# NMDLA Article – 1st Quarter Article (2010)

## State Court Opinions

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### Employment Law

NM Bar Bulletin – January 18, 2010
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*West v. Washington Tru Solutions LLC*
No. 28,443 (N.M. Ct. App., filed June 30, 2009)

The plaintiff employee appealed a portion of an order granting summary judgment in favor of his employer on the plaintiff's claims for breach of an implied contract and breach of the implied covenant of good faith and fair dealing. The Court reversed the trial court because there were questions of material fact regarding the existence of an implied contract that the employee would not be terminated except for just cause and after the use of progressive disciplinary procedures.

The plaintiff was a long-time management-level employee. The employer decided to merge the employee's department with another department, and replace the plaintiff as manager. The employee was reassigned to another department, where although he earned the same pay, he no longer managed any employees. The employee considered the move to be a demotion. Two months later, the employer informed the employee that he would receive a salary for two more months while he looked for a new job because there was not enough work for the employee in his new position. The employee sued the employer as he believed that he was not terminated because of inadequate job performance or as a cost-cutting measure, but because of interpersonal difficulties he had with a superior at work and a contractor who was a friend of the superior.

The Court held that an employer's representations about the use of progressive discipline are relevant even when the employer terminates an employee for reasons it asserts are unrelated to performance or misconduct. It was, therefore, error to view the Employee Handbook as the document that primarily defined the employment relationship. The Court clarified that to the degree that there was an implied contract between the parties, it only covered those matters for which there were representations that were sufficiently specific for a reasonable employee to rely upon. Furthermore, because the Court concluded that there was a question of fact as to whether the employment relationship was at will or whether it was governed by an implied contract, the Court reversed the district court's order dismissing the employee's claim based on a breach of the implied covenant of good faith and fair dealing.

## Jury Verdict and New Trial

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*Shadoan v. Cities of Gold Casino*
No. 28,924 (N.M. Ct. App., filed November 12, 2009)

The plaintiff was robbed and injured in the parking lot of the Cities of Gold Casino while getting out of her car. She filed suit against the casino based on the lack of security in the parking lot. The plaintiff argued that she was entitled to $448,500.00 in compensatory damages arising from the assault for lost income and pain and suffering, as well as medical expenses totaling $9,568.00. The jury returned a verdict for the plaintiff in the amount of $4,784.00 and found that defendants were 20% responsible for plaintiff's injuries. After the proceedings, the district court judge met with the jury for a debriefing. The jury told the judge that they had intended to give the plaintiff half of her medical expenses and 20% of the $448,500.00 that Plaintiff had asked for in closing arguments. One of the jurors told both parties that there was confusion surrounding the verdict form.

The plaintiff filed a motion for additur, or in the alternative, for a new trial, with three essentially identical affidavits from three jurors regarding how the verdict form did not reflect the intention of the jury. The judge did not grant the additur, but granted the plaintiff a new trial based on equity. The judge also allowed an application for interlocutory appeal on the issue of whether the district court had exceeded its equitable authority by granting a new trial. The defendants argued that Rule 11-606(B) prohibits juror testimony or affidavits that seek to impeach the verdict of the jury, and it was error for the district judge to consider the affidavits in his decision to grant a new trial. The policy reasons behind Rule 11-606 protect jurors from harassment by a party who may wish to reopen or re-litigate a case and would require the jury's continued involvement long after a verdict was reached. The district court held that the district court erred in considering the post-verdict jurors' affidavits and remanded the case to the district court with instructions to reinstate the original verdict.

## UM/UIM Motor Vehicle Insurance

NM Bar Bulletin – January 25, 2010
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*Marckstadt v. Lockheed Martin Corp.*
Nos. 31,258/31,447 (N.M. S.Ct., filed November 19, 2009)

In these consolidated cases, the employees were injured on the job and sought uninsured or underinsured (UM/UIM) motorist benefits under their employers' insurance policies, which were denied. The employees claimed that because they were covered under their employers' insurance policies and because their employers failed to properly

reject UM/UIM coverage, the coverage should be read into their employers' policies. The plaintiffs argued that in order to reject UM/UIM coverage in New Mexico, the insured must provide the insurer with a written, signed rejection, which must be attached to the insurance policy. The insurers argued that because there was no dispute that the employers intended to reject UM/UIM coverage and because the rejection was evidenced by endorsements to their policies, UM/UIM coverage was successfully rejected.

The Court held that an insurer must obtain a written rejection of UM/UIM coverage from the insured in order to exclude it from an automobile liability insurance policy under NMSA section 66-5-301 and NMAC regulation 13.12.3.9. However, neither the statute nor the regulation required that the insured's written rejection be signed. Also, despite the clear requirement under 13.12.3.9 NMAC that the rejection of UM/UIM coverage be attached, endorsed, stamped, or otherwise made part of the policy, the written rejection itself need not be made part of the policy.

