*

5. The court of appeals decision is reviewed here, because although the supreme court issued an opinion, it was later withdrawn and certiorari quashed. 26 N.M. St. B. Bull. 93 (January, 1987), *see infra* note 43 and accompanying text.

6. *Stover*, 105 N.M. at 295, 731 P.2d at 1339.

7. *Id.* at 293, 731 P.2d at 1337. Hereinafter, Journal Publishing Co. is referred to by the shortened name of its newspaper, *The Albuquerque Journal*, i.e., “the *Journal*.”

8. *Id.* In addition to the *Journal*, *Stover* also joined the following defendants: Albuquerque Publishing Company, *Journal* owner Thompson Hughes Lang, *Journal* reporter Gerald Crawford, *Journal* investigator John H. Donohue, *Journal* editor Bill Hume, and a federally-protected witness, Jerome Sternlieb. *Record* at 1. The cause of action listing Crawford, Donohue, Hume and Sternlieb was dismissed with prejudice. *Record* at 1193, *see infra* notes 42 and 100 and accompanying text.

This Note will first discuss the historical background of defamation law, absolute and conditional privilege, and whether United States Supreme Court decisions have affected the fair report privilege. The Note will then review the court of appeals' reasoning in allowing the *Journal* to invoke the fair report privilege. Finally, the Note will anticipate the questions that remain unanswered as a result of the *Stover* decision.

II. STATEMENT OF THE CASE

A. *The Original Suit*—Marchiondo v. Brown

Stover developed from an earlier action in which attorney William C. Marchiondo sued the Albuquerque Journal and its editor, Robert A. Brown, for libel.⁹ During pretrial discovery in the *Marchiondo* case, the *Journal* interviewed Jerome Sternlieb, a federally-protected witness, who had formerly been an underworld crime figure.¹⁰ Sternlieb was in the Department of Justice's Witness Protection Program, and had given evidence leading to the conviction of several organized crime figures.¹¹ The government gave Sternlieb a new identity and relocated him, in order to prevent retaliation from criminal defendants against whom he had testified.¹² It was difficult to arrange an interview with Sternlieb, so the trial court required the *Journal* to file an affidavit describing in advance what Sternlieb would testify to in his deposition.¹³ Studying the affidavit in advance of the deposition enabled Marchiondo's attorneys to prepare cross-examination beforehand, because it was difficult to arrange for future depositions.¹⁴

The *Journal* filed Sternlieb's affidavit on January 12, 1982, in compliance with the court's procedure, and the court ordered it sealed.¹⁵ In the affidavit Sternlieb described a visit he made to Albuquerque with James Napoli, Jr., son of underworld crime figure, James Napoli, Sr.¹⁶

9. *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). Marchiondo, a criminal defense attorney, claimed a *Journal* article entitled "Organized Crime Showing Interest in New Mexico," which was juxtaposed by his photograph, linked him with organized crime, and thus libeled him by innuendo. *Id.* at 397, 649 P.2d at 465. Marchiondo also claimed an editorial entitled "Our Choice—Joe Skeen," which contained the phrase "as a criminal lawyer, Marchiondo thrives by having friends in key places," libeled him. *Id.* at 400, 649 P.2d at 468.

The supreme court affirmed the trial court ruling that Marchiondo was not a public figure. *Id.* at 399, 649 P.2d at 467. The supreme court also found the editorial to be absolutely privileged as opinion. *Id.* at 400, 649 P.2d at 468. The issue of whether Marchiondo was libeled by the headline/photograph combination was remanded to the trial court. *Id.* at 404, 649 P.2d at 472.

10. *Stover*, 105 N.M. at 292, 731 P.2d at 1336.

11. *Record* at 891.

12. *Id.*

13. *Stover*, 105 N.M. at 292, 731 P.2d at 1336.

14. *Record* at 891.

15. *Stover*, 105 N.M. at 292, 731 P.2d at 1336.

