

## **NMDLA 2009 State Court Opinions' Summaries (December 2008 – May 2009)**

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### **DWI EVIDENCE**

NM Bar Bulletin – December 15, 2008  
Vol. 47, No. 51

*State v. Downey*  
No. 30,263 (N.M. S. Ct., filed October 16, 2008)

In this criminal case, the court determined whether expert testimony was reliable and admissible pursuant to the criteria established in *Daubert v. Merrell*, 509 U.S. 579 (1993), and *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993). The expert witness was qualified to testify with respect to retrograde extrapolation. However, his testimony was 1) predicated on factual assumptions unsupported by the evidence presented at trial; and 2) he used a range of values to calculate the defendant's BAC at the time of driving, rather than a precise value unique to the defendant. The Supreme Court held that the trial court improperly admitted expert testimony because it was predicated on factual assumptions that were unsupported by the record and, therefore, unreliable and inadmissible under *Daubert* and *Alberico*. The expert testified that his relation-back calculations were predicated on three essential facts: 1) the time of the collision; 2) the time of the blood draw; and 3) the results of defendant's BAC test. The expert did not know when the defendant started or stopped drinking and he assumed that "no beverages were consumed during this time period" and that the defendant was post-absorptive at the time the BAC was administered and at the time of driving. Because the expert did not have the necessary facts to plot the defendant's placement on the BAC curve, he could not express a reasonably accurate conclusion on whether the defendant was under the influence of alcohol at the time of the accident. The Court reached a conclusion on the first issue, and reasoned that it did not therefore need to address the second issue as to whether retrograde extrapolation is a valid scientific method.

### **TORT CLAIMS ACT**

NM Bar Bulletin – December 15, 2008  
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*Martin v. Middle Rio Grande Conservancy District*  
No. 28,051 (N.M. Ct. App., filed September 11, 2008)

The issue in this case was whether the recreational use provision of the Off-Highway Motor Vehicle Act, NMSA 1978, §66-3-1013(A) (2005) (OHMVA), that limits landowner liability for damages arising out of off-highway motor vehicle-related accidents or injuries occurring on a landowner's lands, applies to government landowners as well as private landowners. The plaintiff was driving a recreational vehicle on land controlled by the defendant, a government landowner. She was seriously injured when she ran into an unmarked hazard. The plaintiff argued that she was a visitor and that defendant breached its duty to use ordinary care to keep the land safe for visitor's use, and, alternatively, that she was a trespasser and that defendant breached its duty to use ordinary care to warn trespassers of a dangerous condition. The defendant sought immunity under the OHMVA. The Court of Appeals held that the legislature intended the OHMVA to apply solely to private landowners. The Court stated that extending the immunity of the OHMVA to public bodies would frustrate the purpose of the Tort Claims Act by reinstating governmental immunity in situations in which the Tort Claims Act has waived that immunity. Furthermore, allowing an injured party to sue a public landowner, but only when that landowner charged a usage fee, would be an absurd result that the legislature could not have intended.

### **SUMMARY JUDGMENT**

NM Bar Bulletin – December 15, 2008  
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*Martin v. Franklin Capital Corporation*  
No. 27,369 (N.M. Ct. App., filed September 16, 2008)

The trial court granted summary judgment in favor of Defendant on the plaintiff's allegations of tortious interference with contract. The plaintiff argued that a genuine issue of material fact existed as to whether the defendant intentionally interfered with retail installment contracts for motor vehicle financing loans between the class action plaintiffs and another defendant (Century) who was not a party to the appeal. The plaintiffs alleged that Century tortiously interfered with the Plaintiffs' contracts by inducing the defendant to purchase more extensive insurance and to add the excess premiums to the plaintiffs' loan balances. The Court of Appeals held that there was no evidence to support plaintiffs' claims. Referring to the Restatement (Second) of Torts, the Court held, "an entity like Century may sell a product to a purchaser without incurring liability to a third party even if the entity knows that the product does not comport with the purchaser's contract with the third party," and affirmed the trial court's decision.