## Employment Law

NM Bar Bulletin – February 1, 2010
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*Callahan v. New Mexico Federation of Teachers - TVI*
No. 28,651 (N.M. Ct. App., filed September 4, 2009)

The Supreme Court held in an earlier appeal that the plaintiffs stated a claim against Defendant New Mexico Federation of Teachers-TVI for which relief could be granted for breach of the duty of fair representation. The Court also held that the Plaintiffs stated a claim against Defendant American Federation of Teachers because the union did business in New Mexico as an exclusive bargaining agent for Plaintiffs under a collective bargaining agreement. The primary issue on remand was whether the handling of Plaintiffs' grievances was perfunctory and arbitrary, or was in bad faith. The district courter entered summary judgments in favor of the Defendants.

In the new appeal, the Court of Appeals held that a genuine issue of material fact existed as to whether the union's pursuit of the Plaintiffs' grievances was arbitrary, including perfunctory, thus precluding summary judgment in favor or the Defendants and requiring remand for trial. The Court also held that summary judgment in favor of Defendant American Federation of Teachers was appropriate. The Court of Appeals reviewed the trial court's reasoning and found it was clear that the union's handling of the grievances was necessarily perfunctory, and therefore arbitrary, because the union made its decision to settle with TVI without knowing the reasons why Plaintiffs were terminated.

## Standing

NM Bar Bulletin – February 15, 2010
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*San Juan Agricultural Water Users Association v. KNME-TV*
No. 28,473 (N.M. Ct. App., filed October 29, 2009)

The primary issue in this appeal was whether an undisclosed principal had standing to enforce New Mexico's inspection of the public records statute when that principal's agent made the inspection request. The Court held that the undisclosed principal did not have standing, and others who also sought to enforce the statute, but who never requested an inspection, also lacked standing.

A law firm, through one of its attorneys, made an inspection request for all records relating to a news documentary program on KNME-TV. The request was served on KNME-TV, the Board of Education of Albuquerque Public School, the Regents of the University of New Mexico, John D'Antonio as the New Mexico State Engineer, the Office of the State Engineer, the Interstate Stream Commission, and the Office of the Governor of New Mexico (Defendants). Some of the records were produced by some of the Defendants. The law firm was dissatisfied with the responses and filed a lawsuit on behalf of the Plaintiffs. The district court dismissed the suit with prejudice because the Plaintiffs were not the person(s) that made the requests for records, they failed to disclose themselves as the requester, and failed to disclose their name, address, and telephone numbers at the time the request was made, as required under NMSA section 14-2-8. Under the IPRA, the Plaintiffs, as the undisclosed principals of the person who made the written request for inspection of public records, lacked standing to sue under Section 14-2-12(A).

## Unlicensed Contractors

NM Bar Bulletin – February 22, 2010
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*Reule Sun Corporation v. Valles*
No. 31,192 (N.M. S.Ct., filed November 23, 2009)

The defendant homeowners entered into a contract with a licensed contractor that hired an unlicensed subcontractor to apply stucco on their home. The homeowners were not satisfied with the stucco job and did not pay the contractor. The contractor filed a complaint alleging breach of contract and filed a lien against the home. The district court found in favor of the contractor, foreclosed the lien on the property, and awarded damages to the contractor. The Court of Appeals affirmed the decision. The Supreme Court reversed.

The Court of Appeals applied the common law control test and held that the subcontractor was the contractor's employee and not a subcontractor, and that it need not reach the question of whether a duly licensed contractor may recover for work performed by an unlicensed subcontractor.

The New Mexico Supreme Court considered three issues: 1) whether the Court of Appeals erred when it applied the common law employee exception to the licensing requirements of the Construction Industries Licensing Act (CILA); 2) whether the Court of Appeals erred when it failed to review the application of the facts under a de novo standard of review; and 3) whether an unlicensed business entity can be an "employee" of a licensed entity. The Court held that whomever qualifies as a "contractor" under the CILA's definition is required to have a contractor's license when performing the specified acts described in the CILA, regardless of whether such an individual can be classified as an employee of a licensed contractor. The CILA defines a contractor as "any person who undertakes, offers to undertake…by himself or through others, contracting. Contracting includes constructing, altering, repairing, installing or demolishing any…building, stadium or other structure." The CILA includes subcontractors and specialty contractors in its definition of contractors. There was no dispute that the subcontractor, who applied stucco to the defendants' home. was a contractor under the meaning of the CILA. Furthermore, the subcontractor did not qualify under one of the exceptions listed in NMSA section 60-13-3(D) of the CILA. An unlicensed contractor's classification under the common law control test as an employee of a licensed contractor does not exempt the unlicensed contractor from the CILA's licensing requirements.

The Court declined to address the remaining two issues because it held that a contractor is precluded from maintaining an action for recovery of compensation for the work completed by an unlicensed subcontractor.