16. *Id.*

Sternlieb said that Police Chief Bob Stover drove him and Napoli around Albuquerque. According to Sternlieb, Stover pointed out an unfinished shopping center owned by Napoli's father, together with Marchiondo and Ex-Governor Jerry Apodaca.¹⁷ Judge Richard Traub allowed Marchiondo's attorney to send copies of the affidavit to Apodaca and Stover, since they were mentioned in the affidavit.¹⁸ At the time of the affidavit's filing, Stover was running for Bernalillo County Sheriff, and Apodaca was a candidate for the United States Senate.¹⁹

About four months after the affidavit was filed and sealed by the court, Apodaca's attorney advised Judge Traub that Apodaca planned to call a press conference on April 14th to release the affidavit and rebut Sternlieb's comments.²⁰ Judge Traub scheduled a hearing on April 13th to determine if the affidavit should be unsealed.²¹ Stover did not attend the hearing, but he did have Marchiondo's attorney file an affidavit for him in which he denied Sternlieb's allegations.²² Judge Traub granted the *Journal's* unopposed motion to unseal the affidavit.²³ Earlier, before the hearing to unseal, Stover taped a brief statement with television station KOAT denying Sternlieb's claims.²⁴ That night stations KOAT, Kkob and KGGM all had news stories on the affidavit and Stover's denial.²⁵

The next morning the *Journal* published a front-page article recounting the contents of the affidavit and Stover's rebuttal.²⁶ The article stated that

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 292-93, 731 P.2d at 1336-37.

22. *Id.*

23. *Id.* at 293, 731 P.2d at 1337.

24. *Id.*

25. *Id.*

26. *Record* at 1213, *Albuquerque Journal*, April 14, 1982, at A-1. The headline read, "Accusations Involve Parole Case: Affidavit Says Apodaca Took Bribe." The article stated, in pertinent part:

District Judge Richard Traub unsealed Tuesday an affidavit that accuses former Gov. Jerry Apodaca of accepting \$10,000 from an organized crime figure for paroling a New Mexico prisoner in 1977.

Apodaca said he would answer the accusation and other allegations in the affidavit today with substantive evidence.

The affidavit, by Jerome Sternlieb, a convicted felon who admits to ties with organized crime figures, also claims former police Chief Bob Stover chauffeured Sternlieb and James Vincent Napoli, Jr., son of a New York City organized crime figure, around Albuquerque during a visit more than five years ago.

Stover, however, in an affidavit filed Tuesday in State District Court, claims the affidavit is absolutely false.

Stover, now a Republican candidate for sheriff, says Sternlieb selected his photo from a photo array and 'everything in his affidavit concerning me was an outright lie.'

... Stover, in his own affidavit filed by Marchiondo's attorney, says he was informed of the Sternlieb affidavit implicating him on Jan. 12 and then talked to

Sternlieb had been convicted of interstate mail fraud, wire fraud, and issuing worthless checks.²⁷ Pictures of Stover, Napoli Sr., Napoli Jr., and Apodaca were printed next to the article.²⁸

B. The Spinoff Suit—Stover v. Journal Publishing Co.

Two years later, Stover filed a complaint alleging the *Journal* had defamed him in the news article, and also had conspired to furnish Sternlieb with false information and then obtain the affidavit.²⁹ After extensive discovery, Stover filed an amended complaint, again alleging defamation, but omitting the charge of conspiracy.³⁰ The *Journal's* answers to both complaints asserted the defenses of absolute privilege for statements made in judicial proceedings, and the fair report privilege for reports of official and public proceedings.³¹

After a hearing on the *Journal's* motion for summary judgment, the trial court ruled that the affidavit was generated in a judicial proceeding, and was therefore absolutely privileged.³² Judge Sitterly also granted partial summary judgment as to the statements of the reporter and the placement of the pictures, holding they were not subject to defamatory meaning.³³

Judge Sitterly denied summary judgment, however, as to the publication of the news article.³⁴ She held as a matter of law that the news article was fair and accurate. However, the *Journal* was not entitled to the fair report privilege, because it reported statements of its own witness, an action that was not privileged due to the self-report exception.³⁵ This

Journal attorneys who told him Sternlieb had selected his picture from a photo array.

