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## August 2013 Verdicts

<b>Submitted By</b>	<b>D. Chet Alderete, Mark J. Riley</b> Riley, Shane and Keller PA <a href="mailto:calderete@rsk-law.com">calderete@rsk-law.com</a> (505) 883-5030
<b>Court</b>	State Court
<b>County</b>	Otero
<b>Judge</b>	Hon. Jerry H. Ritter Jr.
<b>Defense Counsel</b>	D. Chet Alderete, Mark J. Riley (Bar M) Jeffrey Croasdale and Robert Sanchez (Premier)
<b>Plaintiff Counsel</b>	Christopher Bauman, Deborah Stambaugh
<b>Trier</b>	12 Person Jury
<b>Style</b>	Bobby and Tina Martinez v. Bar-M Construction Inc and Premier Heating/Air Conditioning and Roofing; CV 2011-446
<b>Statement of Facts</b>	<p>Verdict July 27,2013</p> <p>Plaintiffs contacted to build a 10,300 square foot residence for 2.35 M set on the the bluffs over looking Alamogordo, including more than 1.1M in finishes. After taking possession, the air conditioning system failed to cool the house in the warmer months. Warranty efforts failed. Ps sued general (Bar-M) and HVAC subcontractor (Premier) for breach of contract, warranty claims and pursued a UPA claim against Bar M. Bar M cross claimed for breach of contract, warranty and indemnity against Premier. Ps sought a fix, which completely replaced the HVAC system at a cost of \$340,000. Bar M offered a less comprehensive fix at a cost of\$187,300. The court granted partial summary judgment in favor of Bar-M on its cross claim for breach of contract. Trial focused primarily on P's claim for UPA based on an allegedly false Draw Schedule containing a list of direct costs for the construction, including the HVAC system. Jury rejected the UPA claim and awarded \$200,000 (apparently agreeing with Bar M's fix). Jury found on both traditional and express contract indemnity in favor of Bar M against Premier, and awarded Bar M \$21,000 on its breach of contract claim.</p> <p>Of additional note, Bar-M attempted summary judgment on the UPA claim arguing that new home construction is neither a good nor a service. Bar-M cited to several New Mexico cases supporting that position. The Court denied summary judgment and allowed the UPA claim to go to the jury.</p>
<b>Verdict</b>	Plaintiff Defense
<b>Comments</b>	Trial was dominated by P's efforts to obtain a UPA verdict in order to seek treble damages and attorneys' fees.
<b>Experts</b>	Plaintiffs: Robert Beasley PE and Berry Dillard  Bar M: John Gill  Premier: None



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<b>Court</b>	State Court
<b>County</b>	Roosevelt
<b>Judge</b>	Hon. Drew D. Tatum
<b>Defense Counsel</b>	Ron W. Childress, Mark J. Klecan (Privett Electric) Mark J. Riley, Tifany L. Sanchez, Shelby Carlsen (C&S Inc.)
<b>Plaintiff Counsel</b>	David A. Domina, Felicia C. Weingartner
<b>Trier</b>	12 Person Jury
<b>Style</b>	Bright Horizon Dairy LLC v. Privett Electric LLC and C&S Inc. No. D-0911-CV-00088, Ninth Judicial District Court
<b>Statement of Facts</b>	<p>Plaintiff operated a dairy near Portales, New Mexico. P claimed negligence against C&amp;S, an installer of dairy equipment and Privett, the electrician, for faulty wiring and electrical installation of dairy equipment which lead to stray voltage causing lost milk production from 2002 to 2010. The concept of stray voltage is based upon agricultural engineering science that dairy cows are sensitive to even low voltage and the electrical principle that ungrounded (or stray) voltage will seek a ground through the milking parlor (contacting the cows) such that any electrical exposure above 2 volts disrupts the milking process causing significant financial loss to the dairy. P's damage case ranged as high as \$54,000,000 pretrial before settling on its claim made to the jury of \$25,000,000.</p> <p>The P's electrician testified that he found stray voltage on the dairy in March of 2008 when he performed a stray voltage inspection. Members of the milking crew then recalled receiving shocks and observing the cows tremble when brought into parlor to milk.</p>
<b>Verdict</b>	Defense
<b>Comments</b>	Verdict August 8, 2013. The trial lasted eight days. The verdict in this case may be the first verdict on a stray voltage theory directly addressed by a jury in New Mexico.
<b>Experts</b>	Plaintiff: Don De Gray, electrician; La Verne Stetson Ag. E; Michael Behr PhD economist  Defendants: Gregg Stark Ag E.; James Reynolds D V M; Terry Smith PhD economist



