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The New Mexico Defense Lawyers Association is the only New Mexico organization of civil defense attorneys. We currently have over 400 members. A common misconception about NMDLA is that its membership is limited to civil defense attorneys specializing solely in insurance defense. However, membership in NMDLA is open to all attorneys duly licensed to practice law in New Mexico who devote the majority of their time to the defense of civil litigation. Our members include attorneys who specialize in commercial litigation, employment, civil rights, and products liability.

The purpose of NMDLA is to provide a forum where New Mexico civil defense lawyers can communicate, associate, and organize efforts of common interest. NMDLA provides a professional association of New Mexico civil defense lawyers dedicated to helping its members improve their legal skills and knowledge. NMDLA attempts to assist the courts to create reasonable and understandable standards for emerging areas of the law, so as to make New Mexico case law dependable, reliable, and a positive influence in promoting the growth of business and the economy in our State.

The services we provide our members include, but are not limited to:

- Exceptional continuing legal education opportunities, including online seminars, with significant discounts for DLA members;
- A newsletter, Defense News, the legal news journal for New Mexico Civil Defense Lawyers;
- Members’ lunches that provide an opportunity to socialize with other civil defense lawyers, share ideas, and listen to speakers discuss a wide range of issues relevant to civil defense attorneys;
- An e-mail network and website, where members can obtain information on judges, lawyers, experts, jury verdicts, the latest developments in the law, and other issues; and
- An Amicus Brief program on issues of exceptional interest to the civil defense bar.
Dear Members of the NMDLA:

I hope your year is off to a productive start. I want to start this letter by thanking the NMDLA Editorial Board for their hard work in putting together another excellent newsletter. If you would like to join the NMDLA Editorial Board, we are recruiting new members. Please keep an eye out for an e-mail from NMDLA with additional details on this great opportunity.

On March 21, 2015, the NMDLA Board of Directors held a half-day retreat at Butt, Thornton & Baehr P.C. The purpose of the retreat was to identify additional areas where we, as the Board, can provide value to you, our members. During what was a very productive discussion, we were able to identify a number of different initiatives we hope to implement over the coming months. First, we will be looking to facilitate “round-table” lunches on any topic of interest to the membership. In the event you have a topic that merits discussion with other members, please let us know. We will send an e-mail to the membership to identify others interested in discussing the same topic. Second, we are looking to expand committee participation beyond the Board. We have various committees, including the Young Lawyers Committee, the Amicus Committee, and the CLE Committee, on which we could use volunteers. Third, we plan to increase our presence on social media via Facebook and Twitter accounts, which we would use to promote upcoming events and member milestones.

We are also working on other changes to make NMDLA more accessible to our members. The current website will soon be modified to make it mobile friendly. In addition, we plan to place amicus briefs and other materials (comments, letters, etc.) submitted on behalf of NMDLA on the website. That will include, for example, the Amicus Brief filed by NMDLA in Snow v. Warren Power & Machinery, Inc., et al., a case that remains pending before the New Mexico Supreme Court.

Finally, we have a number of exciting events planned for this year. David Gonzales, chair of Young Lawyers Committee, will be hosting a young lawyers reception at Butt, Thornton & Baehr, P.C., on Thursday, June 4, from 5-7 p.m. This is a great networking opportunity and we encourage all of our young lawyer members to attend. Also, Richard Padilla, last year’s NMDLA President, is putting together an exciting slate of CLE programs for this year. We currently have the following CLE programs planned: 1) Friday, June 19 (1/2 day): Bad Faith; 2) Friday, August 7 & Saturday, August 8: Joint TADC/NMDLA Seminar (Ruidoso); 3) Friday, September 25: Annual Meeting and Awards Luncheon Event; 4) Friday, October 23: Summary Jury Trials (1/2 day) / Advanced Trial Practice (1/2 day); and 5) Friday, December 4: Annual Civil Rights Seminar.

Please let us know if you are willing to volunteer in any capacity. I encourage you to contact me or any other member of the Board with any questions.

Sean E. Garrett  
Conklin, Woodcock & Ziegler, P.C.  
2015 NMDLA President

Share Your Successes!

