

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FRED LOYA INSURANCE CO.,

Plaintiff/Counterdefendant-Appellant,
vs.

NO. 35,338

THOMAS J. SWEICH,

Defendant/Counterplaintiff-Appellee.

**BRIEF OF *AMICUS CURIAE* NEW MEXICO DEFENSE LAWYERS
ASSOCIATION**

**On Appeal From The
Second Judicial District Court for the State of New Mexico
The Honorable Victor Lopez
Second Judicial District Judge, Presiding
(No. D-202-CV-2014-00582)**

Mark D. Standridge
Jarmie & Associates
P.O. Box 344
500 North Church Street
Las Cruces, N.M. 88004
(575) 526-3338
Fax: (575) 526-6791
Attorneys for New Mexico Defense
Lawyers Association

September 19, 2016

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT REGARDING SUBMISSION OF AMICUS BRIEF	1
STATEMENT OF COMPLIANCE	2
SUMMARY OF PROCEEDINGS	3
I. <i>Nature of the Case</i>	3
II. <i>Summary of Facts and Course of Proceedings Below</i>	4
ARGUMENT AND AUTHORITIES	12
I. <i>Punitive Damages are Awarded for Limited Purposes, and as Such, Courts Should Be Doubly Cautious in Awarding Them Against Persons or Entities Who Are Not at Fault</i>	12
II. <i>The District Court Erred in Looking Beyond the Property Damage Policy Limit in Awarding Punitive Damages</i>	25
CONCLUSION	27
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

	Page
<u>Decisions of the New Mexico Courts</u>	
<i>Aken v. Plains Elec. Generation & Transmission Coop., Inc.</i> , 2002-NMSC-021, 132 N.M. 401, 49 P.3d 662	14
<i>Allsup's Convenience Stores, Inc. v. N. River Ins. Co.</i> , 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1	14
<i>Baker v. Armstrong</i> , 1987-NMSC-101, 106 N.M. 395, 744 P.2d 170	7
<i>Bird v. State Farm Mut. Auto. Ins. Co.</i> , 2007-NMCA-088, 142 N.M. 346, 165 P.3d 343	22, 23, 24
<i>Chavarria v. Fleetwood Retail Corp.</i> , 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717	14
<i>City of Santa Fe v. Travelers Cas. & Sur. Co.</i> , 2010-NMSC-010, 147 N.M. 699, 228 P.3d 483	16-17
<i>Espinoza v. Roswell Tower, Inc.</i> , 1996-NMCA-006, 121 N.M. 306, 910 P.2d 940	14
<i>Farmers Ins. Co. of Arizona v. Sandoval</i> , 2011-NMCA-051, 149 N.M. 654, 253 P.3d 944	15, 25
<i>Faubion v. Tucker</i> , 1954-NMSC-047, 58 N.M. 303, 270 P.2d 713	14
<i>First Nat'l Bank in Albuquerque v. Sanchez</i> , 1991-NMSC-065, 112 N.M. 317, 815 P.2d 613	13
<i>Gonzales v. Sansoy</i> ,	

1984-NMCA-133, 103 N.M. 127, 703 P.2d 904	12, 14
<i>Green Tree Acceptance, Inc. v. Layton</i> , 1989-NMSC-006, 108 N.M. 171, 769 P.2d 84	12, 13-14
<i>Gulbransen v. Progressive Halcyon Ins. Co.</i> , 2010-NMCA-082, 148 N.M. 585, 241 P.3d 183	15
<i>Jaramillo v. Providence Washington Ins. Co.</i> , 1994-NMSC-018, 117 N.M. 337, 871 P.2d 1343	13, 19
<i>Kueffer v. Kueffer</i> , 1990-NMSC-045, 110 N.M. 10, 791 P.2d 461	13
<i>Madrid v. Marquez</i> , 2001-NMCA-087, 131 N.M. 132, 33 P.3d 683	12
<i>Manzanares v. Allstate Ins. Co.</i> , 2006-NMCA-104, 140 N.M. 227, 141 P.3d 1281	15, 25
<i>Montoya v. Moore</i> , 1967-NMSC-003, 77 N.M. 326, 422 P.2d 363	12-13
<i>Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.</i> , 2001-NMCA-082, 131 N.M. 100, 33 P.3d 651	24
<i>Romero v. Dairyland Ins. Co.</i> , 1990-NMSC-111, 111 N.M. 154, 803 P.2d 243	20
<i>Romero v. Mervyn's</i> , 1989-NMSC-081, 109 N.M. 249, 784 P.2d 992	13
<i>Sloan v. State Farm Mut. Auto. Ins. Co.</i> , 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230	23
<i>State ex rel. New Mexico Highway and Transp. Dep't v. Baca</i> , 1995-NMSC-033, 120 N.M. 1, 896 P.2d 1148	13

<i>State Farm Auto Ins. Co. v. Ovitz,</i> 1994-NMSC-047, 117 N.M. 547, 873 P.2d 979	20
<i>State Farm Mut. Auto. Ins. Co. v. Progressive Specialty Ins. Co.,</i> 2001-NMCA-101, 131 N.M. 304, 35 P.3d 309	19, 20
<i>Stewart v. State Farm Mut. Auto. Ins. Co.,</i> 1986-NMSC-073, 104 N.M. 744, 726 P.2d 1374	17,18,23,24
<i>Stinbrink v. Farmers Ins. Co. of Arizona,</i> 1990-NMSC-108, 111 N.M. 179, 802 P.2d 664	7, 18, 19
<i>Teague-Strebeck Motors, Inc. v. Chrysler Ins.,</i> 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183	23
<i>Thompson v. Ruidoso-Sunland, Inc.,</i> 1987-NMCA-023, 105 N.M. 487, 734 P.2d 267	13, 22
<i>Weidler v. Big J Enters., Inc.,</i> 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089	13
<i>Whitely v. New Mexico State Personnel Bd.,</i> 1993-NMSC-019, 115 N.M. 308, 850 P.2d 1011	17
<i>Wood v. Millers Nat. Ins. Co.,</i> 1981-NMSC-086, 96 N.M. 525, 632 P.2d 1163	16