### **ARBITRATION**

NM Bar Bulletin – January 19, 2009  
Vol. 48, No. 3

*New Mexico Public School Insurance Authority v. Arthur J. Gallagher & Co.*  
No. 30,643 (N.M. S. Ct., filed November 26, 2008)

The issues in this appeal are 1) whether the New Mexico Public School Insurance Authority (NMPSIA) stated a cause of action for professional negligence (malpractice), or indemnity; and 2) when that action accrued to the state under the applicable statute of limitations. NMPSIA argued that its cause of action was one for indemnification because its claim against Gallaher was derivative of an underlying lawsuit against it. Gallagher argued that NMPSIA did not successfully plead a cause of action for indemnification and if it had, it was barred by the statute of limitations. The New Mexico Supreme Court held that NMPSIA's cause of action was one for professional negligence (malpractice) and that it did not accrue for the purpose of beginning the statute of limitations until NMPSIA suffered an adverse arbitration judgment in the underlying lawsuit.

### **SOVEREIGN IMMUNITY**

NM Bar Bulletin – January 26, 2009  
Vol. 48, No. 4

*Limacher v. Spivey*  
No. 26,770 (N.M. Ct. App., filed September 12, 2008)

The district court granted summary judgment to defendants Spivey (an employee of the Office of the State Engineer) and The State of New Mexico on the basis of sovereign immunity. The plaintiffs' arguments were that the defendants participated in a scheme to prevent them from accessing their water rights on the Rio Ruidoso and whether Spivey was a "law enforcement officer" under the New Mexico Tort Claims Act (NMTCA) was an issue of material fact. The NMTCA entitles state government entities and public employees acting within the scope of the duties (except where specifically waived) to sovereign immunity.

The Court of Appeals held that for an employee to fall within the exception for maintaining public order, that person's duties must include traditional law enforcement duties that directly impact public order. Traditional law enforcement duties include preserving the public peace, preventing public disturbances, and enforcing state laws. Even though Spivey did have the statutory power to arrest, and even though her duties were equivalent to those of a law enforcement officer in that she policed water, the Court also considered the fact that an arrest had never been made by a State Engineer employee. Therefore, the Court decided that even if Spivey had police-like power under statutory authority, she had never arrested anyone, her duties were mainly administrative, she had no law enforcement certification, did not carry a gun, and her vehicle did not have emergency lights. The Court of Appeals affirmed that there was no disputed material fact as to whether an employee of the Office of the State Engineer engaged in conduct sufficient to trigger the "law enforcement officer" waiver of immunity.

## **PUNITIVE DAMAGES**

NM Bar Bulletin – January 26, 2009

Vol. 48, No. 4

*Jolley v. Energen Resources Corporation*

No. 27,489 (N.M. Ct. App., filed September 22, 2008)

In this wrongful death case, the decedent backed up his recreational vehicle to turn around and return to Farmington, when he backed into an unfenced, unprotected natural gas wellhead operated by the defendant. The wellhead exploded, killing the defendant. Plaintiff's suit for wrongful death alleged that Defendant was negligent by failing to exercise ordinary care to protect its exposed natural gas wellhead from contact with motorized vehicles. The plaintiff also argued that Defendant's conduct was so reckless that punitive damages were justified. The jury awarded the plaintiff \$2,957,000 in compensatory damages, which was reduced to \$1,922,050 based on a finding that the decedent in the wrongful death action was 35 percent negligent and the Defendant was 65 percent negligent. The jury also awarded the Plaintiff \$13,000,000 in punitive damages.

The Defendant argued that the trial court abused its discretion in not granting a mistrial or new trial because Plaintiff's attorney's closing arguments deprived the Defendant of a fair trial. The Court affirmed the trial court's decision to deny a mistrial based on Plaintiff's attorney's improper statements during closing argument regarding Defendant's post-accident remedy arguments. The Court also affirmed the trial court's decision not to grant a mistrial based on Plaintiff's counsel's Golden Rule arguments that asked the jurors to determine what life would be worth to them. The Court of Appeals also determined that the evidence was clearly sufficient for the jury to conclude that Defendant's conduct was reckless and warranted an award of punitive damages. The Court held that under the factors outlined in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) the \$13,000,000 punitive damages award in this case did not exceed the outer limits of due process and affirmed the award.