## Judicial Notice of Municipal Ordinances

NM Bar Bulletin – March 1, 2010
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*City of Aztec v. Gurule*
No. 31,480 (N.M. S.Ct., filed January 25, 2010)

The defendant was found guilty of aggravated DWI in the City of Aztec Municipal Court. He appealed to the Eleventh Judicial District Court and was found guilty once again after a trial de novo. The Defendant objected at the close of evidence in the trial de novo, stating that the city had not met its evidentiary burden because it failed to introduce the relevant ordinance into evidence. No mention was made on the record as to whether the district court did, or could, take judicial notice of the city ordinance. The Court of Appeals upheld the conviction by concluding that the district court took judicial notice of the city ordinance, and found the city proved the prima facie elements of its case. The New Mexico Supreme Court held in this appeal that municipal ordinances

are properly considered law, and do not need to be proven as facts necessary for a prima facie case. The Court applied the rule to affirm the defendant's conviction of aggravated DWI under the city code of Aztec, New Mexico.

## Forseeability and Wrongful Death

NM Bar Bulletin – March 1, 2010
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*Ross v. City of Las Cruces*
No. 28,619 (N.M. Ct. App., filed December 21, 2009)

A personal representative of the deceased filed a complaint for wrongful death against the Defendants after the deceased was killed in a car accident caused by a patient that had recently been discharged from the Defendants' care. The district court granted the Defendants' motion for summary judgment based on the assertion that they did not owe a duty of care to the deceased. The district court stated: 1) the likelihood of injury to the deceased from Defendants' actions was too remote to warrant a finding that Defendants had a duty of care to the deceased; 2) public policy considerations, legislative limitations, and the reasoning of this and other jurisdictions argue against extending such duty; and 3) the injuries suffered by the deceased were not foreseeable consequences of the breach of any duty Defendants may have had. The Court of Appeals affirmed. The Court did not find the facts warranted an expansion of health care provider duties to third parties. Any such expansion of health care provider liability to third parties should be left to the Legislature.

## Sovereign Immunity

NM Bar Bulletin – March 22, 2010
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*Wachocki v. Bernalillo County Sheriff's Department*
No. 27,761 (N.M. Ct. App., filed November 24, 2009)

In *Wachocki,* the decedent was a twenty-two year old worker at the Sandia Motor Speedway, who was killed when his vehicle was struck by a speeding van driven by a corrections officer at the Metropolitan Detention Center. After a bench trial, the district court found the officer 70 percent at fault for Wachocki's death and the Defendant 30 percent at fault. The court concluded that the Defendant's liability resulted from its negligence in failing to enforce traffic laws against jail corrections officers on Shelly Road. The Defendant appealed the judgment because 1) several of the district court's factual findings were not supported by substantial evidence; 2) the district court erred in finding that the deceased had no comparative fault in causing his death; 3) the district court erred in calculating the lost value of the decedent's life and household services; and 4) that the court improperly determined that this claim fell within the waiver of sovereign immunity for law enforcement officers. The Court of Appeals did not address

the three evidentiary arguments because the Defendant failed to conform to the rules of appellate procedure with regard to briefing those issues. The Court affirmed the district court's decision that the Tort Claims Act does not provide immunity in this case. The Defendant had ample notice of repeated dangerous traffic violations by its own employees, officers, jail employees, and city employees. The Defendant's response was minimal at best, even though the sheriff himself recognized the potential consequences of non-enforcement.

The Plaintiffs cross appealed, arguing that the Tort Claims Act is unconstitutional because of the $400,000 cap and that a judgment for full damages should have been entered against the Defendant. The deceased's brother further argued that the court improperly denied his claim for loss of consortium. The Court held that the cap on damages continues to bear a rational relation to a legitimate governmental purpose and that the right to recover for loss of consortium does not extend to the facts of this case.

## Workers' Compensation

NM Bar Bulletin – March 22, 2010
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*Chavez v. City of Albuquerque*
No. 29.133 (N.M. Ct. App., filed December 21, 2009)

The employer appealed from the Workers' Compensation Judge's decision in favor of the worker's choice of a health care provider over the employer's objection. The Court of Appeals reversed. The employer made the initial choice of health provider, but made her own selections a year later. The employer did not object to several of her selections until she eventually notified her employer that she wanted to request a change to Dr. Carlos Esparza. The employer did not agree, and the worker filed a request to change with the WCA. The request signed by the worker's legal counsel explained that her prior doctor's medical care was inadequate and unreasonable. The WCJ held that the worker should be allowed to make a formal, second selection of a treating physician. Neither party requested an evidentiary hearing even after the WCJ presented the option. The Court of Appeals held that the worker did not show why she could not obtain an evidentiary hearing and present testimony of unreasonable current care within a short time frame. To the extent that the need to change providers is legitimate but inadequately addressed in the workers' compensation statutes, the Court suggested that the matter should be addressed by the Legislature.