Decisions of the United States Supreme Court

<i>City of Newport v. Fact Concerts, Inc.,</i> 453 U.S. 247 (1981)	13
---	----

Decisions of Other Jurisdictions

<i>Arnold v. Farmers Ins. Co. of Arizona,</i> 827 F.Supp.2d 1289 (D.N.M. 2011)	17
---	----

<i>Fairfield Ins. Co. v. Stephens Martin Paving, LP</i> , 246 S.W.3d 653 (Tex. 2008)	21
<i>Kentucky Cent. Ins. Co. v. Schneider</i> , 15 S.W.3d 373 (Ky. 2000)	21
<i>Kurent v. Farmers Ins.</i> , 62 Ohio St.3d 242, 581 N.E.2d 533 (1991)	20
<i>Omni Ins. Co. v. Foreman</i> , 802 So.2d 195 (Ala. 2001)	21

Statutes and Rules

MSA 1978, § 56-8-4(A)(2) (2004)	23
NMSA 1978, § 66-5-301 (Repl.Pamp.1984)	18
NMSA 1978, § 66-5-301(A) (1983)	16, 26, 27
NMSA 1978, § 66-5-301(A) (Repl.Pamp.1989)	19
Rule 12-213(A)(1)(c) NMRA	2
Rule 12-213(F) NMRA	2
Rule 12-213(G) NMRA	2
Rule 12-215(A) NMRA	1
Rule 12-215(B) NMRA	1
Rule 12-215(F) NMRA	1
UJI 13-1802 NMRA	25

UJI 13-1813 NMRA 25

UJI 13-1827 NMRA 13, 22

Other Authorities

Alicia M. Santos, *Who Are We Really Punishing? Why Mandating Coverage of Punitive Damages Under Liability Insurance Policies Does Not Make Sense*,
NMDLA DEFENSE NEWS, Winter 2014/15 21-22

STATEMENT REGARDING SUBMISSION OF AMICUS BRIEF

Pursuant to Rule 12-215(A) NMRA, Amicus Curiae New Mexico Defense Lawyers Association (“NMDLA”) hereby submits this Amicus Brief pursuant to NMDLA’s contemporaneously-filed Motion for Leave to File Amicus Brief. Pursuant to Rule 12-215(F) NMRA, NMDLA states that no counsel for any party to this appeal authored any portion of this Brief, nor has any party’s counsel or any party to the appeal made any monetary contribution intended to fund the preparation or submission of this Brief. Pursuant to Rule 12-215(B) NMRA, counsel for all parties of record received timely notice of NMDLA’s intent to file this Amicus Brief.

/s/ original signed by:

Mark D. Standridge

Jarmie & Associates

STATEMENT OF COMPLIANCE

Pursuant to Rules 12-213(A)(1)(c) and 12-213(G) NMRA, Amicus Curiae New Mexico Defense Lawyers Association hereby certify that their Brief complies with the limitations of Rule 12-213(F) NMRA. This Brief has been prepared using a proportionally-spaced type style or typeface (Times New Roman, 14 point font), and contains 6,163 words (inclusive of footnotes). This word count was obtained using Microsoft Word 2013.

/s/ original signed by:

Mark D. Standridge

Jarmie & Associates

SUMMARY OF PROCEEDINGS

I. Nature of the Case

This case began as a declaratory judgment action filed on January 21, 2014 by Fred Loya Insurance Company (Plaintiff-Counterdefendant below and Appellant here) against Thomas Sweich (Defendant-Counterplaintiff below and Appellee here) arising out of an insurance contract covering Sweich's motor vehicle. Sweich's vehicle (his personal property) was damaged by an uninsured third party. Loya sought a declaratory judgment stating that Sweich was entitled to no more than \$10,000 from Loya under Sweich's insurance policy, that amount representing the property damage limits available under the policy. *See generally* [1 RP 1-3, 10]. Sweich's policy also had a coverage limit for "bodily injury" damages of \$25,000. [1 RP 10]. On March 14, 2014, Sweich counterclaimed against Loya, asserting *inter alia* that Loya had breached the insurance contract by failing to pay Sweich "additional damages" above and beyond the \$10,000 property damage policy limits. *See generally* [1 RP 14-19]. Specifically, Sweich asserted that Loya was liable for punitive damages arising out of the conduct of the uninsured third party. [1 RP 18]. As is relevant here, Loya appeals the award of punitive damages entered against Loya by the District Court.

II. Summary of Facts and Course of Proceedings Below

On June 21, 2013, Thomas Sweich's vehicle—a 2001 Chevrolet Suburban—was involved in an accident. *See* [10-5-15 4 Tr. 35:12-18]. Plaintiff purchased the Suburban in late 2003; it had been driven approximately 183,000 miles at the time of the accident. [10-5-15 4 Tr. 35:19-25]. Mr. Sweich was in his apartment and asleep when the collision occurred in the early morning. [10-5-15 4 Tr. 38:22-39:3]. No one was inside the vehicle when it was hit—consequently, no one (including Sweich) suffered any bodily injuries. *See* [10-5-15 4 Tr. 39:13-17, 41:10-15]. There was, however, property damage to the vehicle. [10-5-15 4 Tr. 41:16-17]. Sweich wanted to have his vehicle repaired after this accident. [10-5-15 4 Tr. 40:10-20]. It cost \$3,566.24 to repair Sweich's vehicle. [10-5-15 4 Tr. 41:18-42:1, 42:5-9; Plaintiff's Ex. 10]. Sweich did not have to make any additional payments for repairs relating to the June 21, 2013 accident. *See* [10-5-15 4 Tr. 43:1-4, 44:9-18]. Instead, on the afternoon of June 21st, Sweich purchased—and purchased insurance for—a BMW to replace the Suburban (as opposed to renting a car while the Suburban was being repaired). *See* [10-5-15 4 Tr. 44:19-45:4, 45:10-46:4, 48:20-49:4]. Sweich did not request that Loya provide him with a rental car while the Suburban was being repaired. [10-5-15 4 Tr. 46:5-9].