## **MEDIATION**

NM Bar Bulletin – February 9, 2009

Vol. 48, No. 6

*Carlsbad Hotel Associates v. Patterson-UTI Drilling Company*

No. 27,922 (N.M. Ct. App., filed September 22, 2008)

The Fifth Judicial District Court provided the parties with an opportunity for a court-sponsored settlement conference pursuant to a local settlement conference rule. The parties agreed and both were required to participate in good faith. The Defendant determined before the conference that it was not liable and began the conference with no intention to settle. The defendant only made an offer after it was threatened with sanctions. The trial court judge sanctioned the defendant for bad faith participation in

the settlement conference based on the defendant's failure to notify the plaintiff before the conference that it had determined it was not liable and did not intend to make any offer to settle, and because the defendant failed to make an offer until the mediator threatened it with sanctions. The Court of Appeals affirmed the trial court's order because the defendant had agreed to participate in the court-sponsored settlement conference and the order to which it agreed defined good faith in a manner in which the trial court could have properly found was violated by the defendant.

The Court also discussed the Mediation Procedures Act, NMSA 1978 §§ 44-7B-1 to -6 (2007), which was passed by the New Mexico State Legislature after the instant case was decided. The Act does not require good faith participation and does not provide for sanctions for failing to act in good faith. The Act includes a confidentiality provision and states that mediation communications are not subject to disclosure and shall not be used as evidence in any proceeding. There is no exception for use to determine whether a party participated in mediation in good faith. Additionally, the Court encouraged district courts throughout the State to eliminate a good faith requirement in their court-facilitated settlement programs.

### **NM UNINSURED EMPLOYERS' FUND**

NM Bar Bulletin – February 9, 2009  
Vol. 48, No. 6

*Pipkin v. Daniel*  
No. 28,212 (N.M. Ct. App., filed December 1, 2008)

The New Mexico Uninsured Employers' Fund appealed a compensation order of the New Mexico Workers' Compensation Administration denying it an award of pre-judgment interest against an uninsured employer. The Court of Appeals agreed that the Workers' Compensation Judge erred in denying a pre-judgment interest award. However, the Court held that, on appeal, the Uninsured Employers' Fund failed to preserve the argument that the annual rate of fifteen percent applied to this case. The case was remanded to the Workers' Compensation Judge to determine the appropriate rate – not to exceed ten percent annually.

### **TRADE PRACTICES AND FRAUD ACT**

NM Bar Bulletin – March 9, 2009  
Vol. 48, No. 10

*Martinez v. Cornejo*  
Nos. 27,383/27,382 (N.M. Ct. App., filed November 14, 2008)

The two issues decided in this case were whether a manager of a group of insurance adjusters can be held personally liable for violations of the Trade Practices and Fraud Act (TPFA) and which statute of limitations applies to the private right of

action created by Section 59A-16-30 of the TPFA. The Court of Appeals held that a manager of a group of insurance adjusters is subject to the private right of action created by the TPFA. The plain language of the TPFA indicates that the term “insurer” includes agents, brokers, solicitors, adjusters, providers of service contracts pursuant to the Service Contract Regulation Act and all other persons engaged in any business that is subject to the superintendent’s supervision under the Insurance Code. The Court also held that the appropriate statute of limitations is the four year “catch-all” statute of limitations for a private right of action under the TPFA.

