NMDLA 2009 State Court Opinions' Summaries
(June 2009 – September 2009)

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CIVIL RIGHTS

NM Bar Bulletin – June 1, 2009
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Akins v. United Steelworkers of America
No. 27,132 (N.M. Ct. App., filed March 13, 2009)

In *Akins*, the Court of Appeals held that an award of compensatory and punitive damages against a union was proper. The plaintiff was a public employee for the City of Carlsbad for ten years; at the same time, the Defendant was the recognized collective bargaining unit for a unit of city employees, which included the plaintiff. The plaintiff filed claims against the City (which were dismissed before trial) and the Union for breach of the union's duty of fair representation, infliction of emotional distress, and prima facie tort. These claims arose from allegations that the plaintiff was subjected to a hostile work environment, created by coworkers who harassed him and racially discriminated against him by refusing to speak English to him and using racial slurs against him. The only claim to survive the Union's motion for summary judgment was one claim for breach of the duty of fair representation based on the claim that the Union failed to properly process a grievance for racial discrimination. A jury entered judgment in favor of the plaintiff for $1,661.60 in actual damages and $30,000.00 in punitive damages. Both parties appealed. The Court held that punitive damages may be recovered in a case for breach of the duty of fair representation when a union's harmful conduct is sufficiently outrageous, where its actions are willful, wanton, malicious, reckless, oppressive, or fraudulent and in bad faith, or where motivated by "intentional racial discrimination."

The Court also held that the district court's refusal to allow either evidence or a jury instruction concerning intentional infliction of emotional distress was proper because the district court correctly dismissed the issue of emotional distress on summary judgment.

EMPLOYER/EMPLOYEE RELATIONSHIP

NM Bar Bulletin – June 22, 2009
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Beggs v. City of Portales
No. 30,558 (N.M. S. Ct., filed May 20, 2009)

The City of Portales enacted, by city ordinance, a written personnel policy provision that required the City to offer its retiring employees the option of continuing their health care coverage under the City's group plan at the active employee premium reimbursement rate. The plaintiffs accepted the City's offers at the time of retirement, before the city council enacted an ordinance deleting the retirement insurance provision from the City's "Personnel Policy Manual." The New Mexico Supreme Court considered whether the City was correct in its position that the later change in the manual extinguished any enforceable rights the plaintiffs may continue to have under the terms that were applicable when they retired. The Court held that case presented genuine issues of material fact as to whether the City's prior offers and the plaintiff's acceptances were binding contracts. The district court's entry of summary judgment in favor of the City was reversed and remanded.

INTENTIONAL TORT AND FORSEEABILITY

NM Bar Bulletin – July 13, 2009
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Romero v. Giant Stop-N-Go
No. 28,063 (N.M. Ct. App., filed April 6, 2009)

This case involved a convenience store/gas station shooting arising from an ongoing drug trafficking dispute, resulting in three deaths and one injury. The plaintiffs filed a premises liability case against the owner and operator of the business alleging wrongful death and personal injury. The Court of Appeals affirmed the district court's determination that the defendant had no duty to prevent the crime and granted summary judgment.

The plaintiffs alleged that the defendant negligently failed to provide security on the premises. The defendant argued that he did not have a duty to protect the victims from attack or that his actions were a proximate cause of the plaintiffs' injuries. Although the victims were customers of the defendant, and the defendant had a duty to protect business patrons from harm caused by third-party criminal conduct, that duty was limited to only foreseeable conduct and resultant harm. Forseeability was defined as "what one might objectively and reasonably expect, not merely what might conceivably occur." To evaluate forseeability, the Court considered the plaintiffs' status and the type of harm. The history of reported criminal activity at the service station may have made future events foreseeable, if the case resulted in injuries suffered in the course of the prior criminal activity. The Court held that a sudden, deliberate and targeted shooting was not the type of crime that was sufficiently commonplace that a business owner should be categorically required to foresee.