Thomas Sweich's insurance policy for his Suburban included uninsured motorist property damage coverage. [10-5-15 4 Tr. 49:5-7; Plaintiff's Ex. 6, 9].

Sweich’s policy provided that, subject to the limits of liability, Loya would pay for damages Sweich was “entitled to recover from the owner or operator of an uninsured motor vehicle because of property damage caused by an accident and arising out of ownership, maintenance, or use of an uninsured vehicle.” [10-5-15 4 Tr. 56:2-16]. “Property damage” meant “physical damage to or destruction of a covered vehicle and physical damage to or destruction of any property owned by an insured person which is contained in the covered vehicle at the time of the accident.” [10-5-15 4 Tr. 56:20-57:3]; *see also* [2 RP 468] (defining property damage as “physical damage to or destruction or loss of use of tangible property”). Sweich reiterated that he was not making any claim against Loya for “any bodily injuries involved” in the accident with his Suburban—instead, his claim was for property damage to the Suburban. *See* [10-5-15 4 Tr. 55:20-23, 57:4-7].

Sweich made a claim to Loya “for uninsured motorist property damage” and was paid \$3,566.24 noted above. [10-5-15 4 Tr. 57:20-24]. However, Loya paid Sweich (through Sweich’s attorneys) an additional sum of \$6,433.76. [10-5-15 4 Tr. 58:7-9, 59:22-60:2; Plaintiff’s Ex. 3]. The two sums total \$10,000 (the property damages limit under Sweich’s policy). *See* [10-5-15 4 Tr. 59:18-21]. On November 1, 2013 (prior to the litigation of this matter), Loya offered the entirety of the uninsured motorist property damage limit to resolve Sweich’s claim (which included his claim for punitive damages), “inclusive of any additional property

damage associated with this loss that may be found.” **[Plaintiff’s Ex. 1]**; *see also* **[10-5-15 4 Tr. 58:17-59:7]**. One week later, Loya reiterated its offer “to resolve Mr. Sweich’s claim for the remainder of the Uninsured Motorist Property Damage limit.” **[Plaintiff’s Ex. 2]**; *see also* **[10-5-15 4 Tr. 59:8-17, 77:16-21]**. Loya ultimately sent Sweich’s attorneys the \$6,433.76 “to resolve any of the claims that Mr. Sweich had under his uninsured motorist property damage coverage.” *See* **[10-5-15 4 Tr. 98:23-99:4]**; *see also* **[10-5-15 4 Tr. 101:8-11]** (“we paid the policy limit to handle *any and all claims* that [Sweich] had...It was to handle *any claims* that Mr. Sweich had, is my understanding”) (emphasis supplied); **[10-5-15 4 Tr. 101:23-25, 103:14-19, 107:2-8]**.

Loya admitted, through its Litigation Manager Adrienne Sealey, that Thomas Sweich was not at fault for the accident. **[10-5-15 4 Tr. 96:23-97:4]**. Instead, the tortfeasor—Brandon Sandoval—struck Sweich’s “parked, unoccupied vehicle in the parking lot of [Sweich’s] apartment complex.” **[10-5-15 4 Tr. 97:5-14]**. Sandoval had just fled the scene of a crime and crashed into Sweich’s vehicle while fleeing. *See generally* **[1 RP 4-9]**; *see also generally* **[Defendant’s Ex. C]**. Sweich admitted that “Brandon Sandoval’s acts, errors and omissions were the sole cause of the collision.” **[1 RP 16 ¶ 2]**. Based on *Sandoval’s* conduct, Sweich asserted that he was entitled to punitive damages to be paid by Loya under the insurance contract. *See generally* **[1 RP 14-17]**.

Following an arbitration of this matter, in the District Court Loya and Sweich filed and briefed cross motions for summary judgment concerning, *inter alia*, the issue of punitive damages. *See generally* [1 RP 159-237; 2 RP 238-86]. On February 24, 2015, the District Court entered two Partial Summary Judgments in favor of Sweich and against Loya. [2 RP 295-301]. The District Court framed the dispositive question as “Whether the Fred Loya Insurance policy limits the award of ‘punitive damages’ to the standard \$10,000 limit for ‘property damage’ claims where the original claim stemmed from a property damage claim.” [2 RP 295, 298]. Purporting to rely on the New Mexico Supreme Court’s opinion in *Stinbrink v. Farmers Ins. Co. of Arizona*, 1990-NMSC-108, 111 N.M. 179, 802 P.2d 664, the District Court found that

the source for recovery of punitive damages is not the property damage portion of the award; although this source of recovery was used in this case by [Sweich] to open the door of potential liability; nevertheless, the source of entry does not limit [Sweich’s] right to recovery of damages under the policy generally once that door opens, absent clear policy language to the contrary.

[2 RP 296, 300]. The District Court ruled that, “[o]nce the door of liability opens for recovery of punitive damages, the Fred Loya Insurance policy fails to clearly limit the amount of a punitive damage award (intended to punish or deter a tortfeasor) to the \$10,000 limit.” [2 RP 297, 300-01] (citing *Baker v. Armstrong*, 1987-NMSC-101, ¶ 6, 106 N.M. 395, 744 P.2d 170 (“a court should not construe an exclusion of liability for punitive damages where there is nothing in the insuring

clause to forewarn an insured that such was the intent of the parties”). The District Court thus granted “Sweich’s motion to exceed the limitation if a punitive damage award is obtained above the \$10,000” limit, but provided that a trial would be necessary “to determine whether punitive damages are recoverable under the circumstances of this case, and to determine the extent of such damages.” [2 RP 297, 301]. The District Court denied Loya’s request for an interlocutory appeal of this issue. [2 RP 353].