Over the last few years we have been able to enhance the value of membership in the NMDLA by way of electronic access to a variety of information — especially through the use of email inquiries for information and publication of peer accomplishments. As part of that continuing effort, we ask each of you to bring your accomplishments to the DLA’s attention. Submissions might include a good result at trial, a favorable appellate decision, a successful motion at the trial court level, or a recommended expert or mediator.

When you submit your success, we will publish the information and case details to our website’s library of defense verdicts, and send an email notification to all DLA members. Also, the NMDLA website’s home page highlights our most recent submissions.

Successes may be submitted in the member-only section of NMDLA’s website, www.nmdla.org. If you need password assistance, contact us at nmdefense@nmdla.org.
Nicholas Trost (NT):
After you graduated from law school, did you know you wanted to become a judge?

Chief Judge Nan Nash (CJN):
No, I did not know that I would eventually want to become a judge. My undergraduate degree was in the field of environmental biology and my initial goal was to become an environmental lawyer. I had gone to school at the University of Indiana in Bloomington, so when we moved to New Mexico, I did not know anybody. I took a job at what was then Civerolo, Hansen & Wolf. They were gracious enough to offer me a job. While at Civerolo, I handled one environmental case involving a gasoline spill, but I never handled any other environmental law cases.

When I decided to make a change and move away from civil defense work, which was a personal decision on my part, I decided to explore practicing law in areas that did not specifically involve litigation. I joined the district court to run the alternative dispute resolution program, which I did for over three years. Over that course of time, I started to think about becoming a judge. When I initially joined the Bar, I thought there was no way I could ever become a judge. After having worked in the court house, I started to think there was a way. It seemed like interesting and challenging work.

NT: Before becoming a judge, did you ever think about the challenging case load?

CJN: I was far too naive to think about that (laughing).

NT: What are some of the things you love about the Court?

CJN: One of the things I have always loved is the ability to advocate for the system and the work it takes to make the system better. From my perspective, over the years the courts have been called upon to address more and more social issues. A lot of social issues get dropped in our lap and we have worked to address those issues in a way that clearly honors the rule of law. I focus on working to improve the administration of justice, people’s experience with the justice system, as well as the outcome. I appreciate programs like drug court, the domestic violence program, the foreclosure mediation program, children’s court, the program for the empowerment of girls (PEG), and the elder law program. Through these programs, the court has not only administered justice, but also actually initiated efforts to help improve the overall outcome of cases.
A Conversation with Chief Judge Nan Nash  
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NT: What is your judicial philosophy? Is it outcome driven in any way?

CJN: My judicial philosophy is multi-faceted. When folks appear before me, they need a decision. My work is outcome-driven in the sense that I am motivated to get the parties a timely decision. However, my work is not outcome-driven in the sense that I am not simply trying to move the parties through the system. My judicial philosophy is somewhat outcome driven in the sense that in many ways we (judges) react to what the parties bring before us. Overall, my judicial philosophy involves respect for the parties and the process. For me that means preparing, listening, considering and applying the law, and ultimately rendering timely decisions.

NT: You have very high marks among your peers. How do you achieve such high marks?

CJN: It is nice to see those marks. I strive to be transparent in my decisions and the way I conduct myself. There are times when I get it wrong or make a mistake and I try to be transparent about that as well. I also try to be prepared. In most cases that come before me, I have reviewed the pleadings and materials the lawyers have submitted so that I have an understanding of where things stand. I also try to be straightforward and respectful of the attorneys, their needs, and the pressures they face.

NT: Let’s talk about summary jury trials. What do you think about this new development?

CJN: I have spoken on the topic at recent CLE courses presented by the American Board of Trial Advocates, the New Mexico Defense Lawyers Association, and the New Mexico Trial Lawyers Association where the idea of summary jury trials was explored. I believe there are some very good reasons to consider summary jury trials. There are types of cases that would fit well into that model, such as low dollar personal injury cases. I also believe that we should consider a different process for large complex cases that might benefit from the summary jury trial model. One of the suggestions made, and Justice Chavez asked us to think about, involved our court-annexed arbitration program here in the Second Judicial District. Justice Chavez asked that we consider raising the jurisdictional limit to $50,000 and putting tort cases on a summary jury trial track. I will be working with the rest of our civil bench in this district to see what the judges think about that idea.