## **SUBROGATION**

NM Bar Bulletin – March 9, 2009  
Vol. 48, No. 10

*Budget Rent-A-Car Systems, Inc., v. Bridgestone Firestone North American Tire, L.L.C.*  
No. 27,877 (N.M. Ct. App., filed December 30, 2008)

Budget settled with the underlying plaintiffs, who were driving a Budget rental truck involved in a rollover accident. Budget’s expert issued a report stating that the accident was caused by a defective tire manufactured by Bridgestone. Bridgestone did not participate in the settlement. Budget then filed suit against Bridgestone alleging strict products liability, breach of warranty, and negligent design and manufacture. Budget sought “reimbursement in the form of a judgment for the settlement amount paid to the underlying plaintiffs. Bridgestone filed a motion to dismiss claiming that Budget had asserted a subrogation claim and that a claim for personal injuries of the underlying plaintiffs was time barred because it was filed more than three years after the accident. In a second motion to dismiss, Bridgestone claimed that Budget had filed a subrogation claim and because Budget voluntarily settled with the underlying plaintiffs without a contractual obligation to do so, it had no viable subrogation claim.

First, the Court of Appeals determined that because Budget’s claim was for products liability due to a defective tire, the statute of limitations did not run from the date of the accident as it would for a subrogation claim, but as an indemnification claim - from the date that Budget paid the settlement to the underlying parties. The Court of Appeals held that because Budget continually denied that it was seeking subrogation and maintained that its claim was one for indemnification, Budget abandoned a subrogation claim. However, the Court determined that Budget properly pled a cause of action against Bridgestone for indemnification.

## **UNFAIR TRADE PRACTICES/UIM**

NM Bar Bulletin – March 16, 2009  
Vol. 48, No. 11

*Salas v. Mountain States Mut. Cas. Co.*  
No. 30,735 (N.M. S. Ct., filed February 4, 2009)

In *Salas*, the Supreme Court of New Mexico addressed the issue of whether an insurer may deny or limit insurance coverage to a known class-two insured relying on an undisclosed consent-to-settle exclusionary provision. Mary Salas was injured in a vehicle driven by her daughter-in-law and insured with Mountain States that was struck by a vehicle insured by Farmers Insurance Company. Under the Mountain States policy, Ms. Salas was a class II insured entitled to medical payments and UIM coverage as a passenger in the insured vehicle. Ms. Salas filed a claim for medical payments with Mountain States, and was issued a check for the maximum amount of medical payments. However, Mountain States did not inform Ms. Salas that she was entitled to additional benefits under the UIM policy. It was not until after filing suit against the tortfeasor and Farmers Insurance Company that Ms. Salas and her attorney became aware of the UIM coverage. They only became aware of additional coverage when they settled the suit with the tortfeasor, and Mountain States submitted a subrogation demand to Farmers Insurance Company.

Salas filed a claim for UIM benefits under the Mountain States policy. Mountain States denied Salas' claim stating that she was not entitled to UIM benefits because she breached the consent-to-settle exclusionary provision of the Mountain States policy by settling the claim with the tortfeasor and Farmers Insurance Company without Mountain States' consent. Salas filed suit alleging breach of insurance contract and unfair trade practices. Mountain States moved for summary judgment, and the district court granted the motion. Salas appealed and the Court of Appeals reversed the trial court's decision, but did not address the issue of unfair trade practices.

The Supreme Court of New Mexico affirmed the Court of Appeals decision, but remanded the case to the Court of Appeals to address the unfair trade practices claims. The Court held that all insurance contracts contain an implied covenant of good faith and fair dealing, and neither party may do anything which will deprive the other of the benefits of the contract. Additionally, under the duty of disclosure, an insurer must notify a known insured of the scope of available coverage regardless of whether the insured is a party to the insurance contract or a third-party beneficiary. The Court reasoned that because Salas was a Class II insured under the Mountain States policy, Mountain States had actual knowledge of Ms. Salas' status when she filed a claim for medical payment benefits and filed suit against the tortfeasor and Farmers Insurance Company. This knowledge triggered Mountain States' duty to inform Ms. Salas of the additional coverage under the UIM policy. As a result, Mountain States was equitably estopped from enforcing the exclusionary portion of the insurance policy.