On August 17, 2015, Sweich filed a Motion for Partial Summary Judgment seeking a determination that “Brandon Sandoval’s conduct warrant[ed] punitive damages.” *See generally* [2 RP 423-37]. Three days later, Loya filed its Motion to Reconsider the District Court’s February 24th partial summary judgment rulings. [2 RP 440-74]. Following briefing, at a hearing on September 9, 2015, the District Court stated that it would take Sweich’s motion under advisement, preferring to “determine the awardability – the liability for punitive damages, as well as the amount of damages for the time at trial.” *See* [9-9-15 2 Tr. 19:24-20:15]. Subsequently, on the day of trial (October 5, 2015), the District Court also indicated that it would carry Loya’s motion to reconsider through trial. *See* [10-5-15 4 Tr. 7:3-21].

At the October 5, 2015 trial in this matter, Sweich’s counsel asserted that the “whole purpose” of the trial was to “figure out” the nature of Loya’s payment of

the \$6,433.76 above Sweich’s provable repair damages. *See* [10-5-15 4 Tr. 110:24-111:2]. The District Court remarked that it had not “seen any evidence of what else” the \$6,433.76 payment “could be for *other than punitive damages*” (emphasis supplied). [10-5-15 4 Tr. 111:6-7]. While Sweich’s counsel generally argued “about loss of use” and “loss of diminution of value,” Sweich did not “present[] any testimony on those” subjects. [10-5-15 4 Tr. 111:8-10]; *see also* [10-5-15 4 Tr. 111:18-24]. The District Court surmised that, “by a matter of exclusion,” it could “make the determination whether” the \$6,433.76 was “going to be credited towards punitives or whether it’s going to actually be some other form of...property damage.” [10-5-15 4 Tr. 111:12-15]. The District Court also remarked that it was “fairly clear that the intent of Fred Loya [wa]s to include any payments within the property damage portion of the policy.” [10-5-15 4 Tr. 114:12-14].

On December 14, 2015, the District Court entered its Findings of Fact and Conclusions of Law, as well as its Judgment. *See generally* [3 RP 653-60]. As stated at trial, the District Court found that Brandon Sandoval “was entirely responsible for the damage to Sweich’s Suburban.” [3 RP 656 ¶ 35]. However, without citing to any specific evidence or testimony, the District Court also found that “Sandoval’s conduct justifies a punitive damage award of \$20,000, over and above the compensatory property damages already paid herein (i.e., \$10,000), *to*

punish him and to send a message to other would-be tortfeasors that such driving conduct is unacceptable in a civilized society.” [3 RP 656 ¶ 38]. The District Court ruled that, “[i]f the \$10,000 property damage limit was applied in this case, the tortfeasor (whose damages are paid to Sweich through the policy’s UIM clause) would not have to pay any damages over and above the property damage portion of the claim, i.e., \$10,000, which has already been paid.” [3 RP 657 ¶ 52]. Per the District Court, such a “limited recovery would send no societal message to the tortfeasor, or to the community, about the cost of engaging in, and would not deter, such reprehensible conduct” (emphasis in original). [3 RP 658 ¶ 53].

In its Conclusions of Law, the District Court noted that “[t]he law of punitive damages does not seek to compensate the plaintiff for any bodily injuries or property damages suffered; instead, the law seeks to *punish* the tortfeasor to a degree sufficient to send the message, and to deter other drivers from engaging in such dangerous and reprehensible conduct” (emphasis in original). [3 RP 659 ¶ F]. While admitting that “[t]he punishment purpose meant to be accomplished by a punitive damages award on a societal scale is directed against the *uninsured tortfeasor*,” see [3 RP 659 ¶ H] (emphasis in original), and noting that punitive damages are supposed to “sanction[] the *tortfeasor* with payment,” see [3 RP 659 ¶ I] (emphasis supplied), the District Court nonetheless ruled that, because Loya as the insurer “steps into the tortfeasor’s shoes and provides the insured for protection

for which he has paid under [the] UIM provision,” *see* [3 RP 659 ¶ H], Loya was required to pay Sweich “the amount of \$20,000 in punitive damages over and above the \$10,000 amount previously paid for property damage-based compensatory damages.” [3 RP 660]. In assessing the \$20,000 in punitive damages, the District Court “utiliz[ed] the higher limits under the policy,” i.e. the “bodily injury” or “per accident” coverage limits under Sweich’s policy, “rather than the \$10,000 property damage-based limit.” [3 RP 659 ¶ L]. Without citation to any statute, case or rule, the District Court “[l]ook[ed] to the higher policy limit...not because the claim arose from ‘bodily injuries’ or ‘property damages,’ or because it arose from a single claim or accident, but because in the context of this case the punitive damage purpose logically demands access to the greater policy limits.” [3 RP 659 ¶ M].

ARGUMENT AND AUTHORITIES

I. Punitive Damages are Awarded for Limited Purposes, and as Such, Courts Should Be Doubly Cautious in Awarding Them Against Persons or Entities Who Are Not at Fault

A. The Nature and Limited Purpose of Punitive Damages

Punitive damages are a special class of damages that are awarded in addition to compensatory or nominal damages against a Defendant, “usually as punishment or deterrent levied against a defendant found guilty of particularly aggravated misconduct, coupled with a malicious, reckless or otherwise wrongful state of mind.” *Madrid v. Marquez*, 2001-NMCA-087, ¶ 4, 131 N.M. 132, 33 P.3d 683; *see also Gonzales v. Sansoy*, 1984-NMCA-133, 103 N.M. 127, 703 P.2d 904 (New Mexico law permits punitive damages as long as the wrongdoer’s conduct is willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith). Punitive damages are based on the wrongdoer’s misconduct; their purpose is not to compensate a plaintiff for a loss he or she has suffered, but rather, to punish the wrongdoer and dissuade others from engaging in similar conduct. *See Madrid*, 2001-NMCA-087, ¶ 4.