Summary jury trials would allow attorneys the freedom to take cases to trial that they would not otherwise try because it is too expensive. One of the things Justice Chavez was very concerned about was the fact that young lawyers have a difficult time getting to trial. It is hard for young lawyers to get trial experience. In terms of providing trial experience, our current court-annexed arbitration program does provide a similar quasi-trial experience. However, even though a summary jury trial is not a full-blown jury trial, there are elements that would certainly help young lawyers develop jury trial skills. One of the issues I raised as a panelist is the fact that, with the advent of fewer civil trials, it has become more difficult to develop good civil trial judges. You learn how to try a case when you try a case, whether you are an attorney or a judge.

At the end of the conference in closing, Justice Chavez asked how many people would be interested in the summary jury trial model and everyone raised their hand. From my perspective, lawyers are looking for an opportunity to use their trial skills. I have always been a huge advocate of ADR throughout my career. I am still always going to be an advocate of ADR, but I also think that many people are drawn to the practice of law because they want to try cases. I analogize a lawyer who wants to try cases, but is unable to try cases, to an actor who cannot find a play in which play to act. Trial lawyers want the opportunity to practice their trial skills. Summary jury trials are an interesting concept and the Second’s civil bench will explore the concept as a group.

NT: Lastly, the quintessential question: What are some of the most common mistakes you see lawyers make?

CJN: First of all, I have been on the civil bench now for seven years. I am generally impressed with the lawyers I see. My experience is that they are pretty respectful to each other and they are dedicated to moving their cases through the system and achieving good results for their clients. I think during trials, lawyers always ask too many questions, more questions than the jury needs to hear. Those who end up on our
juries take this process seriously, take notes, and listen to what was asked. On important points, ask once, maybe twice, but you do not have to ask the third time. The jury has gotten it by then.

One of the things I always tell young lawyers is that it is important to err on the side of formality. So if you are in a courtroom and you do not know whether the judge wants you to stand, stand. The judge can always tell you to stay seated if it is a more relaxed proceeding. Younger lawyers tend to be more informal. There is nothing wrong with that, but the formality is about respect for the system. We do not stand for the judge or jury to make the judge happy, but because we respect the system. It is important for both judges and attorneys to maintain that respect. This shows our clients and the general public to respect the system. If we do not respect the system, then no one will respect the system. So, that is important to me.

Also, when appearing before the court, do not make assumptions. Do not call the morning of the hearing to tell my assistant that you are planning on appearing telephonically. If you want to do something that is out of the ordinary, seek the court’s permission. I cannot tell you how many times this happens.

Lastly, be prepared for anything. When you show up for a substantive proceeding, be prepared to argue it fully or not to argue it at all. Ask for a reasonable amount of time in your requests for hearing and be prepared to do your job in the amount of time you sought. Do not ask for twenty minutes because you think it will get you a quicker hearing when what you really need is one hour.

NT: Thank you, Judge. It was a pleasure talking with you.
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Vanishing Civil Jury Trials: Views From Recipients of the Outstanding Civil Defense Lawyer of the Year Award

By Justin D. Goodman, Esq.
O’Brien & Padilla, P.C.

Now you see them, now you don’t. Although jury trials were once a common method to resolve civil law suits, courtrooms today seem to be decreasing their peer populations by 6-12 individuals. On October 10, 2014, New Mexico Supreme Court Justice Edward L. Chavez hosted an innovative seminar entitled Can Summary Jury Trials Revive A Declining Jury System?, which brought together New Mexico’s Defense and Plaintiffs’ Bars to address a potential resurgence of the proverbial day in court.

But why are civil jury trials vanishing? Is the civil jury trial being replaced by alternative means of dispute resolution? Should attorneys still prepare their cases as if they are going to trial? What does the future hold for civil jury trials?

To help answer these questions, we turned to recent recipients of the New Mexico Defense Lawyers’ Association’s prestigious Outstanding Civil Defense Lawyer of the Year Award, including Emily Franke (2011), Steve Simone (2012), and William Slattery (2013). These awardees possess years of experience and have been kind enough to offer their views and observations on the phenomenon of vanishing civil jury trials.

Recognizing the Decline

When Steve Simone started his practice in 1979, he recalls how they had only just stopped doing jury trials in worker’s compensation cases. Mr. Simone laments that the trials simply disappeared, despite many of his colleagues having received specific training for arguing to a workers’ compensation jury. While at the time it was considered an abrupt disappearance, jury trials in other practice areas have continued to fade away.