Stover said he told the Journal lawyers 'that I did not know Jerome Sternlieb; I had never met him and everything in his affidavit was an outright lie.'

Stover says he offered to take a lie detector test or any other kind of truth test but the Journal refused his offer.

He said he also offered to get copies of his daily appointment calendars as police chief, establishing his whereabouts, but that the efforts failed because the calendars had been destroyed in accordance with office practices.

Journal Publisher T.H. Lang said, 'Stover is free to obtain a lie detector test if he wants one. We told him we weren't practicing law enforcement. We merely asked his help to determine the truth of the Sternlieb affidavit in connection with our libel suit. We paid his transportation later to the site where we took Sternlieb's deposition, so Stover could confront his accuser.'

27. *Record* at 1214.

28. *Id.* at 1216.

29. *Id.* at 1.

30. *Id.* at 194, *see supra* note 8 and accompanying text.

31. *Id.* at 49, 1217.

32. *Stover*, 105 N.M. at 293, 731 P.2d at 1337.

33. *Id.*

34. *Id.*

35. *Id.*

common-law exception provides that "a person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated."³⁶

The trial court certified the question of the self-report exception for interlocutory appeal.³⁷ The court of appeals reversed, holding that even if the self-report exception was valid, it did not apply to the facts of *Stover*.³⁸ The court of appeals based its rationale on two factors: 1) the exception applies to parties publishing their own defamatory statements, and the *Journal* did not make the defamatory statement, it was made by Sternlieb; and 2) the exception is designed to prevent abuse of the fair report privilege by parties initiating suits, and the *Journal* did not initiate this suit.³⁹

The New Mexico Supreme Court reversed the court of appeals in a 3 to 2 opinion on December 11, 1986.⁴⁰ The supreme court adopted the self-report exception as the law governing *Stover*, and held that material issues of fact as to collusion in obtaining the affidavit would preclude granting summary judgment to the *Journal*.⁴¹ The two dissenting judges agreed with the majority's statement of the law, but pointed out that *Stover's* original claim of conspiracy or collusion had been dismissed with prejudice by the trial court.⁴² On January 28, 1987, in response to the *Journal's* request for rehearing, the supreme court rescinded its opinion and quashed certiorari.⁴³ Seven months later, *Stover* petitioned the United States Supreme Court for review, and was denied certiorari.⁴⁴

III. DISCUSSION AND ANALYSIS

A. Common Law Background of Defamation Law

Defamation law is the result of the tension between traditional respect

36. RESTATEMENT, *supra* note 1, at comment (c).

37. *Stover*, 105 N.M. at 293, 731 P.2d at 1337. The court cited N.M. STAT. ANN. § 39-3-4 (1978) which provides that a question for interlocutory appeal must involve a controlling question of law as to which there is substantial ground for the difference of opinion, and that a resolution would materially advance the ultimate termination of the litigation. The court indicated that a decision on the self-report exception "will entirely dispose of this case in light of the court's other rulings." *Id.*

38. *Id.*

39. *Id.* at 295.

40. *Stover v. Journal Publishing Co.*, 26 N.M. St. B. Bull. 89 (January, 1987). The opinion was written by Chief Justice Harry E. Stowers, Jr., who was joined by Justices William Riordan and William R. Federici.

41. *Id.* at 93.

42. *Id.* Justices Dan Sosa, Jr., and Mary C. Walters dissented.

43. *Stover*, 105 N.M. at 290, 731 P.2d at 1334. At the time the court rescinded its opinion, two of the majority, Justices William Riordan and William R. Federici, were no longer on the bench, having been replaced by Justices Richard E. Ransom and Tony Scarborough. State Bar of New Mexico, *1987 Bench and Bar* 15 (1987).