“Punitive damages are to be awarded when actual or nominal damages are inadequate to satisfy the wrong committed.” *Green Tree Acceptance, Inc. v. Layton*, 1989-NMSC-006, ¶ 9, 108 N.M. 171, 769 P.2d 84 (citing *Montoya v.*

Moore, 1967-NMSC-003, ¶ 11, 77 N.M. 326, 422 P.2d 363) (“punitive damages are inflicted for the limited purpose of punishment and only when compensatory damages seem inadequate to satisfy the wrong committed”)); *see also Jaramillo v. Providence Washington Ins. Co.*, 1994-NMSC-018, ¶ 26, 117 N.M. 337, 871 P.2d 1343 (finding that punitive damages could not be recovered against the Estate of a deceased tortfeasor because if the culpable tortfeasor cannot be punished for his behavior, the purpose of punishment cannot be accomplished). Put more bluntly, “[p]unitive damages are a windfall conferred upon an otherwise fully compensated plaintiff.” *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 53, 124 N.M. 591, 953 P.2d 1089; *see also State ex rel. New Mexico Highway and Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 22, 120 N.M. 1, 896 P.2d 1148 (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)).

An award of punitive damages is discretionary and must be supported by substantial evidence. *See, e.g., Thompson v. Ruidoso-Sunland, Inc.*, 1987-NMCA-023, ¶ 23, 105 N.M. 487, 734 P.2d 267. It must also be supported by “logic and reason.” *See Kueffer v. Kueffer*, 1990-NMSC-045, ¶ 10, 110 N.M. 10, 791 P.2d 461 (citations omitted). “A punitive award must bear a reasonable relationship to actual damages and injury.” *First Nat’l Bank in Albuquerque v. Sanchez*, 1991-NMSC-065, ¶ 27, 112 N.M. 317, 815 P.2d 613 (citing *Romero v. Mervyn’s*, 1989-NMSC-081, ¶ 37, 109 N.M. 249, 784 P.2d 992; UJI 13-1827 NMRA); *cf. Green*

Tree Acceptance, supra, 1989-NMSC-006, ¶ 9 (punitive damages “must not be so unrelated to the injury as to plainly manifest passion and prejudice rather than reason and justice”) (citing *Faubion v. Tucker*, 1954-NMSC-047, ¶ 8, 58 N.M. 303, 270 P.2d 713). In ascertaining the reasonableness of a punitive damages award, New Mexico courts assess (1) the reprehensibility of the tortfeasor’s conduct, or the enormity and nature of the wrong; (2) the relationship between the harm suffered and the punitive damages award; and (3) the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases. *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 36, 140 N.M. 478, 143 P.3d 717 (citing *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 20, 132 N.M. 401, 49 P.3d 662).

Of course, punitive damages must be “predicated on an established cause of action.” *Espinoza v. Roswell Tower, Inc.*, 1996-NMCA-006, ¶ 15, 121 N.M. 306, 910 P.2d 940. An award of punitive damages must be supported by an award of compensatory damages. *Gonzales v. Sansoy, supra*, 1984-NMCA-133, ¶ 3. Punitive damages are derivative of liability, compensatory damages, and a “culpable mental state indivisible from the conduct constituting liability.” See *Allsup’s Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 53, 127 N.M. 1, 976 P.2d 1 (internal quotation marks and citation omitted).

As this Court has made clear, “[p]unitive damages...*derive from actual damages*” (emphasis supplied). *Farmers Ins. Co. of Arizona v. Sandoval*, 2011-NMCA-051, ¶ 8, 149 N.M. 654, 253 P.3d 944; *Manzanares v. Allstate Ins. Co.*, 2006-NMCA-104, ¶ 5, 140 N.M. 227, 141 P.3d 1281 (“New Mexico has characterized punitive damages as deriving from actual damages”). Indeed, a claimant is generally entitled to recover punitive damages under his or her UM coverage precisely because they are a part of the claimant’s actual injury. *See Manzanares*, 2006-NMCA-104, ¶ 5; *see also Sandoval*, 2011-NMCA-051, ¶ 16. However, the amount of punitive damages recovered through an insured’s uninsured motorist carrier may not be commensurate with the amount of punitive damages for which the actual tortfeasor is liable. *See Sandoval*, 2011-NMCA-051, ¶ 9; *see also Gulbransen v. Progressive Halcyon Ins. Co.*, 2010-NMCA-082, ¶ 6, 148 N.M. 585, 241 P.3d 183 (rejecting plaintiff’s “demarcation” between uninsured and underinsured motorist coverage for purposes of punitive damages: “[b]ecause Plaintiff recovered some money from Tortfeasor’s liability policy, but not all of his claimed damages, his claim is appropriately viewed as a claim for [underinsured motorist] coverage”) (citing *Manzanares*, 2006-NMCA-104, ¶¶ 5-6).

B. The Uninsured Motorists Act and Punitive Damages

The New Mexico Uninsured Motorists Act, NMSA 1978, Section 66-5-301(A) (1983) (the UMA), provides:

No motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person *and for injury to or destruction of property of others* arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in New Mexico with respect to any motor vehicle registered or principally garaged in New Mexico unless coverage is provided therein or supplemental thereto in minimum limits for bodily injury or death and for injury to or destruction of property as set forth in [the Mandatory Financial Responsibility Act, NMSA 1978, Section 66-5-215 (1983)] and such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured's policy, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom, according to the rules and regulations promulgated by, and under provisions filed with and approved by, the superintendent of insurance.

