NMDLA Winter 2009 Article

State Court Opinions

By John S. Stiff, Esq. and Ann L. Keith, Esq.
Stiff, Keith & Garcia, LLC. - Albuquerque

Coverage and UM/UIM

NM Bar Bulletin – October 5, 2009
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Arias v. Phoenix Indemnity Insurance Company
No. 28,282 (N.M. Ct. App., filed July 9, 2009)

In *Arias*, the New Mexico Court once again addressed what constitutes a valid rejection of uninsured/underinsured motorist (UM/UIM) coverage under the New Mexico Uninsured Motorist Act (UMA), NMSA 1978, §§ 66-5-301 to -303 (1978, as amended through 2003). The insured signed a rejection of UM/UIM coverage as part of her initial application for insurance and she received a copy of the application at the time of her application. However, the application and rejection were not physically attached to the insurance policy that she eventually received from the insurer. Additionally, the declaration page provided to the insured did not contain any specific reference to her rejection of UM/UIM coverage. The Court held that the rejection was therefore ineffective under an administrative regulation that requires the rejection of coverage to be made a part of the insurance policy delivered to the insured.

Negligence – Spectator Injury

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Crespin v. Albuquerque Baseball Club LLC
No. 27,864 (N.M. Ct. App., filed July 31, 2009)

This lawsuit arose when the plaintiffs' four-year-old- son was struck by a baseball during a pre-game batting practice at an Albuquerque Isotopes baseball game. The defendants include the Isotopes, the City of Albuquerque, the Houston Astros, and Dave Matranga. While the child's family was seated at picnic tables located in the left outfield stands at the Isotopes stadium (owned by the City and operated by the Isotopes), Houston Astro Dave Matranga hit a baseball directly into the left field picnic tables, striking the child in the head and fractured his skull. The pre-game batting practice began without warning or notice.

The plaintiffs argued that the City and the Isotopes owed the Plaintiffs "the duty to use ordinary care to keep the premises safe for use by visitors" and breached that duty and

that Matranga, an employee of the Astros, "ignored his duty to exercise ordinary care as he directed the ball into the occupied picnic area." Plaintiffs further alleged that Matranga's conduct "was wanton and showed an utter indifference to or conscious disregard for the safety of" Plaintiffs and other visitors at the stadium. The Plaintiffs' theories of negligence against the City and the Isotopes included failure to adequately protect spectators from fly balls, failure to warn, and failure to keep the premises safe for visitors. Against the Astros, Plaintiffs alleged negligent training and supervision of Matranga and vicarious liability for Matranga's conduct. The City and the Isotopes argued that an owner/occupier of a baseball stadium has only a limited duty to screen spectators with protective netting in the most dangerous part of the stadium, which is behind the home plate, and to provide enough seating in the screened area to accommodate reasonable demand. The Astros and Matranga argued that a baseball player owes no duty to a spectator but that even if such duty is owed, the Astros and Matranga did not breach the duty as a matter of law. The district court granted all defendants summary judgment and the plaintiffs appealed.

The Court of Appeals acknowledged that there are certain risks to spectators inherent in the game of baseball, but reversed summary judgment in favor of the Isotopes and the City on the ground that, under the particular circumstances, there were issues of material fact precluding summary judgment. The Court concluded that a spectator's knowledge of baseball's inherent risks should not automatically preclude the spectator from recovering if he or she is injured as a result of one of those risks. Rather, the spectator's assumption of the risks inherent in the game may inform the fact finder's assessment of the parties' relative fault. The Court declined to adopt the Baseball Rule, which would immunize the owners/occupiers of baseball stadiums, allowing apportionment of liability. The question of whether a defendant breached a duty owed to a plaintiff is generally a question of fact; therefore, Defendants were entitled to summary judgment only if they established that they fulfilled their duty to the child as a matter of law.

Workers' Compensation

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Gutierrez v. Intel Corporation
Nos. 28,472/28,678 (N.M. Ct. App., filed August 10, 2009)

This workers' compensation appeal is a sequel to *Baca v. Complete Drywall Co.*, 2002-NMCA-002, 131 N.M. 413, 38 P.3d 181 (filed 2001). In *Baca*, a worker had an injury to a scheduled member, as well as a non-scheduled injury. The Court of Appeals held that the benefits period for the scheduled member could be added to the benefits period for the non-scheduled injury. In the present case, a worker fell of a ladder in 1996, injuring his left foot and back. The Workers' Compensation judge followed *Baca*, and added both benefits periods together, allowing 615 weeks of benefits. Both parties appealed. The Employer argued that *Baca* is inapplicable, and that the worker was

limited to 500 weeks of benefits, beginning on the date of the accident, as set by NMSA 1978, Section 52-1-42 (A)(2)(1990). The Worker argued that he was entitled to 699 weeks of benefits and that benefits for his back injury should have begun on June 14, 2005, the date he had back surgery. The Court affirmed the compensation order, holding that *Baca* applies and justifies more than 500 weeks in benefits. The Court rejected the Worker's cross-appeal that the 500-week period for benefits for his back injury should have begun on the date of his back surgery.