44. See *supra* note 3.

for free speech versus sympathy for an individual maligned by a lying tongue.⁴⁵ Defamation includes the "twin torts" of libel, which generally is written, and slander, which is oral.⁴⁶ Defamation is defined as a communication which tends to harm the reputation of another so as to lower him in the estimation of the community, or to deter third persons from associating or dealing with him.⁴⁷

Typically, a plaintiff in a defamation case puts the communication in evidence and proves that the defendant published it to others.⁴⁸ In the past, a private figure plaintiff had a rebuttable presumption that the statement was false, and did not need to prove that the defendant knew it was false, or could have proved it false on reasonable inquiry.⁴⁹ The United States Supreme Court, however, recently abrogated the common law principle that a defendant may prove the truth of defamatory statements as an affirmative defense.⁵⁰ Now, at least when a newspaper publishes matters of public interest, a private figure plaintiff must prove as part of his *prima facie* case that the statement is false.⁵¹

45. PROSSER AND KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 771-848 (W. Keeton 5th ed. 1984) [hereinafter "Prosser"]. For a thorough discussion of the common law of defamation, see generally, Kelley, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295-333 (1958), and Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA.L.REV. 1349 (1975).

46. PROSSER, *supra* note 45, at 771. In this Note, the term "defamation" is used to include libel and slander.

New Mexico is the first state to abolish the distinction between libel and slander, including both within the tort of defamation. See N.M. STAT. ANN. U.J.I. CIV. 13-1002 (Supp. 1986) The distinction between libel *per se* and libel *per quod* has also been eliminated. *Id.*, comment at 117.

47. RESTATEMENT, *supra* note 1, at § 559, comment (3). In New Mexico, defamation has been held to be "that which tends to render the person about whom it is published contemptible or ridiculous in public estimation, expose him to public hatred or contempt, or causes virtuous men not to associate with him." *Bookout v. Griffin*, 97 N.M. 336, 639 P.2d 1190 (1982).

A *prima facie* defamation case consists of a publication to a third party, which is of or concerning plaintiff, which is susceptible to defamatory meaning, and which is a statement of fact, not opinion. See, N.M. STAT. ANN. 1978 U.J.I. CIV. 13-1002 (Supp. 1986).

The damages plaintiff must prove depend on whether the communication involves slander or libel. PROSSER, *supra* note 45, at 788. Generally, a slander plaintiff must include proof of actual damage to reputation as part of his *prima facie* case. *Id.* Libel, on the other hand, is actionable *per se*. *Id.* at 788. A libel plaintiff does not have to prove any impairment of reputation, because damage is assumed from the publication of the libel itself. *Id.*

48. RESTATEMENT, *supra* note 1, at § 558.

49. PROSSER, *supra* note 45, at 788. Exceptions in which at common law slander was actionable *per se* and required no proof of damage include: 1) accusations of crime, 2) imputation of a loathsome disease, 3) defamation of a person's business or trade, and 4) accusations of sexual unchastity or perversion. *Id.* at 788-93. Slander *per se* has been virtually eliminated by the United States Supreme Court decision that a libel plaintiff must show fault on the part of defendant. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

50. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558 (1986). This decision dealt only with a media case involving a private figure plaintiff and a matter of public interest. *Id.*

51. *Id.* at 1559. See also Note, *DEFAMATION LAW—The Private Figure Plaintiff Must Establish a New Element to Make a Prima Facie Showing: Philadelphia Newspapers, Inc. v. Hepps*, 17 N.M.L. REV. ____ (1987).