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<b>Submitted By</b>	<b>Rip Harwood</b> Ripley B. Harwood, P.C. <a href="mailto:Ripharwood@aol.com">Ripharwood@aol.com</a> (505) 299-6314
<b>Court</b>	State Court
<b>County</b>	Bernalillo
<b>Judge</b>	Hon. Denise Barela-Shepherd
<b>Defense Counsel</b>	Rip Harwood
<b>Plaintiff Counsel</b>	Paul Kennedy, Justine Fox-Young, Arne Leonard
<b>Trier</b>	12 Person Jury
<b>Style</b>	Clarissa Freeman, et al v. New Mexico Department of Transportation, et al.; Second Judicial District Court Cause No. D-202-CV-2011-00599
<b>Statement of Facts</b>	Plaintiffs alleged that defendant NMDOT was negligent for failing to discover and for allowing bumps of concrete deposited on Tramway Boulevard by unknown persons to remain on the roadway. Plaintiffs were riding in the dark on a wet roadway in a racing formation called a pace line. The lead rider in the pace line hit one of the concrete bumps and crashed, and the second rider ran in to him and crashed. The first rider sustained a minor shoulder sprain/strain but the second rider sustained significant, long-term dental injuries.
<b>Verdict</b>	Defense
<b>Comments</b>	It appears the lawsuit was motivated behind the scenes by one or more New Mexico bicycle rights advocacy groups. Defendant was prohibited from asserting that Tramway Boulevard was a controlled access street upon which bicyclists were not legally allowed to ride until a 2011 city ordinance change became effective. The City of Albuquerque failed and refused to provide requested legal and factual support to the State on this issue.
<b>Experts</b>	Plaintiffs: James M. Green, Asheville, North Carolina  Defendants: John Howard, Encinitas, California



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<b>Submitted By</b>	<b>Rip Harwood</b> Ripley B. Harwood, P.C. <a href="mailto:Ripharwood@aol.com">Ripharwood@aol.com</a> (505) 299-6314
<b>Court</b>	Federal Court
<b>County</b>	Bernalillo
<b>Judge</b>	Hon. Patrick Michael Duffy (visiting)
<b>Defense Counsel</b>	Rip Harwood
<b>Plaintiff Counsel</b>	Rich Valle, Christoir O'Cleirachain
<b>Trier</b>	6 Person Jury
<b>Style</b>	Kevin Clower, Individually and as next friend for Jadon Clower, a Minor, v. GEICO General Insurance Company; United States District Court Cause No. 112:CV-00472-PMD-KBM
<b>Statement of Facts</b>	Plaintiff sued his underinsured motorist carrier for UIM benefits and insurance bad faith arising out of a minor fenderbender in Los Lunas, New Mexico. Plaintiff claimed long-term soft tissue-type injuries as well as a left hip labral tear. Plaintiff also claimed that the minor child, who suffered from a congenital brittle bone condition, sustained spinal fractures in the accident. Much of this was excluded by pretrial motions. The bad faith case was bifurcated and stayed, and the matter went to trial on the surviving UIM claims, only.
<b>Verdict</b>	Defense
<b>Comments</b>	Jury unanimously concluded no negligence on the part of the adverse driver. With consent of counsel, the Court allowed the two alternates to remain and deliberate. The Court excluded evidence of "prolotherapy", concluding after an evidentiary hearing conducted outside the presence of the jury, that this form of treatment was not generally accepted by the scientific or medical community and would not constitute damages for medical treatment.
<b>Experts</b>	Plaintiffs: Robert C. Jones, D.C. (Southwest Integrative Health Center)  Defendants: John M.H. Allen, M.D.



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**Submitted By** **Rip Harwood**  
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(505) 299-6314

**Court** State Court

**County** Bernalillo

**Judge** Hon. Nan Nash

**Defense Counsel** Rip Harwood

**Plaintiff Counsel** David Duhigg

**Trier** Judge

**Style** Alfredo Rodriguez v. Stephen Williams; Second Judicial District Court Cause  
No. D-202-CV-2012-03697

### Statement of Facts

Plaintiff and defendant collided head on at an Albuquerque intersection. Both were intoxicated, although plaintiff was just below the legal limit whereas defendant was .011. Plaintiff was not wearing his seatbelt and sustained a subdural hematoma as a result of striking something hard with his head in the front of his pickup truck. His medical specials were approximately \$110,000 for the head injury alone. Neither the defendant nor his passenger were injured in the accident. Both were wearing their seatbelts.

Defendant argued 1) that the case was barred by the unlawful acts rule, 2) that failure to wear a seatbelt is common law comparative fault (though not negligence per se under the seat belt use act), 3) that failure to consider seatbelt non use as comparative fault under the common law is unconstitutional, and 4) that plaintiff as a criminally negligent tortfeasor (because of his own intoxication) was not entitled to the benefit of the collateral source rule, and that his medical expense damages were accordingly limited to those he had actually expended (less than \$1,000).

The court rejected these arguments but found plaintiff 5% at fault. It awarded \$182,000 in compensatory damages and declined to award punitive damages on the grounds that the plaintiff's conduct was equally culpable.