To an appellate attorney, does it feel that trials have vanished from the court system, especially in New Mexico? Emily Franke responds, “Significantly, yes!” She recalls beginning her practice with a series of little cases, many comprised of subrogation claims. Her firm assigned such cases to the associates and the associates went to trial with great regularity. Now, she notes that five or six years may pass between trials for associates.

William Slattery, on the other hand, explained that he has not personally experienced the vanishing jury trial phenomenon. “I recognize it to be true, I know what the statistics say, but a lot of it depends on the nature of your practice.” Mr. Slattery shared that medical malpractice cases often get tried before a jury. In the summer of 2012, his firm tried five jury trials in 120 days. As a member of the American Board of Trial Advocates and the litigation section of the American Bar Association, Mr. Slattery has heard the concerns and recognizes the decline. However, as evidenced by Mr. Slattery’s experience, perhaps there is hope to revive the civil jury trial system in other practice areas.

A Burden on Judicial Resources

Some would argue that filing a lawsuit seems to have replaced baseball as the American pastime. With the incessant filing and the influx of civil suits to the judges’ chambers, it is no surprise that civil jury trials would decline. Courts simply do not have the ability to support a jury trial for every filed suit. If they tried, we could probably expect to see docket calendars extend past a decade.

“I hear rumors, I hear complaints from the judges as to their lists of cases, and it is mind-boggling,” says Mr. Simone. Ms. Franke hears that judges are so overburdened by their caseloads that, when a case settles, it is almost cause for celebration, because it does not have to go to trial. As Ms. Franke explains, “The overburdened court system just simply cannot deal with the number of cases that we are asking it to. I do not know how you deal with getting the court’s system back to more reasonable caseloads that would allow us to not overburden the court when we ask for a jury trial.”

However, Mr. Slattery proposes a solution, saying, “I think the most important thing to be done in this state at this time is to get the legislature to give more financial support to the judiciary to hire more judges so they can be trial judges, not just managing their overburdened dockets.”
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An overburdened court may not be the only cause for a declining civil jury trial system. Other causes likely stem from the expense, length of time, and exhaustion of resources it takes to try a case before a jury. Thus, there is more and more appeal to alternative dispute resolution options.

Time to Prepare

Let’s face it: the odds are that a jury will not be the fact finder in most of our current civil cases. Ms. Franke believes that, since her admittance to practice law, civil jury trials have been reduced in excess of 75%. Mr. Simone estimates that, in the 1970’s and 1980’s, 90% of cases settled and he recognizes that now only a very small percentage actually go to trial. During his hosted seminar, Can Summary Jury Trials Revive A Declining Jury System?, Justice Chavez explored the statistic that more than 95% of all civil cases filed do not proceed to a trial. With such a small number of cases being tried, it prompts the following question: Should you prepare all of your cases as if you are going to trial?

After putting a good deal of thought into this question, Mr. Slattery suggested a step-by-step process:

1. Listen to your client. We are agents of our clients. Ideally, they should decide whether their case is tried or settled.
2. Do not persuade your clients to settle cases. Instead, evaluate the likely outcome if the case tried.
3. Guide your clients by giving them your best legal advice.

Mr. Simone believes that you should always prepare your cases as if they are going to trial, despite the reality that a vast majority of them settle. Clients should take into consideration the costs of litigation. Preparing a case as if it were going to trial also prepares you for arbitration or mediation; either way, you are prepared. However, as a firm believer in alternative dispute resolution and mediation, Mr. Simone is also sympathetic to a plaintiff who has to wait two or three years to get a resolution in today’s legal climate. Likewise, he is sympathetic to the defense, because they have to tell their client why it is taking so long to resolve the case. As the old adage goes, “Justice delayed is justice denied.”

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Ms. Franke agrees that an attorney should always prepare for a case to proceed to trial. She states, however, that of the multiple reasons for fewer cases going to trial, the single biggest reason is that more cases are resolved by alternative dispute resolution. Because our system encourages alternative dispute resolution, attorneys always need to focus on getting the case resolved through mediation or arbitration rather than the court system. In any event, if the case is prepared as though it will proceed to trial, the case will also be better prepared for resolution through alternative dispute resolution procedures.