1. Absolute Privilege

If a plaintiff proves a *prima facie* case of defamation, the defendant may plead truth, which in some cases is a complete defense, and/or privilege.⁵² To promote the free flow of important information to the public, courts have developed absolute privilege and conditional privilege.⁵³ Absolute privilege or immunity protects participants in judicial or legislative proceedings, based on the policy that information conveyed in these proceedings is so important to the public that participants should have complete freedom of expression, without fear of liability for anything that is said.⁵⁴ Absolute privilege even protects a party who knows the information spoken is false, and a party who makes statements for the specific purpose of defaming.⁵⁵

2. Qualified or Conditional Privilege

Information which has less weight from a social point of view is conditionally privileged.⁵⁶ Generally speaking, a conditional privilege only shields a publisher who fairly and accurately reports a matter the publisher believes is true.⁵⁷ A special class of conditional privilege, however, does not require that the publisher believe the matter published is true.⁵⁸ News reporters, for example, enjoy this special conditional privilege, and may report on public meetings or judicial proceedings free of responsibility to determine truth or falsity.⁵⁹ The privilege is defeasible, however, on proof that the report is not fair and accurate. Thus a reporter

52. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA.L.REV. 1349, 1353 (1975)

53. PROSSER, *supra* note 44, at 815.

54. *Id.* The New Mexico Court of Appeals has defined absolute privilege as "absolute immunity from liability for defamation" and held that it is confined to "very few situations where there is an obvious policy in favor of permitting complete freedom of expression without any inquiry as to defendant's motives." *See Neece v. Kantu*, 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App. 1973) (citations omitted). These situations would include judicial or legislative proceedings, executive communications, consent of the plaintiff, husband and wife, and political broadcasts. *Id.*

55. PROSSER, *supra* note 45, at 816.

56. *Id.* The New Mexico Supreme Court has defined an occasion in which qualified or conditional privilege would be justified as "one consisting of a good-faith publication in the discharge of a public or private duty when the same is legally or morally motivated." *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico*, 79 N.M. 293, 296, 442 P.2d 783, 786 (1968).

57. ELDREDGE, *THE LAW OF DEFAMATION* 419 (1978). As an example, a New Mexico case deals with an employer who was given immunity to talk about an employee during an unemployment security hearing on the condition that the employer tell the truth. *See Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 671 P.2d 662 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983) ("an abuse of the privilege occurs if the publisher lacks belief or reasonable grounds for belief in the truth of the alleged defamatory statements.").

58. RESTATEMENT, *supra* note 1, at comment (a). For a discussion of whether this privilege still shields a defamer who publishes information the defamer knows is false, *see infra* note 74 and accompanying text.

59. *Id.*

who inserts an opinion or garbles the facts is subject to liability.⁶⁰ Because of the limitation, this conditional privilege is often termed the "fair report" privilege.⁶¹

B. United States Supreme Court Decisions—Have They Affected the Fair Report Privilege?

In 1964, the United States Supreme Court first held that free speech considerations of the first amendment should restrict the standard of fault set by state libel laws.⁶² The Court abrogated the common law principle of strict liability for defamation, requiring instead that fault be a prerequisite to liability.⁶³ The standard of fault was set in *New York Times v. Sullivan*,⁶⁴ where the Court held that a public official could recover damages for defamation only by clear and convincing evidence that the false statement was made with "actual malice."⁶⁵ Actual malice is shown when a statement is made with "knowledge that it was false or with reckless disregard of whether it was false or not."⁶⁶ The Supreme Court based this new requirement on the principle that debate on public issues should be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁶⁷ The Court later applied a similar requirement of fault to public figures.⁶⁸

In 1971, the actual malice standard was expanded to include private figures if the statements were made about a matter of "public or general interest."⁶⁹ The Court later rejected this view, and held that actual malice must be proved if plaintiff is a public official or public figure, but not if plaintiff is a private figure.⁷⁰ The Court allowed the states to set the

60. *Id.* at comments (a), (c).

61. The fair report privilege was first recognized in New Mexico when the Supreme Court quoted with approval from NEWELL ON SLANDER AND LIBEL § 646 (3d. ed.) stating that "[e]very impartial and accurate report of any proceeding in a public law court is privileged." *Stover*, 105 N.M. at 294, 731 P.2d at 1338, (quoting from *Henderson v. Dreyfus*, 26 N.M. 541, 566, 191 P.2d 442, 452 (1919)).

