NMDLA Civil Case Summaries
July-September 2010

State Court Opinions

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Bad Faith/Excess Insurance

NM Bar Bulletin – August 2, 2010
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Jolley v. Associated Electric & Gas Insurance Services Limited
No. 32,032 (N.M. S.Ct., filed June 17, 2010)

The issue in this case is whether the third-party bad faith cause of action against a compulsory automobile liability carrier, for failure to settle an underlying lawsuit (*Hovet* claim), should be extended to bad faith claims by third parties against carriers providing nonmandatory excess liability coverage. The underlying accident in this case involved a vehicle backing into an unprotected natural gas wellhead operated by Energen. The gas company had an excess reimbursement insurance policy with Defendant.

The New Mexico Supreme Court held that neither the holding, nor the doctrine underpinnings of *Hovet,* support an extension to nonmandatory excess liability coverage. The Court reasoned that this case had nothing to do with Energen's operation of an automobile and that the excess liability policy was not mandated by the Mandatory Financial Responsibility Act. As such, the excess policy was not required by any New Mexico law. Although the defendant owed Energen an Article 16 duty to engage in fair claims practices, neither the Insurance Code, nor any other statute, imposed any such obligation on the defendant to the plaintiff.

Contracts/Indemnification

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United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.
No. 31,860 (N.M. S.Ct., filed June 17, 2010)

The Court considered whether a rental contract for a scissor lift used in the construction of an aircraft hangar was a "contract or agreement relating to construction, alteration, repair or maintenance of any real property." If so, the contract would be considered a "construction contract" and NMSA 1978, §56-7-

1(A) (2005) would apply. This statute mandates that any indemnity clause in a construction contract that seeks to shift tort liability from one party to another "is void, unenforceable and against the public policy of the state."

Two employees of the plaintiff died while using a scissor lift at the new Eclipse Aviation hangar. The plaintiff sued the scissor lift rental company, not because of any wrongdoing, but based on an "Indemnity/Hold Harmless" clause that was one of twenty-three "Additional Terms and Conditions" preprinted on the back side of the rental contract. The Court held that the statute's anti-indemnity protections apply to rental contracts for construction equipment because they are contracts "relating to construction."

Punitive Damages

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Akins v. United Steel Workers of America
No. 31,637 (N.M. S.Ct., filed June 22, 2010)

In a punitive damages case, the jury must first engage in a factual inquiry to determine whether the plaintiff has proven the elements of the claim. If so, the jury must then engage in a much different inquiry to decide whether the defendant's conduct should be punished, and whether such punishment would serve to deter similar conduct in the future. The New Mexico Court of Appeals held that the same punitive damages analysis should be available in duty of fair representation (DFR) suits against labor unions where the union's conduct is malicious, willful, reckless, wanton, fraudulent or in bad faith. The New Mexico Supreme Court upheld the ruling.

Summary Judgment

NM Bar Bulletin – August 9, 2010
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Dickson v. City of Clovis
No. 29,111 (N.M. Ct. App., filed April 1, 2010)

The plaintiff brought civil rights actions against defendants after he was arrested for "felon in possession of a firearm" based on dispatch information that the plaintiff was a felon and despite his statement and documentation that he had received a deferred sentence in Texas. The district court denied plaintiff's motion for summary judgment on the basis that the arresting officer was entitled to qualified immunity and that there was no evidence that the City of Clovis had any policy or custom regarding arrest that violated civil rights. The Court of Appeals affirmed the decision, holding that the arresting officer reasonably believed that

he had probable cause to arrest the plaintiff and that there was no supervisory liability under Section 1983 on behalf of the City.

Workers' Compensation/Notice of Appeal

NM Bar Bulletin – August 16, 2010
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Schultz v. Pojoaque Tribal Police Department and NM Mutual Casualty Company
No. 31,374 (N.M. S.Ct., filed June 24, 2010)

The petitioner filed a workers' compensation complaint for medical benefits and survivor benefits on behalf of her deceased husband. The workers' Compensation Judge (WCJ) denied the claims. Four days before the filing deadline, petitioner mailed her notice of appeal from Albuquerque to the Court of Appeals, but the notice of appeal was filed two days after the filing deadline. The WCJ granted her unopposed motion for an extension of time to file a notice of appeal, but the Court of Appeals dismissed the appeal as untimely because the WCJ did not have authority to grant an extension of time. The Court of Appeals also ruled that there was no showing of excusable neglect or events beyond the control of the petitioner that would justify extending the time to file the appeal. The New Mexico Supreme court held that the WCJ did not have authority to grant an extension of time under Rule 12-601, but that the late filing was excusable in this case because it was due to a delay in the mail, which was outside of the petitioner's control. Judge Chávez dissented stating that the appellate rules are unambiguous and clearly provide that filing of the notice of appeal by mailing is not complete until it is actually received by the appellate court.