**The Future of Civil Jury Trials**

Could civil jury trials face a further decline? Will parties see an increase in alternative dispute resolution? Is there a middle ground between a jury trial and alternative dispute resolution?

The right to a civil jury trial is embedded as a fundamental right of the Seventh Amendment of the Constitution of the United States of America. Ms. Franke emphasizes that it is not just our right to a jury trial that needs to be preserved. “In addition to reducing the number of civil jury trials I think it’s also impacting the development of the common law because there are issues that they don’t go through trial, they don’t go up on appeal, and, in that sense, it is altering the legal landscape.” To combat this, she would propose additional help for judges. Perhaps the use of special masters during the discovery phase would reduce the judicial workload and free up time for trials.

Mr. Simone suggests a resolution system outside of the court system, such as a private jury system aimed at low exposure cases with significant legal issues that would still allow the parties to maintain appellate rights. The hope is that it would ease the burden from the district courts and still preserve legal issues for appeal and determination.

Mr. Slattery admits that not all cases should be tried, but it is important to establish the deterrent effect. Plaintiffs’ lawyers have to believe that defendants will try their cases. This is increasingly difficult these days, as both plaintiffs and defendants alike know that the likelihood of a case settling statistically outweighs the chance of it going to trial.

It seems clear that those wishing to experience frequent jury trials could practice criminal law and join the public sector, *i.e.*, the Public Defender or District Attorney’s Offices. However, should an attorney decide to work in a civil practice area, he or she should be prepared for a sharp drop in presentations to a jury. As civil jury trials have begun to vanish, the hope is that innovative ideas from the judiciary and legislature will preserve the constitutional right to a trial by jury.
Making the Unconscious Conscious: How Unconscious or Implicit Bias Affects the Diversity of the Legal Profession

By Denise M. Chanez, Esq.
Rodey, Dickason, Sloan, Akin & Robb, P.A.

As a lawyer you may pride yourself on being rational and objective, and you might find it hard to believe that you have biases of which you are not consciously aware. But, like all human beings, lawyers are not immune from unconscious or implicit bias. Being a lawyer, you will probably want to see the evidence to back up this assertion. The research on unconscious or implicit bias in many contexts, such as criminal justice, employment, housing, and academia, is significant and abundant.¹ One recent study confirms that implicit bias impacts the legal profession, too.

In the 2014 study conducted by Dr. Arin N. Reeves, researchers used a legal memorandum that contained spelling, grammatical, technical writing and analytical mistakes.² The analytical mistakes included factual errors and errors in the analysis of facts. Fifty-three partners from twenty-two law firms reviewed the memorandum. Among the reviewers were men, women, diverse and non-diverse attorneys. Half of the reviewing partners were told that the author of the memorandum, Thomas Meyer, was a Caucasian third-year law student at New York University. The other half were told he was an African American third-year law student at New York University. The African American Thomas Meyer received an average rating of 3.2 out of 5, while the Caucasian Thomas Meyer received an average rating of 4.1 out of 5, even though the memorandum was exactly the same. The reviewing partners also found more spelling and grammar errors, as well as technical writing errors and factual errors, in the African American Thomas Meyer’s memorandum. Comments from the reviewing partners about the memorandum included that he “needs lots of work” and was “average at best.” One reviewing partner stated that he “can’t believe [the author] went to NYU.” On the other hand, reviewing partners praised the Caucasian Thomas Meyer for his “potential” and “good analytical skills.”

The study’s authors concluded that “commonly held racially based perceptions about writing ability unconsciously impact our ability to objectively evaluate a lawyer’s writing.” The authors further noted that most commonly held perceptions uncovered in research thus far are biased against African American lawyers. We see more errors when we expect that we will see errors. And, in this particular study, this likely meant that reviewers unconsciously expected to see more errors in the African American Thomas Meyer’s memorandum. The study’s authors concluded that the reviewers may have believed that they evaluated the memorandum without bias; however, the final evaluation reflected a disparate number of errors in an identical memorandum, which was related to the unconscious bias associated with Thomas Meyer’s race.

¹ The Kirwan Institute, which focuses on the study of race and ethnicity, defines implicit bias as ‘the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.’