62. ELDREDGE, *supra* note 57, at 422; *see also infra* note 64 and accompanying text.

63. PROSSER, *supra* note 44, at 805.

64. 376 U.S. 270, 279 (1964).

65. *Id.* at 279-80.

66. *Id.*

67. *Id.* at 270.

68. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (a public figure may "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."). For a discussion of the basis of the public official/public figure distinction in showing actual malice, *see* PROSSER, *supra* note 44, at 805-06, and Higdon, *Defamation in New Mexico*, 14 N.M.L. REV. 321, 331 (1984).

69. *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

70. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

standard of fault required to show defamation of a private figure, as long as that standard was not strict liability.⁷¹ As it now stands, a public official or public figure plaintiff must show a defendant acted with actual malice; a private figure plaintiff must show the defendant acted with the standard of fault set by state common law.⁷²

By its terms the fair report privilege protects a publication if it is "accurate and complete, or a fair abridgement of the occurrence reported."⁷³ But is a publication privileged if it is accurate and complete, but contains information the publisher knows to be false? Stated another way, do Supreme Court decisions indicate the fair report privilege is defeasible on a showing of actual malice? The American Law Institute, publishers of the *Restatement (Second) of Torts*, takes the position that the actual malice standard is inapplicable to the fair report privilege. Rather, the constitutional standard of fault to defeat the fair report privilege remains the same: proof that the publisher failed to do what was reasonably necessary to insure that the report was accurate and complete.⁷⁴ The Institute thus interprets Supreme Court decisions to grant immunity to a publisher of known falsehood. The *Restatement (Second) of Torts* provides: "the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false."⁷⁵

C. The Court of Appeals Decision in *Stover*

The New Mexico Court of Appeals followed the *Restatement* position, and held that because the *Journal* article had been fairly and accurately reported, the article was protected by the fair report privilege regardless of whether the reporter believed the statements to be true.⁷⁶ The court reviewed the reasons for the fair report privilege,⁷⁷ examined the facts of *Stover*, and held the self-report exception did not apply.⁷⁸

71. *Id.*

72. *Id.* The New Mexico Supreme Court subsequently adopted an ordinary negligence standard for defamation of a private figure. See *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982). For a complete discussion of the case, see Note, *New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown*, 13 N.M.L. REV. 715 (1983).

73. RESTATEMENT, *supra* note 1, at §611.

74. *Id.* at comment (b). Other authorities maintain that even if a report is fair and accurate, a publisher of known falsehood is not immune. For example, Laurence H. Eldredge states: "[I]n none of the decisions of the Supreme Court of the United States has Constitutional immunity been extended to the publisher of defamatory falsehood which he knows to be false." ELDREDGE, *supra* note 57, at 422. Also, W. Page Keeton comments regarding the Second Restatement's position: "[T]here is substantial judicial authority to the contrary, and the result does not appear to be constitutionally mandated." PROSSER, *supra* note 45, at 838.

75. *Id.* at comment (a).

76. *Stover*, 105 N.M. at 294, 731 P.2d at 1338.

77. *Id.*

78. *Id.* at 293, 731 P.2d at 1337.

1. Reasons for the Fair Report Privilege

The court listed three reasons why some information is so important that it takes precedence over a defamed person's interest in reputation, and is privileged, regardless of truth or falsity.⁷⁹ First, under an agency theory, the reporter is agent for the citizen who cannot be present at public proceedings.⁸⁰ As early as 1918, the New Mexico Supreme Court recognized this function of the press. Since few people are able to attend public meetings, the press reports on what occurs at these meetings as the public's agent.⁸¹

Secondly, the court reasoned that in a free society the public exercises a supervisory function over its government through the power of the vote.⁸² It is essential that the press inform the public regarding government officials, so that the public may exercise its supervisory function and vote intelligently.⁸³