## **WORKERS' COMPENSATION**

NM Bar Bulletin – March 23, 2009  
Vol. 48, No. 12

*Bianco v. Horror One Productions*  
No. 30,747 (N.M. S. Ct., filed February 12, 2009)

In *Bianco*, the Supreme Court of New Mexico held that N.M. Stat. § 31-1-1, governing final judgments and decrees, applies to workers' compensation cases. In *Bianco*, the worker filed a workers' compensation complaint for recovery of medical care, psychological care, and medications. The workers' compensation judge ruled that the worker's medical care was reasonable and necessary, but the workers' psychological treatment and medication was not. Twenty-seven (27) days after entry of the final compensation order, the worker filed a motion for reconsideration concerning the ruling on psychological care and medication. The workers' compensation judge denied the motion, and the worker filed her notice of appeal eighty-three (83) days after the workers' compensation judge filed the final compensation order. The Court of Appeals held that the worker's notice of appeal was untimely, stating that the worker was required to file her notice of appeal within thirty (30) days after entry of the final compensation order. The Court of Appeals also held that N.M. Stat. § 31-1-1 does not apply to workers' compensation cases.

The Supreme Court of New Mexico reversed the Court of Appeals' decision. The Court stated that under the New Mexico Rules of Appellate Procedure, a party is entitled to file a notice of appeal for an express or constructive disposition on a post-judgment motion directed at the district court's final judgment within thirty (30) days. The Court also stated that the New Mexico Workers' Compensation Act governs the parties' rights to appellate review of the workers' compensation judge's final order. Therefore, whether N.M. Stat. § 31-1-1 applies must be viewed through the Workers' Compensation Act. Moreover, a final order from the workers' compensation judge is reviewed by the Court of Appeals in the manner provided for in other cases, and is subject to a stay of proceedings as provided by the Rules of Civil Procedures. Because the legislature incorporated the statutory and appellate scheme for taking appeals from district court cases to workers' compensation cases, N.M. Stat. § 31-1-1 applies to workers' compensation cases. Therefore, because the worker filed her notice of appeal within thirty (30) days after entry of the judgment denying the motion to reconsider, the worker's notice was timely filed.

### **BAD FAITH AND MALICIOUS ABUSE OF PROCESS**

NM Bar Bulletin – April 13, 2009  
Vol. 48, No. 15

*Durham v. Guest*  
No. 30,656 (N.M. S. Ct., filed February 20, 2009)

In a case involving the tort of malicious abuse of process, the Supreme Court of New Mexico held that a defendant's initiation of judicial proceedings against a plaintiff is no longer an element of the tort of malicious abuse of process, overruling *DeVaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277. In *Durham*, plaintiffs filed a UM/UIIM claim with Allstate Insurance Company. After a dispute arose regarding the amount of damages, plaintiffs requested arbitration and Allstate Insurance

Company retained Guest to represent it in the arbitration. Following the arbitration, plaintiffs sued Allstate and Guest for bad faith and malicious abuse of process. Plaintiffs alleged that Guest maliciously issued subpoenas for an illegitimate purpose when she sought Plaintiff's medical records and employment records in violation of a protective order issued by the arbitrators. The district court dismissed Plaintiffs' claims for failure to state a claim upon which relief can be granted. Plaintiffs appealed, but the New Mexico Court of Appeals affirmed the trial court's decision, stating the *DeVaney* case requires that Guest must have initial judicial proceedings against Plaintiffs in order for the malicious abuse of process claim to proceed.

The Supreme Court of New Mexico reversed the trial court's and Court of Appeals' decision, arguing that initiated judicial proceedings against a Plaintiff are not required to bring a malicious abuse of process claim. The Court held that *DeVaney* would create inequity, in that a defendant could still abuse process within the proceeding without risk of liability. The Court also referred to several other situations where the abuse of process was to be read in a broader scheme (e.g., discovery abuses, improper issuance of subpoenas, etc.). As such, the Court of Appeals restated the elements of abuse of process: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end, and (3) damages. Also, an improper use of process may be shown by (1) filing a complaint without probable cause, or (2) "an irregularity or impropriety suggesting extortion, delay, or harassment" or other conduct formerly actionable under the tort of abuse of process. Moreover, a use of process is deemed to be irregular or improper if it (1) involved a procedural irregularity or a misuse of procedural devices such as discovery, subpoenas, and attachments; or (2) indicates the wrongful use of proceedings. The Court also stated that the tort of abuse of process should be construed narrowly to protect the right of access to the courts. Finally, the Court held that the new requirements of abuse of process may be used in arbitrations as well as lawsuits filed with the district court.