WORKERS' COMPENSATION

NM Bar Bulletin – July 20, 2009
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DeWitt v. Rent-A-Center
No. 30,640 (N.M. S. Ct., filed June 17, 2009)

The plaintiff was injured at work and appealed the Workers' Compensation Judge's decision denying her claim for disability benefits. The Court held that the judge erred in refusing to admit testimony of the Worker's medical experts concerning observations made and treatment rendered before the experts were designated as her authorized health care providers. The worker had diagnosed back pain before she was hired as a sales manager for the defendant. She was injured when she reached out to keep a table from falling and felt back pain. In less than three weeks, she was released from treatment from her employer's preferred health care provider when she reported that her symptoms had resolved. Four months later, she sought emergency medical treatment for nausea and severe low back pain. Although the employer's insurer told the employer to send her back to their preferred health care provider, the employer did not tell the employee, and the employee resigned. She then sought treatment on her own from several medical providers, but did not tell them that the back pain was caused by her work-related accident; therefore, her treatment, including back surgery, was not set up as a worker's compensation case or billed to her employer's insurer. Seven months after surgery, the plaintiff filed a workers' compensation complaint seeking temporary total and permanent partial disability benefits, medical benefits, and attorney fees.

Although the Workers' Compensation Act limits testimony at a compensation hearing to a treating physical or a health care provider who has provided an independent medical examination under the Act, in this case, the record revealed that the worker's health care providers provided treatment after their official designations and could testify at the compensation hearing. The case was remanded to allow consideration of the omitted testimony.

UNFAIR PRACTICES ACT

NM Bar Bulletin – July 20, 2009
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Stansell v. New Mexico Lottery
No. 28,241 (N.M. Ct. App., filed May 14, 2009)

The plaintiffs appealed the dismissal of their Unfair Practices Act claims and the defendant appealed the district court order denying its motion for attorney fees, which it argued it was entitled to because the Plaintiffs' complaint was groundless and frivolous. The plaintiffs alleged that the Lottery "began a practice of prematurely pulling scratch off games from the market while they had substantial cash prizes still available," which they claimed is a prohibited practice under the UPA. The Court of Appeals held that the New Mexico Lottery is not a "person" under the Unfair Practices Act (UPA). The plaintiffs had argued that the Lottery is a "person" as defined by the UPA because, although it is a "governmental instrumentality" under statute, it operates in such a unique fashion that it should be deemed a corporation or company. The Court held that because the

Legislature did not include any governmental body or the Lottery within the UPA's definition of "person,' the Lottery is not subject to the UPA. Finally, the Court held that the defendant was not entitled to attorney fees because the issue of whether the Lottery is considered a "person" under the UPA was not as apparent in New Mexico as the Lottery claimed.

UM/UIM COVERAGE

NM Bar Bulletin – August 24, 2009
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Williams v. Farmers Insurance Company
No. 28,220 (N.M. Ct. App., filed March 30, 2009)

The plaintiffs, who were automobile accident victims, brought an action to recover UIM benefits under a policy issued to the car owner's parent. The district court granted summary judgment in favor of the plaintiffs, and the Court of Appeals affirmed, holding that a conflicting endorsements and declarations page did not clearly and unambiguously call the waiver of UIM coverage to the insured's attention. The district court's reasons for granting summary judgment were: 1) the rejection of UM/UIM coverage did not conform to the applicable regulation; 2) the rejection of UM/UIM coverage was not sufficiently clear; and 3) the policy appeared to provide for UM/UIM coverage in some areas, but expressly denied such coverage in other areas. The insured's argument that UM/UIM coverage could not be imputed into the insurance contract to cover Plaintiffs because they were Class II insureds was irrelevant because there was no valid contractual limitation on Class II recovery similar to the offset provision in *Mountain State v. Martinez*, 115 N.M. 141 (1993).