Finally, the information function is an important basis for the fair report privilege.⁸⁴ Because a self-governing society needs to be fully apprised of controversies, this need for information outweighs concern for the reputation of the individual.⁸⁵ Thus, the press is privileged to report fully, giving all information on public proceedings, with no responsibility to weigh truth/falsity.⁸⁶ The court cited a two-pronged justification for this: 1) The public has a right of access to a full account of proceedings in order to fulfill its supervisory duties,⁸⁷ and 2) the press would be intolerably burdened if it had to determine the truth or falsity of everything published regarding an official proceeding.⁸⁸ News coverage of important information would be limited if the press faced liability for every falsehood reported, and the public would suffer as a result.⁸⁹

Stover referred to the actual malice standard, alleging the *Journal* article was published with a "high degree of awareness of the [affidavit's] probable falsity."⁹⁰ The court, however, agreed with the *Restatement* position that the actual malice standard does not apply to the fair report privilege, and the privilege is only defensible on proof that the report

79. *Id.* at 294, 731 P.2d at 1338.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* For a current discussion of the information function, see generally, Dengler, *The Information Theory: Justification for the Fair Report Privilege in Ohio*, 12 OHIO N.U. LAW REV. 307 (1987).

85. *Stover*, 105 N.M. at 294, 731 P.2d at 1338.

86. *Id.*

87. *Id.*

88. *Id.* at 295, 731 P.2d at 1339.

89. *Id.*

90. *Id.* at 293, 731 P.2d at 1337.

was not fair and accurate.⁹¹ The trial court had held as a matter of law that the *Journal* news article fairly and accurately reported the contents of the Sternlieb affidavit.⁹² The court of appeals reasoned, therefore, that the *Journal* was insulated from liability unless the fair report privilege did not apply due to the self-report exception.⁹³

2. The Self-Report Exception Does Not Apply to the Facts of Stover

The court of appeals noted that the parties disagreed sharply as to whether the self-report exception had been adopted by the American Law Institute.⁹⁴ The court declined to enter the debate, and instead merely held that even if the exception had been adopted, it would not apply to the facts of *Stover* for two reasons.⁹⁵

First, the self-report exception provides that if a party makes a defamatory publication and then reports the defamation to others, that party is not protected by the fair report privilege.⁹⁶ The court emphasized the fact that the *Journal* did not make the original defamatory statement; rather, it was made by Sternlieb.⁹⁷ Stover argued that the *Journal's* investigator provided Sternlieb with the false information in the affidavit, and thus the *Journal* did make the defamatory statement.⁹⁸ The court noted, however, that the record did not show that the *Journal* gave Sternlieb the information. Rather, Sternlieb gave the FBI the information, and then more than a year later, the *Journal* obtained Sternlieb's affidavit repeating the information.⁹⁹ The trial court took notice of this fact, and dismissed Stover's conspiracy charge with prejudice. The court of appeals therefore

91. *Id.* at 295, 731 P.2d at 1339.

92. *Id.*

93. *Id.*

94. *Id.* The dispute centered around the fact that the self-report exception was included in the RESTATEMENT by the reporter after the American Law Institute Proceedings had ended. The *Journal* argued that the exception was not authoritative as it had not been voted on by the A.L.I., but rather had "jumped full-blown from the brow of the reporter in an effort to meet unrelated concerns." *Defendant's Appellate Brief* at 11-13. The *Journal* also pointed out that the self-report exception has never been relied on by any court in denying application of the fair report privilege. *Id.* at 13.