## STATUTE OF LIMITATIONS

NM Bar Bulletin – May 4, 2009  
Vol. 48, No. 18

*Gomez v. Chavarria*  
Nos. 28,072/28,073 (N.M. Ct. App., filed January 12, 2009)

In *Gomez*, the Court of Appeals of New Mexico was confronted with the issue of whether N.M. Stat. § 37-1-8, requiring minors sixteen (16) years or older to file suit within the three-year statute of limitations, was unconstitutional. Robert Gomez was involved in two (2) motor vehicle accidents in February 2004 and April 2004 when he was sixteen-years-old and seventeen-years-old respectively. He filed the two lawsuits after the three-year statute of limitations expired. The district court dismissed the lawsuits stating they were untimely filed.

Gomez argued that his claims and the three-year statute of limitations were tolled until he reached eighteen-years-old, and under N.M. Stat. § 37-1-10 the limitations period was tolled an additional year after he reached eighteen-years-old. The Court of Appeals disagreed, stating Mr. Gomez was eighteen-years-old, and had a little over a year after the date of the accrual of the first lawsuit. As for the second lawsuit, Mr. Gomez was eighteen-years-old short of one year after the accrual of the second cause of action. When he reached eighteen-years-old, Mr. Gomez has more than two (2) years to sue before the three-year statute of limitations expired.

The Court of Appeals also stated that the purpose of N.M. Stat. § 37-1-10 is to allow minors reasonable time after reaching majority to file an action. In the Court's view, Gomez had reasonable time to file his lawsuits within the three-year statute of limitations. Moreover, "a minor's lawsuit for personal injury is not barred until one year after the minor reaches the age of majority or until three years after the accident—whichever computation of time gives the injured minor the most time to act." Finally, the Court stated that Gomez failed in his burden to show the New Mexico statutes were unconstitutional, as there was no reasonable basis to conclude that a minor who is at least sixteen-years-old when the injury occurred would be treated differently on an arbitrary or discriminatory manner.

## **EMPLOYMENT LAW**

NM Bar Bulletin – May 4, 2009  
Vol. 48, No. 18

*Guest v. Allstate Ins. Co.*  
No. 27,253 (N.M. Ct. App., filed February 27, 2009)

In a companion case to the *Durham* case, the Court of Appeals of New Mexico held that an insurer breached its contract with an attorney retained to defend it in a UM arbitration, but that attorney was not entitled to future earnings or attorneys' fees for the breach of contract. The lawsuit was filed after Allstate refused to defend Guest in the *Durham* lawsuit. Following Allstate's refusal to defend her, Guest returned the cases she defended on behalf of Allstate and refused to accept any new cases. She was also forced to close her practice and she moved out-of-state. Guest filed suit for breach of contract, breach of the implied covenant of good faith and fair dealing, and *prima facie* tort. The case went to trial and the attorney was awarded damages after reducing the amount of punitive damages.

On appeal, Allstate argued that there was no contract between it and Guest, and even if there was a contract it violated the New Mexico Rules of Professional Conduct where Guest could not enter into a business transaction with her client. The Court of Appeals disagreed, stating Guest's testimony at trial provided sufficient evidence that a contract existed. The Court also held that the Rules of Professional Conduct does not apply to the contract between Guest and Allstate because the Rules do not apply to "standard commercial transactions between the lawyer and the client for products or

services that the client generally markets to others.” Because a contract existed between Guest and Allstate, the Court next ruled that Allstate, by refusing to defend Guest in the *Durham* case, breached its duty of implied covenant of good faith and fair dealing.