(emphasis supplied). The phrase “legally entitled to recover” requires that a determination of liability be made by legal means. *See Wood v. Millers Nat. Ins. Co.*, 1981-NMSC-086, ¶ 14, 96 N.M. 525, 632 P.2d 1163.

The plain language of the UMA statute mandates coverage for two different types of property damage: “injury to or destruction of property.” NMSA 1978, § 66-5-301(A). By the use of the disjunctive term “or,” it is evident the Legislature intended that uninsured motorist coverage apply to more than one damage – partial damage and total destruction. *See City of Santa Fe v. Travelers Cas. & Sur. Co.*,

2010-NMSC-010, ¶ 12, 147 N.M. 699, 228 P.3d 483 (New Mexico courts interpret statutes “using the plain language of the statute as the primary indicator of its intent”); *see also Whitely v. New Mexico State Personnel Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d 1011. Indeed, the New Mexico Supreme Court has consistently interchanged the phrase “injury to or destruction of property” in New Mexico’s vehicle-liability insurance statutes with the phrase “property damage.” *Arnold v. Farmers Ins. Co. of Arizona*, 827 F.Supp.2d 1289, 1301 (D.N.M. 2011) (collecting cases). In the present case, Sweich’s car was not totally destroyed: it was repairable, and indeed, Sweich elected to use the money paid to him by Loya to repair the vehicle. *See* [10-5-15 4 Tr. 40:10-20, 41:18-42:1, 42:5-9]. The vehicle was not a total loss. Nonetheless, Loya—to resolve *all* of Sweich’s outstanding claims relating to this incident—paid Sweich nearly three times the amount of his actual, provable loss (i.e. the \$10,000 property damage coverage limit provided for in Sweich’s insurance policy with Loya).

In *Stewart v. State Farm Mut. Auto. Ins. Co.*, 1986-NMSC-073, 104 N.M. 744, 726 P.2d 1374, the New Mexico Supreme Court first held that “under our uninsured motorist law, an insured may recover punitive damages from his insurer if he would be legally entitled to recover them from the uninsured tortfeasor.” *Stewart*, 1986-NMSC-073, ¶ 13. The Supreme Court noted that the purpose of UMA was “for the protection of persons insured thereunder who are legally

entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury . . . or destruction of property.” *Id.* (citing NMSA 1978, § 66-5-301 (Repl.Pamp.1984)).

The Supreme Court concluded that, under the UMA, “uninsured motorist coverage includes coverage for punitive damages” because “the only condition to protection under [the UMA] is that ‘the injured person must be legally entitled to recover damages from the uninsured motorist.’” *Stewart*, 1986-NMSC-073, ¶ 9. Moreover, the applicable policy contained language promising to pay “all sums which the insured shall be legally entitled to recover as damages,” which was “virtually identical” to the language of the UMA. *Id.* Therefore, based on “the prevailing trend” at the time, the Supreme Court strictly construed the policy against the insurer and held that absent an express exclusion, “under our uninsured motorist law, an insured may recover punitive damages from his insurer if he would be legally entitled to recover them from the uninsured tortfeasor.” *Id.* ¶ 13.

Years later, in *Stinbrink v. Farmers Ins. Co. of Arizona*, *supra*, the Supreme Court clarified that “[i]f the [UMA] is interpreted to include punitive damages within the context of uninsured motorist coverage, an express exclusion in the insurance policy is necessarily void.” *Stinbrink*, 1990-NMSC-108, ¶ 6. The Supreme Court relied on the reasoning in *Stewart* that the “only condition” to recovery under the UMA is that the injured person must be “legally entitled to

recover damages from the uninsured motorist.” *Stinbrink*, 1990-NMSC-108, ¶ 5. However, unlike in *Stewart*, the insurance contract in *Stinbrink* “excluded coverage for punitive damages against uninsured motorists.” *Id.* ¶ 3. Therefore, in *Stinbrink*, the Supreme Court clarified that because “punitive damages are as much a part of the potential award under the uninsured motorist statute as damages for bodily injury, and therefore they *cannot be contracted away*.” *Id.* (emphasis in original).

The UMA requires that an insurance policy contain UM coverage “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury.” *State Farm Mut. Auto. Ins. Co. v. Progressive Specialty Ins. Co.*, 2001-NMCA-101, ¶ 17, 131 N.M. 304, 35 P.3d 309. The UMA provides that UM insurance must be provided in at least the minimum limits for bodily injury or death and for injury to or destruction of property “for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles...” *Jaramillo v. Providence Washington Ins. Co.*, *supra*, 1994-NMSC-018, ¶ 22 (quoting NMSA 1978, § 66-5-301(A) (Repl.Pamp.1989)). “The purpose of requiring an insurer to provide UM coverage is to be sure that an injured insured is compensated for injuries even when the tortfeasor is financially irresponsible.” *Jaramillo*, 1994-NMSC-018, ¶ 24 (citations omitted).

The UMA “aims high but does not mandate prudence.” *State Farm Mut. Auto. Ins. Co. v. Progressive Specialty Ins. Co.*, *supra*, 2001-NMCA-101, ¶ 10. Under the UMA, “[t]he more liability insurance a driver purchases, the more the UM Act requires insurers to make available in UM coverage.” *Id.* As such, the UMA allows for coverage limited only by what a driver seeking protection is willing to pay, but it “places the responsibility for obtaining adequate UM insurance upon the citizen seeking protection.” *Id.* The purpose of the UMA is to “offer the opportunity to insure fully against a victim’s loss.” *Id.* ¶ 13. While “the purpose of [the UMA] is to ‘protect individual members of the public against the hazard of culpable uninsured motorists,’” *see State Farm Auto. Ins. Co. v. Ovitz*, 1994-NMSC-047, ¶ 12, 117 N.M. 547, 873 P.2d 979 (quoting *Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 6, 111 N.M. 154, 803 P.2d 243), uninsured motorist coverage is ‘not intended to provide coverage in every uncompensated situation.’” *Ovitz*, 1994-NMSC-047, ¶ 12 (quoting *Kurent v. Farmers Ins.*, 62 Ohio St.3d 242, 581 N.E.2d 533, 536 (1991)).