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counterparts. That led them to look more closely at bias in evaluating writing skills through the idea of confirmation bias. The authors describe confirmation bias as "[a] mental shortcut – a bias – engaged by the brain that makes one actively seek information, interpretation and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs." The authors note that their research "has consistently shown that implicit bias is far more prevalent in our workplaces today than explicit bias."

Unconscious or implicit bias is not limited to bias based upon race. There are many studies that also address implicit bias with respect to gender, although mostly outside of the legal setting. One study found that men interrupt women more frequently than they interrupt other men and that women almost never interrupt men. Another study that evaluated implicit bias among scientists found that male students were rated as more competent, more likely to be hired, deserving of a better salary and worth spending more time mentoring. The evaluations were made based upon application materials that were exactly the same, except that half of the applications had female names.

These studies are just a few pieces of evidence proving that unconscious or implicit bias exists. But just because we have unconscious bias does not mean that we are necessarily racists or sexists. Bias is part of the “day-to-day functioning of all human beings.” Some commentators about bias in the legal profession have noted that “humans are hardwired to be biased” and that it is “human nature to seek the company of others who fall within our comfort zone.” This is also known as “affinity bias.”

The Kirwan Institute, which focuses on the study of race and ethnicity, defines implicit bias as “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” According to the Kirwan Institute, implicit biases “are activated involuntarily, unconsciously, and without an individual’s awareness or intentional control.” And these biases are pervasive. “Everyone possesses them, even people with avowed commitments to impartiality such as judges.”

So how does unconscious or implicit bias impact the diversity of the legal profession? Like other professions, it can impact hiring decisions, promotions, distribution of work assignments, and performance evaluations. The Center for Legal Inclusiveness notes that it is often times easier for attorneys to develop a close working relationship with people who are more like themselves. Dr. Reeves, who conducted the recent study on unconscious bias when evaluating legal writing described above, notes that “the legal profession and law firms specifically should understand that [ ] biases are not necessarily against somebody, but are biases for someone... So a preference for someone or a comfort with a particular kind of person may not be bias against someone else, but it may end up having the same impact.” This can significantly affect the opportunities for diverse attorneys, who are still in the minority in the legal profession and particularly with respect to leadership roles.

Google has recognized the negative effect that unconscious bias can have on diversity in the workplace, and last fall it developed a training workshop called “Unconscious Bias @Work” for its employees. This may have been prompted by Google's poor diversity numbers and underrepresentation of women, blacks and Hispanics in its workforce. On its official blog, Google described how unconscious bias can influence our every-day actions. “We’ve evolved to trust our guts. But sometimes these mental shortcuts can lead us astray, especially when they cause us to misjudge people... Combating our unconscious biases is hard, because they don’t feel wrong; they feel right.” Google went on to say that “it’s necessary to fight against bias in order to create a work environment that supports and encourages diverse perspectives and people. Not only is that the right thing to do, but without a diverse workforce, there’s a pretty good chance that our products... won’t work for everyone. That means we have to make the unconscious, conscious.”

The good news, according to the Kirwan Institute, is that implicit biases and associations are malleable and can be unlearned. This may require training, like the one Google employees are undergoing, especially for those in an interviewing or evaluating role in a law firm. It may also involve making workplace evaluations more objective to reduce confirmation bias. Other best practices include incorporating diversity and inclusiveness questions in the annual evaluation process for partners and associates and analyzing attorney departures from the firm to determine

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5 Implicit Bias Review, supra note 1 at p. 23.
6 Stella Tsai and Debra Rosen, Know Thyself: Affinity Bias in the Legal Profession, Section of Litigation’s Woman Advocate, Mar. 9, 2015.
7 Implicit Bias Review, supra n. 1 at p. 16.
8 Id. at p. 73.
9 Id. at p. 17.
11 Id. at 58.
14 Google Official Blog, supra n. 12.
15 Id.
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if there is a pattern that may relate to unconscious bias. 16

Accepting that we each have bias and becoming aware of our own biases is one of the biggest steps toward addressing the negative impact of unconscious bias. The Center for Legal Inclusiveness provides a set of sample questions that can be posed to senior attorneys to raise awareness about bias: (1) List the more junior attorneys with whom you socialized outside of work in the past six months; (2) What are the highest profile cases in your department/practice group right now and which junior attorneys are working on them? (3) Which attorneys have you assigned work to in the past three months?; and (4) With whom do you discuss new ideas? 17

And for those of you who are still not convinced that you, too, have unconscious biases, consider challenging that belief by taking the Implicit Association Test (“IAT”).