However, the Court of Appeals ruled Guest was not entitled to future earnings or attorneys’ fees. Although the Court ruled that under contract law an injured party is entitled to all damages which flow as a nature and probable sequence from the breach, damages which are “speculative, conjectural, or remote are not to be considered for compensation.” The Court also referred to the nature of the contract, which it considered an “at-will” contract (e.g., any party may terminate the contract at any time). The Court ruled that any future wages or earnings are not recoverable because the damages were too speculative to permit recovery.

## **WORKERS’ COMPENSATION**

NM Bar Bulletin – May 18, 2009  
Vol. 48, No. 20

*Ortiz v. Overland Express*  
No. 28,135 (N.M. Ct. App., filed February 26, 2009)

In this workers’ compensation case, the Court of Appeals of New Mexico held that a provision of the New Mexico Workers’ Compensation Act prohibiting compensation when a worker was under the influence of “certain drugs,” does not include methamphetamine and amphetamine use. In *Ortiz*, a worker was killed during the course and scope of his employment. The toxicology report revealed the worker’s blood was positive for amphetamines and methamphetamines. The workers compensation judge concluded that the worker’s use of amphetamines and methamphetamines was the sole cause of death, and the worker’s estate was therefore barred from recovery under the Workers’ Compensation Act.

The Court of Appeals reversed the workers’ compensation judge’s decision. The Court held that amphetamines and methamphetamines were not listed as certain excluded drugs barring recovery. The Court noted that although amphetamines and methamphetamines were at one time drugs which prohibited recovery under the Workers’ Compensation Act, the specific exclusion from the Act was repealed in 1971. The Court also stated that to read the New Mexico Workers’ Compensation Act to include exclusion of benefits due to use of amphetamines and methamphetamines would engage them in an “impermissibl[e] broad construction.” Therefore, nothing in the Workers’ Compensation Act bars recovery despite a worker’s use of amphetamines and methamphetamines.

## UNFAIR PRACTICES ACT

NM Bar Bulletin – May 18, 2009

Vol. 48, No. 20

*Eisert v. Archdiocese of Santa Fe*

No. 27,728 (N.M. Ct. App., filed March 3, 2009)

In addressing an issue under the Unfair Practices Act, the Court of Appeals of New Mexico ruled that a daughter failed to demonstrate that a cemetery knowingly made a misrepresentation of fact in connection with its sale of three contiguous burial plots, and in only providing two plots. In *Eisert*, the dispute arose over the placing of remains of three individuals: Eisert's father, Juan Castillo, Eisert's mother, Severita Castillo, and Eisert's stepmother, Sofie Castillo. Severita died in 1970, and Mr. Castillo reserved the plot next to Severita for his eventual death. A few years later, Mr. Castillo married Sofie, and Mr. Castillo returned to the cemetery and signed a plot reservation which memorialized this previous reservation next to Severita. Sofie also reserved a burial plot for herself next to Juan's, placing Juan's burial plot between his deceased's wife and current wife's plots.

In 2002, Mr. Castillo died, and Sofie arranged to have him buried in the plot reserved years ago. The cemetery staff began to excavate the grave, but found unidentified remains buried in the plot Sofie reserved for herself next to Mr. Castillo's plot. The cemetery gave her several options, one of which was to have Mr. Castillo's grave excavated at double-depth so that Sofie could be buried in the same plot as her husband. Two years later, Sofie died and pursuant to the prior arrangement was buried as the second burial in the double-depth plot occupied by Mr. Castillo. Approximately two months following Sofie's burial, Ida Eisert visited the burial site, and noticed that the ground over her father's grave was disturbed. After being told by the groundskeeper that Sofie was buried above Mr. Castillo in the double-depth grave, Ms. Eisert filed suit against the cemetery for breach of the burial contract. Ms. Eisert argued that the cemetery violated the Unfair Practices Act by selling and being paid for three burial plots and only providing two. The cemetery filed a motion for summary judgment that was granted by the trial judge.