C. While the UMA Allows for Punitive Damages Against a UM Insurer, Awards of Punitive Damages for a Third Party’s Actions Should be Circumscribed

Under the case law as developed by the New Mexico Supreme Court and this Court, a punitive damages claim must 1) be predicated on an otherwise cognizable claim, 2) derive from the actual damages proven by the claimant, 3)

bear a reasonable relationship to actual damages proven and injury suffered, and 4) be awarded to punish the tortfeasor for malfeasance and deter others from similar conduct. While a UM insurer ostensibly steps into the tortfeasor's shoes for purposes of paying damages for the tortfeasor's actions, the fact remains that the insurer was not the actor that committed the misconduct supporting the award of punitive damages. The "challenging public-policy arguments concerning the wisdom of allowing punitive damages to be awarded against" a UM/UIM insurer that has done no wrong include "the risk of increased premiums" and insurer's often "illusory right to be subrogated against the tortfeasor." See *Omni Ins. Co. v. Foreman*, 802 So.2d 195, 198 (Ala. 2001); *Kentucky Cent. Ins. Co. v. Schneider*, 15 S.W.3d 373, 375-76 (Ky. 2000) ("most jurisdictions holding that punitive damages are not recoverable under the injured party's UM coverage also note that it would be antithetical to require the UM carrier to pay a penalty assessed against the wrongdoer, because the burden of payment would fall...upon the insurer of the innocent party"); cf. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 660-63 (Tex. 2008) (discussing courts' and commentators' struggle with the question of the insurability of punitive/exemplary damage awards and collecting cases representing various states' approach to the question); Alicia M. Santos, *Who Are We Really Punishing? Why Mandating Coverage of Punitive Damages Under*

Liability Insurance Policies Does Not Make Sense, NMDLA DEFENSE NEWS, Winter 2014/15, at 14-16.¹

While, per the New Mexico Supreme Court, the UMA generally mandates that uninsured motorist coverage includes coverage for punitive damages, the foregoing concerns should nonetheless inform courts' decisions as to the propriety and amount of punitive damages where, as in the present case, a UM insurer is asked to pay for the wrongdoing of a stranger to the insurance contract. Punitive damages are, of course, discretionary. *See Thompson v. Ruidoso-Sunland, Inc.*, *supra*, 1987-NMCA-023, ¶ 23; UJI 13-1827 NMRA, *supra* (“you may award punitive damages”) (emphasis supplied). The lower courts must be directed to exercise greater caution when using their discretion to assess punitive damages to be paid by an otherwise innocent insurer for the wrongdoing of a third-party tortfeasor.

In other contexts, this Court has limited an insurance claimant's demand for payment against a UM insurer flowing from the tortious acts of a third party. In *Bird v. State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-088, 142 N.M. 346, 165 P.3d 343, the plaintiffs' son was killed in an automobile accident. *Bird*, 2007-NMCA-088, ¶ 2. The trial court granted summary judgment in favor of the plaintiffs in the

¹ Available at http://www.nmdla.org/Resources/Documents/Newsletter_2014_15_Winter.pdf (last accessed Sep. 19, 2016).

amount of \$100,000. *Id.* ¶ 4. The trial court later entered an order awarding plaintiffs post-judgment interest at 15%, pursuant to NMSA 1978, § 56-8-4(A)(2) (2004) (providing for 15% rate for post-judgment interest where “the judgment is based on tortious conduct, bad faith or intentional or willful acts”). *Bird*, 2007-NMCA-088, ¶¶ 5, 36. Relying on the Supreme Court’s opinion in *Stewart v. State Farm Mut. Auto. Ins. Co.*, *supra*, the trial court reasoned that the judgment was based on the tortious conduct of the uninsured driver and that because the purpose of the UM statute is “to put the insured in the same position in which he or she would have been had the tortfeasor had liability insurance, the insurer should be held liable for any interest that could have been imposed on the tortfeasor.” *Bird*, 2007-NMCA-088, ¶ 37.

This Court noted that, in *Bird*, the trial court “awarded damages based on the insurance contract.” *Bird*, 2007-NMCA-088, ¶ 40 (citing *Teague-Strebeck Motors, Inc. v. Chrysler Ins.*, 1999-NMCA-109, ¶¶ 63-64, 127 N.M. 603, 985 P.2d 1183 (plaintiff “was awarded the benefit of its bargain, the extent of insurance coverage promised by [the defendant’s agent]”), *overruled on other grounds*, *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230). This Court rejected the parents’ contention that, in a UM claim against an insurer, the “plaintiff’s recovery is actually ‘the recovery of tort damages for the tortfeasor’s negligence ... for which [the insurer] may pursue the tortfeasor.’” *See Bird*, 2007-

NMCA-088, ¶¶ 41-42. This Court stated, “We do not believe that the legislature intended to hold insurance companies liable for 15% interest on a judgment, above and *beyond the recovery limits of the policy*, based on the tortious conduct of the tortfeasor” (emphasis supplied). *Id.* ¶ 42 (citing *Stewart, supra*, 1986-NMSC-073, ¶ 18 (holding that the insured’s recovery could not exceed the liability limitations of his policy, even though punitive damages were appropriate under the UM provision)); *cf. Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 56, 131 N.M. 100, 33 P.3d 651 (stating that punitive damages serve to deter and punish wrongful conduct that is committed by a culpable tortfeasor and holding that an award of 15% post-judgment interest is not mandated by an award of punitive damages).