Statute of Limitations

NM Bar Bulletin – August 23, 2010
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Gerke v. Romero
No. 28,652 (N.M. Ct.App., filed March 10, 2010)

A pro se tenant appealed a district court order granting summary judgment in favor of the defendant landlords, dismissing his claim for damages due to mold exposure. The district court granted summary judgment because the statute of limitations had run. The Court of Appeals affirmed, holding that the three year statute of limitations begins to run on "toxic tort" personal injury claims pursuant to the discovery rule. Under the discovery rule, the statute of limitations begins to run when the plaintiff knows or, with reasonable diligence should know, of his injury and its cause. When the claimant in a toxic mold case experiences physical symptoms that would cause an ordinary person to make an inquiry

about the discovery of the cause of the symptoms, that is the point at which the statute of limitations begins to accrue.

Settlement/Vicarious Liability

NM Bar Bulletin – September 6, 2010
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Jose Valdez v. R-Way, L.L.C.
No. 29,342 (N.M. Ct. App., filed May 4, 2010)

The issue in this interlocutory appeal is whether settlement with an employee releases the employer from claims based on respondeat superior. This case involved a rear-end motor vehicle accident. The plaintiff claimed that the defendant's employer was vicariously liable. The parties settled and plaintiff fully released the defendant driver from all claims arising from the accident. The release between the two parties specifically preserved Plaintiff's claim against the defendant employer. The district court granted defendant employer's motion to dismiss on the ground that the settlement with the employee destroyed plaintiff's claim against the employer. The Court of Appeals held that the release of the employee driver released her employer despite reservation of plaintiff's claim against the employer on the ground that where an employer's liability arises only by virtue of the doctrine of respondeat superior, and not through any negligence on the part of the employer, the employer is not a true joint tortfeasor.

DWI

NM Bar Bulletin – September 6, 2010
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State v. Bowden
No. 29,291 (N.M. Ct. App., filed May 6, 2010)

Defendant appealed his fourth offense DWI conviction, alleging that the district court erred 1) in admitting the results of his blood test in violation of Regulation 7.33.2.12(A) (2) NMAC, which requires blood to be drawn within two hours of arrest; and 2) by allowing testimony that defendant did not satisfactorily complete field sobriety tests when the tests were invalid because he had gout. The Court of Appeals held that NMSA 1978, Section 66-8-110(E)(2007), permitting tests administered under the Implied Consent Act, more than three hours after a person was driving a vehicle, supersedes the regulation and that the district court did not abuse its discretion in allowing the testimony on the field sobriety tests.

Juries

NM Bar Bulletin – September 13, 2010
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Kilgore v. Fuji Heavy Industries Ltd.
No. 31,750 (N.M. S.Ct., filed August 3, 2010)

The New Mexico Supreme Court held that the party moving for a new trial based on extraneous juror communications bears the burden to prove that 1) material extraneous to the trial actually reached the jury, 2) the extraneous material relates to the case being tried, and 3) it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror. This case involved a defective seatbelt buckle claim in a Subaru. The jury entered a special verdict in favor of the defendants, and the plaintiffs filed a motion for new trial. The plaintiffs claimed that they were presumptively prejudiced during trial by juror misconduct. They claimed that an impaneled juror did not disclose during voir dire that her brother was employed as a Subaru mechanic, and further personally obtained the advice of the owner of the Subaru repair garage as to whether seatbelts were prone to inadvertent unbuckling. Ultimately, the Court remanded the case for an evidentiary hearing, rather than a new trial, to determine whether there was reasonable probability of prejudice.