MEDICAL MALPRACTICE and STATUTE OF LIMITATIONS

NM Bar Bulletin – August 24, 2009
Vol. 48, No. 34

Pacheco v. Cohen
No. 28,469 (N.M. Ct. App., filed April 21, 2009)

In *Pacheco*, a plaintiff's complaint was not barred by the three-year statute of limitation period set by the Medical Malpractice Act. A patient brought a medical malpractice action against an eye surgeon. After a stipulated dismissal of the initial complaint to pursue review with the Medical Review Commission, and the patient's filing of a second complaint, the district court granted the patient's motion to reinstate the original complaint upon letter decision of the Medical Review Commission because the limitation period stopped running at the time the plaintiff filed her original complaint. On interlocutory appeal, the Court of Appeals held that the district court's interpretation of its earlier stipulated order of dismissal was not an abuse of discretion.

DWI

NM Bar Bulletin – August 31, 2009
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State v. Thompson
No. 28,358 (N.M. Ct. App., filed May 11, 2009)

The defendant was convicted in Metropolitan Court of aggravated DWI third offence and the District Court affirmed. The Court of Appeals held that a preponderance of the evidence established that there had been a greater than 20-minute deprivation period during which the defendant had not had anything to eat, drink, or smoke before taking a breath alcohol test, thereby affirming the admission of the defendant's breath-alcohol test (BAT) results.

NM Bar Bulletin – August 31, 2009
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State v. Pickett
No. 27,938 (N.M. Ct. App., filed May 11, 2009)

This defendant was also convicted in Metropolitan Court of DWI, with the District Court affirming the conviction. The Court of Appeals held that BAC results were relevant to proving that the defendant was impaired to the slightest degree. (This case was decided under the pre-2008 Amendments to the DWI statute). Judges Vigil and Fry dissented because there was no pretrial determination that the case would be tried either as a per se DWI or as an impaired DWI, creating substantial evidentiary issues.

PRODUCT LIABILITY

NM Bar Bulletin – August 31, 2009
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Kilgore v. Fuji Heavy Industries Ltd.
No. 27,470 (N.M. Ct. App., filed May 29, 2009)

A driver and passenger filed a complaint against a car designer, seat belt designer, and manufacturer alleging that the seat belt system in their Subaru, which rolled over during the accident, was defective and negligently designed, tested, and selected. The plaintiffs tried to prove that the seat belt release button "was needlessly and dangerously exposed and demonstrably susceptible to unintended contact, opening the buckle and releasing…" the seatbelt. A jury trial resulted in a defense verdict. The Court of Appeals held that 1) evidence was insufficient to establish that extraneous evidence reached the jury; 2) the trial court was not required to hold an evidentiary hearing or otherwise investigate once it was presented with evidence that a repair shop owner discussed seatbelt buckles with a juror during the trial; 3) the order that precluded evidence of four incidents or occurrences was not an abuse of discretion; 4)

an order that precluded evidence of three complaints made to the National Highway Transportation Safety Administration (NHTSA) consumer hotline about the seatbelt buckle release in vehicles was not an abuse of discretion; and 5) the driver and passenger were not entitled to a new trial due to defendants "surprise theory" of the defense.

DUTY TO DEFEND

NM Bar Bulletin – September 7, 2009
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City of Albuquerque v. BPLW Architects & Engineers, Inc.
No. 27,837 (N.M. Ct. App., filed June 9, 2009)

A pedestrian brought this action against the City of Albuquerque and the city's architectural and construction contractor after falling from an excessively high curb while exiting one of the car rental buildings at the Albuquerque International Airport. The City filed a cross-claim against the contractor for indemnification after the contractor denied the City's request for a defense. The district court granted the City's partial motion for summary judgment finding the contractor had a duty to defend and awarded the City $90,000 in attorney fees and expenses. The City and contractor settled with the pedestrian. The Court of Appeals held that the contractor had a contractual duty to defend the City, but declined to decide whether the contractor had a contractual duty to indemnify the City.