16 Written in Black and White, supra n. 2; Affinity Bias in the Profession, supra n. 6.
17 Center for Legal Inclusiveness, supra n. 10at p. 60.

NEW MEXICO DEFENSE LAWYERS ASSOCIATION

2015 Continuing Legal Education Schedule

Bad Faith Half Day Seminar
June 19 • State Bar Auditorium, Albuquerque

Joint TADC/NMDLA Seminar
August 7-8 • Inn of the Mountain Gods, Ruidoso

Annual Meeting Luncheon, Awards and CLE
September 25 • Hotel Andaluz, Albuquerque

Summary Jury Trials (1/2 Day) / Advanced Trial Practice (1/2 day)
October 23 • State Bar Classroom, Albuquerque

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December 4 • Albuquerque Jewish Community Center

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Discovery Sanctions

NM Bar Bulletin – September 17, 2014
Vol. 53, No. 38

State of New Mexico, ex rel. Gary King v. Advantageous Community Services, LLC,
2014-NMCA-076
No. 31,782 (filed April 28, 2014)

The State filed a complaint against the defendant, a home-based healthcare provider that contracted with individual caregivers, for violation of the Medicaid Fraud Act. The State alleged that the defendant knowingly violated New Mexico Department of Health (DOH) regulations requiring the receipt of a criminal background check clearance letter from DOH before a caregiver may provide services billed to Medicaid. The State alleged that the defendant permitted six of its caregivers to provide services before the defendant received DOH clearance letters for those caregivers. As proof for its claim, the State compared the date on the clearance letter for each of the six caregivers to the date of hire for each caregiver.

The Assistant Attorney General (AAG) prosecuting the case enlisted the aid of an investigator at the Attorney General’s Office to gather relevant documents. The AAG specifically requested that the investigator include each caregiver’s DOH clearance letter. The investigator subsequently contacted DOH and requested copies of the clearance letters for two of the caregivers whose previously produced clearance letters were misplaced. Upon learning that DOH did not have physical copies of the letters, the investigator asked DOH to “reprint” copies of the 2006 letters from DOH’s electronic database despite a warning from DOH that the reprinted clearance letters would contain several inaccuracies (e.g., addressed to the wrong person, signed by the wrong person, and provided the name of the wrong Governor) due to updates in the clearance letter template. The investigator then provided the reprinted clearance letters to the AAG but failed to inform the AAG that the letters were inauthentic copies. The AAG later used the letters for impeachment purposes during the deposition of the defendant’s owner and representative. The defendant filed a motion for sanctions against the State for using an inauthentic document during the deposition. In granting the defendant’s motion and dismissing the State’s complaint with prejudice, the court found that the created letters were false documents, that the investigator’s testimony was not credible, and that it was egregious to knowingly allow the use of a false document in discovery. The State appealed.

In its discussion of the case, the Court of Appeals first explained a court’s inherent power to manage the cases before it through the use of appropriate sanctions, up to and including dismissing a complaint with prejudice for willful misconduct during discovery, regardless of whether the misrepresented information is critical or whether the other party was deceived or relied on the misrepresentation. The Court of Appeals then addressed the State’s three arguments. First, the State argued that the reprinted clearance letters were not “false,” because the inaccuracies in the letters were neither critical nor relevant to the case. The Court rejected this argument by reasoning that the State’s position ignores the undisputed fact that the State
created and used false documents that were represented as authentic during the deposition of the defendant’s owner and representative. Second, the State argued that its actions were not “willful,” because the mistake was attributable to DOH’s computer limitations and failure to retain physical copies of prior clearance letters. Focusing on the State’s actions rather than the actions of DOH, the Court rejected this argument, reasoning that the key issue is the fact that the investigator knowingly provided a false document to the AAG for use during a deposition without informing the AAG that the document was inauthentic. Third, the State argued that dismissal with prejudice was inappropriate because the false clearance letters did not prejudice the defendant or hinder its ability to prepare for trial. The Court rejected this argument by noting that prejudice is not a prerequisite to dismissal according to established precedent, and considering the State’s egregious conduct, it would threaten the integrity of the judicial system to utilize any sanction less severe than dismissal with prejudice. Therefore, the Court of Appeals affirmed the district court’s order of dismissal.