In the present case, Loya—who was not the insurer for the criminal tortfeasor Brandon Sandoval—was nonetheless ordered to pay \$20,000 in punitive damages above and beyond the \$10,000 coverage limit that it had already tendered to Sweich. Sweich’s actual, proven property damages were \$3,566.24 (the cost to repair Sweich’s damaged but repairable Suburban). **[10-5-15 4 Tr. 41:18-42:1, 42:5-9; Plaintiff’s Ex. 10]**. However, the District Court effectively ruled that Loya had to pay a total of \$30,000—nearly *eight-and-a-half* times the amount of Sweich’s actual damages—plus attorney’s fees and costs. The District Court abused its discretion in doing so, particularly where it did not explain its basis for

ruling that the first \$10,000 paid by Loya to Sweich consisted entirely of “compensatory” damages. As discussed herein, the \$20,000 in punitive damages does not reasonably “derive” from the \$3,566.24 in actual provable damages.

II. The District Court Erred in Looking Beyond the Property Damage Policy Limit in Awarding Punitive Damages

Again, under this Court’s precedent, punitive damages must derive from actual damages. *Farmers Ins. Co. of Arizona v. Sandoval*, *supra*, 2011-NMCA-051, ¶ 8; *Manzanares v. Allstate Ins. Co.*, *supra*, 2006-NMCA-104, ¶ 5. At the October 5, 2015 trial in this matter, the only evidence of actual damages that was adduced was the \$3,566.24 cost of repairing Sweich’s damaged vehicle. *See* UJI 13-1813 NMRA (“In determining property damages, if any, you may award the reasonable expense of necessary repairs to the property which was damaged”). As in any case, Sweich’s damages had to be shown “based upon proof and not upon speculation, guess or conjecture.” UJI 13-1802 NMRA. Notably, at trial, the District Court itself surmised that Sweich did not present any evidence or testimony on any other damages. *See* [10-5-15 4 Tr. 111:8-10]; *see also* [10-5-15 4 Tr. 111:18-24]. Indeed, the District Court did not “see[] any evidence of what else” the \$6,433.76 payment in excess of the repair costs “could be for *other than punitive damages*” (emphasis supplied). [10-5-15 4 Tr. 111:6-7]. Consequently,

any award of punitive damages in this case could *only* have been premised upon the \$3,566.24 in actual damages stemming from the “injury to...[Sweich’s] property” under Section 66-5-301(A).

Nonetheless, without any explanation, the District Court conclusorily found that the entire \$10,000—including the \$6,433.76 above and beyond the repair costs—paid by Loya constituted “property damage-based compensatory damages.” [3 RP 660]. Strikingly, the District Court made this determination despite the abundance of testimony that Loya tendered the extra \$6,433.76 to resolve any and all of the claims that Mr. Sweich had under his uninsured motorist property damage coverage.” *See* [10-5-15 4 Tr. 98:23-99:4]; *see also* [10-5-15 4 Tr. 101:8-11, 101:23-25, 103:14-19, 107:2-8]. The District Court itself noted that it was “fairly clear that the intent of Fred Loya [wa]s to include any payments within the property damage portion of the policy.” [10-5-15 4 Tr. 114:12-14]. Notably, neither the District Court’s Findings of Fact and Conclusions of Law, [3 RP 653-60], nor its prior Partial Summary Judgments, [2 RP 295-301], acknowledge the black-letter law that punitive damages must derive from actual damages.

Ultimately, by paying the full \$10,000 property damages coverage limit provided for in the policy, Loya paid an amount sufficient to cover *all* claims (including any punitive damages claims) raised by Sweich under the insurance policy. As Sweich’s damages only flowed from that provision of the policy (in that

he sought claims only related to injuries to property, not injuries to the human body), the District Court erred in looking to the “bodily injury” and “per accident” coverage limits in awarding punitive damages. Because Sweich’s original claim stemmed from a property damage claim, the policy limited the award of punitive damages to the standard \$10,000 limit for property damage claims. Put another way, because Sweich’s damages could only “derive” from an “injury to...property” claim under NMSA 1978, Section 66-5-301(A), any punitive damages to be awarded to Sweich could only derive from the \$10,000 property damage coverage limit. Loya tendered that full amount prior to litigation. The District Court erred in assessing punitive damages to be paid by Loya above and beyond the \$10,000 amount. As such, the District Court also erred in denying Loya’s request for a declaration that it had paid all amounts due to Sweich under the terms of the insurance contract.

CONCLUSION

In sum, this honorable Court should reverse the District Court’s ruling regarding punitive damages—specifically, this Court should reverse the award of \$20,000 in punitive damages above and beyond the \$10,000 already paid to Sweich by Loya, and remand with instructions that the \$10,000 already paid represents the total amount to which Sweich is entitled.

Respectfully submitted,

/s/ original signed by:

Mark D. Standridge

Jarmie & Associates

P.O. Box 344

Las Cruces, N.M. 88004

(575) 526-3338

Fax: (505) 526-6791

mstandridge@jarmielaw.com

Attorneys for Amicus Curiae New Mexico

Defense Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed and e-mailed this 19th day of September, 2016 to:

Matthew J. Zamora
Carter & Valle Law Firm
8012 Pennsylvania Circle NE
Albuquerque, NM 87110
(505) 888-4357
rv@carterlawfirm.com
mz@carterlawfirm.com

Leonard R. (Bud) Grossman
Elizabeth Hill
Craig, Terrill, Hale & Grantham, L.L.P.
First Bank Centre
9816 Slide Road, Suite 201
Lubbock, Texas 79424
(806) 744-3232
budg@cthglawfirm.com
ehill@cthglawfirm.com

/s/ original signed by: _____
Mark D. Standridge
Jarmie & Associates