Sovereign Immunity

NM Bar Bulletin – November 16, 2009
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Guzman v. Laguna Development Corp.
No. 27,827 (N.M. Ct. App., filed June 25, 2009)

The parents of a casino employee brought a wrongful death and loss of consortium action against the Laguna Pueblo's Route 66 Casino, a gift shop supervisor, and the casino's insurer arising out of the death of their son in a motor vehicle accident on his way home from work from the casino gift shop. In early 2004, the deceased, the gift shop supervisor, and one other employee began occasionally consuming alcoholic beverages at work. On the night of the accident, the three shared and finished a quart of rum purchased by the supervisor. The Court of Appeals held that 1) the casino, insurer, and supervisor were judicially estopped from taking a position that the parents' claims were precluded under the exclusivity provision of the Workers' Compensation Act; 2) whether the allegation that the employee was a visitor under the sovereign immunity waiver provisions of the gaming compact with the State of New Mexico, NMSA 1978, §11-13-1 (1997) was sufficiently pled; and 3) the parents' loss of consortium claims could not be brought under the sovereign immunity waiver provision of the gaming compact.

Appealable Order

NM Bar Bulletin – November 30, 2009
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Dickens v. Laurel Healthcare
No. 29,239 (N.M. Ct. App., filed June 18, 2009)

The decedent was a resident at a nursing home. The plaintiff filed a compliant for personal injury and wrongful death against the owners and operators of the nursing home. Defendants filed motions to dismiss the complaint and compel arbitration, relying on the agreement the decedent signed when she became a resident of the nursing home. The district court granted the motions, dismissed the complaint with prejudice, and ordered the Plaintiff to pursue her claims through arbitration. Plaintiff filed a timely motion to alter or amend the judgment under Rule 1-059(E) NMRA and requested a

hearing on the motion. After the Defendants filed a response to the motion, the Plaintiff filed an appeal. The Court of Appeal's calendar notice proposed to dismiss the appeal for lack of a final order. In response, the Court received a memorandum in opposition to the proposed disposition from the defendants and a memorandum in support of the proposed disposition from the Plaintiff. The Court of Appeals was not persuaded the order in the case was final and appealable, and dismissed the appeal. The Rule 1-059(E) motion was a motion asking the district court to alter or change the same order which was on appeal before the Court of Appeals; therefore, the filing of the motion rendered the order not final for purposes of appeal. Instead, in a case where a Rule 1-059(E) motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion.

Course of Employment

NM Bar Bulletin – December 7, 2009
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Nelson v. Homier Distributing Co. Inc.
No. 27,543 (N.M. Ct. App.., filed September 8, 2009)

In this workers' compensation case, after benefits were awarded to the claimant, both sides appealed. The employee alleged that on the date of the accident, he was hired by the employer to drive a truck from Farmington to Santa Fe and back. The Employer denied that it hired the worker or instructed him to drive the truck. The worker asserted that he was told to drive the truck to a gas station, fill it with fuel, and return to the Employer's temporary location at a Farmington mall. The worker argued that he did as instructed and as he was returning to the mall, he noticed a problem with the truck's lights and decided to ask a forklift driver what to do about fixing them. The worker stepped onto the forklift, but the forklift driver apparently did not notice he was there and began driving off. The worker fell and was dragged some distance across the parking lot, suffering serious injuries. Tests indicated that the worker had alcohol and cocaine in his system at the time of the accident.

The Court of Appeals held that the statute of limitations was tolled until the employer filed an accident report in the state of New Mexico. The Court also held that the workers' injuries were not occasioned solely by intoxication and the benefits could not be reduced by 10 percent pursuant to a statute requiring reduction in certain cases where intoxication was a cause of injury. Finally, evidence was sufficient to show that the claimant was the employer's employee at the time of injury.

Summary Judgment

NM Bar Bulletin – November 23, 2009
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Keith v. Manorcare, Inc.

No. 28,008 (N.M. Ct. App., filed August 14, 2009)

The personal representative of the estate of a nursing home resident brought a wrongful death action against the Manorcare nursing home in Albuquerque. The plaintiff alleged that the decedent died of gastrointestinal bleeding that was negligently left untreated by the nursing staff at the nursing home facility. Following a jury trial, the District Court entered a $53,200,000 verdict against the nursing home, and the nursing home appealed. The Court of Appeals held that the District Court's pre-trial determination that an employment relationship existed between the nursing home staff and the alleged owner of the nursing home was the equivalent of summary judgment. The District Court's error in ruling that the alleged owner of the nursing home employed a nursing staff required a reversal of judgment and a new trial. Judicial estoppel was inapplicable in this case.

Judicial Immunity

NM Bar Bulletin – November 23, 2009
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Hunnicutt v. Sewell
No. 28,343 (N.M. Ct. App., filed September 3, 2009)

A former foster child brought an action against the New Mexico Children Youth and Families Department (CYFD), her appointed contract attorney, the Administrative Office of the Courts (AOC), The Twelfth Judicial District Court (TJDC), various state employees, and John and Jane Does one through 12. Defendants AOC, TJDC, and John Does 11 and 12 moved to dismiss and the District Court granted the motion. The Court of Appeals held that CYFD, AOC, TJDC, and John Does 11 and 12 had absolute judicial immunity from suit based on two theories – judicial function or integrally related actions - and that the complaint was properly dismissed as to those defendants.

DUI

NM Bar Bulletin – December 28, 2009
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State v. Marquez
No. 31,294 (N.M. S.Ct., filed November 18, 2009)

The Defendant was convicted of DWI in metropolitan court. The District Court and Court of Appeals affirmed. The Supreme Court held that evidence was sufficient to support a conviction, but the officer's testimony constituted scientific evidence requiring an evidentiary foundation as to its scientific valid. Therefore, the admission of scientific evidence absent a foundation as to its validity was not harmless error.