WORKERS' COMPENSATION

NM Bar Bulletin – September 14, 2009
Vol. 48, No. 37

Martinez v. Cities of Gold Casino
No. 28,762 (N.M. Ct. App., filed April 24, 2009)

The plaintiff filed this Worker's Compensation case and a claim that he had been wrongfully terminated by the Casino in retaliation for filing the workers' compensation claim. "Although the Workers' Compensation Act expressly provides that the remedy for retaliatory discharge is mandatory rehiring, the WCJ concluded that he lacked authority to award such relief in this case." The Court held that Section 52-1-28.2(B) provided the WCJ with authority to require the Pojoaque Gaming Inc. to rehire the Worker, while affirming the remainder of the issues on appeal. In their ruling, the Court of Appeals discussed issues of sovereign immunity and the state court's jurisdiction under the Indian Gaming Regulatory Act. The Supreme Court also decided that the attorney fee cap provision under the Workers' Compensation Act was not unconstitutional.

DWI

NM Bar Bulletin – September 21, 2009
Vol. 48, No. 38

State v. Chavez
No. 28,948 (N.M. Ct. App., filed May 28, 2009)

The defendant was convicted of DWI and child endangerment. Although her appeal was assigned to the summary calendar, the Court of Appeals issued a formal opinion to clarify that retrograde analysis is irrelevant based on the recent amendment to the New Mexico DWI statute. NMSA 1978, §66-8-102(C)(2008): "It is unlawful for…a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle." The recent amendment renders retrograde extrapolation irrelevant in cases where test results are obtained within three hours.

FORSEEABILITY

NM Bar Bulletin – September 28, 2009
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Chairez v. James Hamilton Construction Co.
Nos. 27,581/28,201 (N.M. Ct. App., filed May 15, 2009)

The personal representative of a construction employee's estate brought this action against a manufacturer of a rock crusher plant and the employer arising from the employee's death. After the rock crusher was delivered, it was modified to make it easier for a worker to gain access to the feed box of the machine to clear rock jams or to maintain the machine. The modification included removing a metal shield, which exposed a moving flywheel. Mr. Chairez died after an accident when a blood clot developed because his leg was broken by the moving flywheel while he was trying to clear a rock jam.

The plaintiff argued that the modifications to the machine were foreseeable by the manufacturer, and therefore the designer was strictly liable. The plaintiff's theory against the employer was that the employer was liable under *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272 (2001). The Court of Appeals held that, as matter of first impression, the manufacturer could be strictly liable for the rock crusher that had been modified after it left the manufacturer's control if the modification was reasonably foreseeable to the manufacturer. A factual issue remained whether the modification was reasonably foreseeable. The employer's modification of the rock crushing plant did not subject the employer to liability as an exception to the exclusivity of remedy provisions of the Workers' Compensation Act. The employer was also not liable under the dual persona doctrine.

DAMAGES

NM Bar Bulletin – September 28, 2009
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Sandoval v. Baker Hughes Oilfield Operations, Inc.
No. 28,266 (N.M. Ct. App., filed June 21, 2009)

A worker from another company suffered a fractured femur when a packer tool owned and operated by the defendant oilfield service company blew apart and chain tongs attached to it struck the worker's leg. The worker filed a negligence suit against the defendant company and was awarded $2.2 million. The District Court denied the defendant company's motion for a new trial, or in the alternative, for remittitur. The defendant claimed that 1) insofar as the verdict was based on future damages, the verdict was not supported by substantial evidence, and 2) the evidence did not justify the amount of the award and the award was excessive because of Plaintiff's counsel's improper closing argument that tainted the verdict by "passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages." The Court of Appeals held that the verdict was not excessive, and an award of 15 percent post-judgment interest on the verdict was justified. The "passion or prejudice" argument was denied because the Defendant failed to preserve the underlying improper-closing-argument ground.