The Court of Appeals affirmed the trial court's decision, stating Ms. Eisert not only failed to provide sufficient evidence to overcome the motion, but failed to allege a violation of the Unfair Practices Act. The Court of Appeals stated that Ms. Eisert had to demonstrate that the cemetery knowingly made a misrepresentation of fact in connection with its sale of the three burial plots. Under the Unfair Practices Act, in order to prove a failure to deliver the quantity or quality of goods or services, the failure must be the result of a false or misleading statement knowingly made by the individual or entity. The Court noted that when Sofie contracted to purchase the third burial plot, the cemetery did not know that another body already occupied the plot and could not have knowingly misrepresented that the plot was available. The cemetery also gave Sofie an option to the already-used burial plot, including having Mr. Castillo's plot be double-

depth. Because the cemetery did not make a misrepresentation of fact, it did not violate the Unfair Practices Act was made.

## **EMPLOYMENT LAW**

NM Bar Bulletin – May 25, 2009  
Vol. 48, No. 21

*Zarr v. Washington Tru Solutions, LLC*  
No. 27,553 (N.M. Ct. App., filed April 1, 2009)

The Court of Appeals of New Mexico held that an employee who sued her former employer for intentional interference with a contractual relationship, was an at-will employee and not entitled to additional protections as would a non-at-will employee. In *Zarr*, the employee was employed with a governmental sub-contractor. The employee was terminated after disagreements with a fellow employee. The employee sued Washington Tru Solutions, LLC for intentional interference with a contractual relationship, but the employer's motion for summary judgment was granted. On appeal, the employee argued she was a non-at-will employee and that the district court's use of the "sole-motive test" was improper. The Court of Appeals affirmed the district court's use of the "sole-motive test," stating that existing contractual relationships merit more protection than prospective contracts. Moreover, under at-will employment, any claim for intentional interference of a contractual relationship is treated as interference with a prospective employment relationship. The Court of Appeals also noted the trial court's findings that the employee was an at-will employee after she admitted that when she was first hired, she was hired as an at-will employee. The Court of Appeals stated that because the employee was an at-will employee, the "sole-motive test" was the correct standard.

## **EMPLOYMENT LAW**

NM Bar Bulletin – May 25, 2009  
Vol. 48, No. 21

*Romero v. Parker, et al.*  
No. 27,027 (N.M. Ct. App., filed March 25, 2009)

The Court of Appeals of New Mexico held that an unlicensed independent contractor was not entitled to payment from an independent contractor under the theory of substantial compliance and, in turn, a general contractor was not entitled to a refund for compensation from the unlicensed independent contractor. In *Romero*, Romero was an unlicensed subcontractor who performed masonry and excavation work for a general contractor at several residential construction sites. Romero sued the general contractor and its agent for breach of construction contracts, seeking payment for the portion of work he had performed. The general contractor filed a motion for summary judgment, which was granted. Thereafter, the general contractor filed a counterclaim seeking a

refund of money paid to the subcontractor for work on projects. The general contractor filed another motion for summary judgment, which was granted.

The Court of Appeals held that the unlicensed independent contractor was not entitled to payment for substantial compliance, stating that the New Mexico Legislature “casts a harsh eye on contracting without a license.” Under the New Mexico Construction Industries Licensing Act, a contractor may not bring an action for collection of payment for performance for which a license is required. Moreover, there is also a public policy mandate to protect the public from incompetent and irresponsible builders, which includes barring unlicensed contractors lawsuits for compensation for work performed.

The appellate court also held that because Romero was an unlicensed independent contractor, the general contractor was not entitled to a refund because of its failure to be a responsible contractor under the New Mexico Construction Industries Licensing Act. Again, the Court of Appeals referred to the Legislature’s intention that an unlicensed independent contractor may not recover for work performed that requires a license. The New Mexico Construction Industries Licensing Act does not allow recovery by the general contractor against the unlicensed independent contractor, and the Legislature intended general contractors to be required to furnish and maintain “evidence of responsibility.” Finally, the Court stated that the purpose of protecting the public from unlicensed independent contractors would be thwarted if general contractors were allowed to recover from those whom they irresponsibly hired to perform unlicensed work.