Notice of Lis Pendens

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High Mesa General Partnership v. Patterson
No. 28,802 (N.M. Ct. App., filed June 8, 2010)

The issue was whether a notice of lis pendens was properly filed in connection with an administrative appeal under Rule 1-074 NMRA (2007)(amended 2008) by a third party who did not have a personal interest in the title to the property. The Court held that a requirement that a party have an interest in the property before filing a notice of lis pendens is not set forth in the plain language of the New Mexico statute. The notice of lis pendens, which may be filed to protect a party's interest by binding a subsequent purchaser to the "proceedings taken after the recording of the notice to the same extent as if the purchaser were made a party to the underlying action," is also designed to protect unidentified prospective purchasers of property by alerting them to the existence of a lawsuit that could affect the title of the property. Filing a notice of lis pendens is not limited to those cases in which the adverse party claims a beneficial interest in the title to the property.

Tavern Keeper's Liability

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Mendoza v. Tamaya
No. 28,809 (N.M. Ct. App., filed May 25, 2010)

This wrongful death action alleged that Tamaya sold alcohol to the deceased at a wedding reception held at the Santa Ana Star Casino. Their vehicle was involved in a one-vehicle rollover accident. The complaint alleged that Tamaya, through their agents, servants, or employees, knew or should have known from the circumstances that the decedents were intoxicated, yet continued to sell and serve alcohol. The defendant moved to dismiss for failure to state a claim upon which relief could be granted in which they argued that an over-served patron had no common law right to recover from a tavern keeper. The district court dismissed the complaint.

The Court of Appeals reversed for further proceedings. The New Mexico Supreme Court has recognized that a third party who was injured by an intoxicated driver has a cause of action against the tavern keeper who illegally served alcohol to the intoxicated driver. *Lopez v. Maez,* 98 N.M. 625 (1982). In this case, the plaintiffs argued that one of the decedents, as it was unclear who was driving at the time of the accident, was not driving and was entitled to the common law claim. Under comparative negligence principles, the question of the amount of fault, complicity, or assumption of the risk is a jury question.

Unfair Practices Act/Attorney's Fees

NM Bar Bulletin – September 13, 2010
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Dean v. Brizuela
No. 29,247 (Ct. App., filed June 29, 2010)

The plaintiff prevailed on certain claims brought against the defendant, but not on an Unfair Practices Act (UPA) claim. The metropolitan court judge ruled that the defendant was only entitled to attorney fees incurred in defending the UPA claim. The defendant did not identify what portion of his fee was attributable to defending the UPA claim, so the trial court ruled that the defendant was not entitled to any attorney fees. The Court of Appeals affirmed.

Sovereign Immunity/Tribal Law

NM Bar Bulletin – September 13, 2010
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Antonio v. Inn of the Mountain Gods Resort
No. 27,192 (N.M. Ct. App., filed May 13, 2010)

A worker appealed an order of dismissal entered by the Workers' Compensation Administration (WCA) for lack of subject matter jurisdiction. The worker alleged that 1) the WCA erred in determining that his injury occurred on the Mescalero Apache Tribe reservation (Tribe) and that the Tribe was not conducting business within the State of New Mexico; and 2) the WCA had jurisdiction by default because the Tribe did not have a workers' compensation program in effect at the time the worker's injury, and the compensation that was provided to the worker was not as good as the compensation required by the New Mexico Workers' Compensation Act. The Court of Appeals determined that the WCA did not have jurisdiction over the Tribe because the Tribe did not expressly waive sovereign immunity and, therefore, the WCA's order reached the right result for the wrong reason. The worker's question of whether he was provided adequate workers' compensation was unreviewable because he had not exhausted his tribal remedies.

Workers' Compensation

NM Bar Bulletin – September 13, 2010
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Quintero v. New Mexico Department of Transportation
No. 28,875 (N.M. Ct. App., filed July 8, 2010)

The Court of Appeals considered whether the Workers' Compensation Act is the exclusive remedy for a clerical worker, who was injured as a result of the alleged negligence of a State agency (New Mexico Department of Transportation), while in the course of commuting on public transportation to her job, because she happened to work for a separate State agency (New Mexico Department of Public Safety). The plaintiff was injured while walking through a "Park and Ride" parking lot, when she fell into an unlit hole that was not clearly marked, barricaded, nor cordoned off. She sustained a compound leg fracture. The "Park and Ride" lot was a temporary lot used during the 2006 Balloon Fiesta that the worker used predawn for her daily commute to work. The court held that the exclusivity provisions of the Act do not bar the plaintiff's negligence action.