**Verdict** Plaintiff

**Comments** The defense has appealed the case on the unlawful acts doctrine, seatbelt non-use, and collateral source issues, and will request assignment to the general calendar. Amicus briefing on these important issues is requested and would be welcome.

**Experts** Plaintiffs:  
None  
Defendants:  
Don Fisher, M.D. - toxicologist for Defendant



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<b>Submitted By</b>	<b>Brenda Saiz</b> Rodey Law Firm <a href="mailto:bsaiz@rodey.com">bsaiz@rodey.com</a> (505) 768-7282
<b>Court</b>	State Court
<b>County</b>	Bernalillo
<b>Judge</b>	Hon. Judge Clay Campbell
<b>Defense Counsel</b>	Brenda Saiz & Jeff Croasdell
<b>Plaintiff Counsel</b>	Jim Ellis and Steve Henry
<b>Trier</b>	12 Person Jury
<b>Style</b>	Michelle Ann Lopez v. Presbyterian Healthcare Services, D-202-CV-2011-11019
<b>Statement of Facts</b>	<p>Plaintiff claimed that two doctors at PHS breached the standard of care by misdiagnosing Plaintiff with elbow tendinitis and/or failing to refer Plaintiff to a specialist when she alleged it was clear she had a tumor present in her elbow during the two visits she had at PHS urgent care. Plaintiff was later diagnosed with Pigmented Villonodular Synovitis ("PVNS") of the elbow, which is an extremely rare disease that manifests as a tumor that cannot be seen on x-rays until the disease is in the advanced stages (several years into the disease). Plaintiff claimed that the failure to diagnose her condition over a prolonged period of time resulted in substantial damage to her elbow joint and a markedly increased possibility that the tumor will recur multiple times, causing progressive damage to the joint and the necessity for an elbow replacement in the future.</p>
<b>Verdict</b>	Defense
<b>Comments</b>	<p>The jury delivered their defense verdict in under one hour, because the jury did not believe the tumor was detectable or palpable in the early stages, the exam and treatment was proper, and the urgent care center did not breach the standard of care.</p>
<b>Experts</b>	<p>Plaintiff: Dr. Robert Quinn, orthopedic oncologist/surgeon, Peter Burge, PA, JD--urgent care specialist</p> <p>Defendants: Dr. Miguel Pirela-Cruz, orthopedic surgeon, Dr. Jeff Collins, urgent care specialist</p>



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<b>Submitted By</b>	<b>Michelle Lalley Blake</b> Keleher & McLeod, P.A. <a href="mailto:mlb@keleher-law.com">mlb@keleher-law.com</a> (505) 346-4646
<b>Court</b>	State Court
<b>County</b>	Santa Fe
<b>Judge</b>	Hon. Sarah Singleton
<b>Defense Counsel</b>	Kathleen M. Wilson and Michelle Lalley Blake
<b>Plaintiff Counsel</b>	Paul Mannick
<b>Trier</b>	12 Person Jury
<b>Style</b>	Kathleen DiMascio, individually and as Personal Representative of Richard DiMascio v. St. Vincent Hospital, New Mexico Heart Institute, and New Mexico Cancer Care Associates; D-0101-CV-2011-01046
<b>Statement of Facts</b>	<p>St. Vincent Hospital and New Mexico Heart Institute were dismissed on summary judgment in 2012. Plaintiff alleged New Mexico Heart Institute, acting through its employee (a cardio-thoracic surgeon) negligently failed to diagnose and treat a post-surgical infection that was apparent on the second day after bypass surgery, and as a result Richard DiMascio died on the sixth day after surgery as a result of septic shock. Defendants were able to establish that the post-operative symptoms the patient displayed were consistent with and normal for a cardiac bypass patient, and that the patient did not develop an infection until the fourth post-operative day. The cardiac surgeon promptly ordered appropriate cultures, started antibiotics, and requested a consult with an infection disease specialist. Defendant further established that had the bacteria in question, <i>serratia marcescens</i>, actually been present on the second post-operative day, the patient would have experienced a rapid decline at that time.</p>
<b>Verdict</b>	Unanimous Defense Verdict. No liability.
<b>Comments</b>	<p>Plaintiff's counsel relied on previously undisclosed medical literature to shore up Plaintiff's expert's testimony and attempted to cross Defendant's experts on the medical literature as well. Plaintiff's expert lost credibility when he could not site one of the many articles to support theory. Ms. Wilson's direct examination of Defendant's expert was impressive, and offered the jury a clear and concise view of a very complicated medical case.</p>
<b>Experts</b>	<p>Plaintiff: Michael P. Koumjian, M.D. (cardio-thoracic surgeon)</p> <p>Defendant: David Fullerton, M.D. (cardio-thoracic surgeon) Ronald W. Quenzer, M.D. (infectious disease)</p>