Stover argued the Institute had voted on the exception in principle when it accepted comment (e), another exception that is cross-referenced to the self-report exception. *Plaintiff's Appellate Brief* at 6. Comment (e) provides that judicial proceedings covered by the fair report privilege are only those in which "official action" has been taken, and the filing of a complaint does not constitute official action. *Id.* Stover also pointed to the fact that the reporter was asked to cover a similar situation to the self-report exception in his comments. *Id.* at 7. This was the situation in which an individual publishes defamation in an official proceeding and then republishes the defamation in another context, and claims it is privileged. *Id.*

95. *Stover*, 105 N.M. at 295, 731 P.2d at 1339.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

found that Stover was not entitled to this claim of conspiracy on appeal.¹⁰⁰

It seems clear that under these facts, Sternlieb could not be held to be an agent of the *Journal*. The court gave no guidance, however, as to what type of relationship would be necessary to find a defendant liable under the self-report exception. The court held the *Journal* was privileged to report defamatory statements made by a witness the *Journal* located in connection with its litigation. But what if Sternlieb had been a reporter for the *Journal* who wrote an affidavit, and then a year later reported on his own affidavit? The question of what type of agency relationship constitutes a conspiracy remains unanswered.

The court's second reason for not applying the self-report exception to the *Journal* was that the *Journal* defendants did not originate the suit, but were drawn into the original action as unwilling defendants.¹⁰¹ The court narrowly interpreted the self-report exception to apply only to parties initiating suits. Since the *Journal* was a defendant in the *Marchiondo* suit, and its newsgathering for the article was done separately from its defense, the court held the exception could not apply.¹⁰²

In emphasizing the fact that the *Journal* was an unwilling defendant, the court seemed to reason that the self-report exception, by its own terms, may be violated only by a plaintiff who initiates a suit, testifies in the suit, and then reports his own testimony. Does the court mean to say that the distinction between plaintiff and defendant is one that will carry the day in all cases, and that it is impossible for a defendant to violate the fair report privilege? For example, what if the affidavit had been from an editor of the *Journal*? Would the *Journal* be immune from liability if it reported what its editor wrote, simply because the *Journal* was a defendant in the suit? It would certainly be illogical and unfair to hold that all defendants are absolutely immune from violation of the fair report privilege, even when they report their own testimony.

Finally, the court pointed to the fact that the affidavit had been unsealed and was available to the public, and had been reported on three television stations.¹⁰³ Therefore, to deny the *Journal* the opportunity to report on

100. *Id.*

101. *Id.* at 296, 731 P.2d at 1340. The *Stover* court cited a New York case as helpful in understanding how the exception only applies to a plaintiff initiating a suit. The case involved a plaintiff who initiated a suit against a defendant, alleging conspiracy to misappropriate trade secrets. *Williams v. Williams*, 23 N.Y.2d 592, 298 N.Y.S.2d 473, 246 N.E.2d 333 (1969). Plaintiff circulated copies of the complaint to members of defendant's trade. *Id.* The defendant then sued plaintiff, alleging that the original action was initiated to ruin his business reputation. *Id.* Plaintiff asserted New York's statutory fair report privilege as a defense. *Id.* The New York court held the fair report privilege statute was not intended to protect a plaintiff who maliciously initiated an action, and then made defamatory publication regarding the action. The court thus grafted a self-report exception onto the statute. *Id.*

102. *Id.* at 296, 731 P.2d at 1341.

103. *Id.*

an affidavit which was already public knowledge would defeat the purpose of the fair report privilege, which is to allow a report of what the public could have heard or read.¹⁰⁴ The court found it would be illogical to accord Sternlieb absolute immunity for statements given as a witness in a judicial proceeding, while making the *Journal* liable for fairly and accurately reporting the same statements.¹⁰⁵

IV. CONCLUSION

Stover is a narrow decision, limited to the facts of the case. The court did not decide whether the self-report exception is the law in New Mexico. Rather, it held the exception would not apply to the facts of *Stover* for two reasons. In its first rationale the court failed to provide principled guidance as to what relationship would be required in order to find liability under the self-report exception. The court's second rationale seems to conclude that as long as a party is a defendant in a lawsuit, that party cannot be guilty of violating the fair report privilege. The *Stover* decision is well-reasoned, however, in its clarification of one aspect of New Mexico law. The actual malice standard or knowledge of falsity does not destroy the fair report privilege. Rather, the privilege is only defeasible on proof that the report is not accurate or complete.

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104. *Id.*

105. *Id.*