UM Stacking / Choice of Law

NM Bar Bulletin – September 17, 2014
Vol. 53, No. 38

Wilkeson v. State Farm Mutual Automobile Insurance Company,
2014-NMCA-077
No. 32,779 (filed April 30, 2014)

The plaintiff was involved in an automobile accident with an uninsured driver in Albuquerque, New Mexico. The plaintiff was a named insured on two separate automobile insurance policies issued by the defendant, State Farm Mutual Automobile Insurance Company (State Farm). Both insurance policies provided for uninsured motorist benefits (UM benefits), subject to limits of liability that were not subject to stacking. At the time of the accident, the plaintiff resided in New Mexico, but owned property in California and New Mexico. State Farm issued both insurance policies to the plaintiff while she resided in California, and the policy of record listed the plaintiff’s California address. State Farm filed a motion for summary judgment on the basis that it paid the liability limits to the plaintiff and the policy did not permit stacking of UM benefits. The plaintiff filed a cross motion for summary judgment, arguing that the court should apply New Mexico law because California law was in conflict with the law and public policy of New Mexico. The district court granted State Farm’s motion for summary judgment and dismissed the plaintiff’s complaint. The plaintiff appealed.

Upon review, the Court of Appeals first discussed choice of law principles and stated that New Mexico law applied to issues of negligence and damages, because the accident took place in New Mexico. However, under the law of the place of the contract (“lex loci contractus”), California law applied to issues interpreting the stacking limitations in the insurance policies, because the contract was formed in California. The Court, however, also noted that a court in a forum state may disregard the conventional choice of law principles and apply the forum state’s laws if the law of the place of the contract conflicted with the public policies of the forum state. The plaintiff argued that such a conflict existed in this case. Specifically, the plaintiff argued that, in spite of California law recognizing the validity of the anti-stacking provisions in the insurance policies, the court should apply New Mexico law and public policy, because they favor the stacking of UM benefits.

In its analysis of this issue, the Court noted that stacking of UM benefits in New Mexico is a “judicially-created doctrine” and is favored by public policy when interpreting insurance policies with anti-stacking provisions. Conversely, California’s insurance code specifically permits the preclusion of stacking and California does not share New Mexico’s public policy favoring stacking. With the public policy conflict as a preface, the Court then discussed the applicability of the New Mexico Supreme Court case of Shope v. State Farm Insurance Company, 1996–NMSC–052, 122 N.M. 398, 925 P.2d 515, which involved a choice of law analysis when New Mexico’s public policy favoring stacking was in conflict with the law of Virginia, where the insurance policy at issue was formed. The court in Shope held that a countervailing fundamental interest that is separate from the general principles of contract formation must be present in order to override the conventional policy of interpreting a contract under the law of the state of formation, and the question of stacking insurance coverage is not a fundamental interest according to this analysis. Considering the holding in Shope, the plaintiff attempted to distinguish this case by arguing that California’s laws allowing the preclusion of stacking clearly conflicted with New Mexico’s public policies, whereas Virginia’s laws that were addressed in Shope did not. The Court rejected this argument. The plaintiff also argued that other cases addressing whether New Mexico public policy should override the policy of interpreting a contract in accordance with the law of the state of formation demonstrate that stacking should be a countervailing fundamental interest. The Court distinguished each case cited by Plaintiff in turn and determined that public policy favoring stacking does not override New Mexico’s policy regarding choice of law for contract interpretation. As a result, the Court affirmed the grant of summary judgment.
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Guardian Ad Litem / Liability

NM Bar Bulletin – September 24, 2014
Vol. 53, No. 39

*Kimbrell v. Kimbrell,*
2014-NMSC-027
No. 34,150 (filed June 23, 2014)

This lawsuit arises out of an extremely contentious custody dispute. The district court appointed a guardian ad litem, pursuant to both NMSA 1978, Section 40-4-8 and Rule 1-053.3 NMRA, as an arm of the court to determine the best interests of the minor children. Following the appointment, the plaintiff, the minors’ father, began interfering with the guardian ad litem’s ability to represent the children and filed several different complaints. The plaintiff, individually and on behalf of one of his minor children, filed the subject tortious conduct lawsuit in state court and named the minors’ mother and the guardian ad litem as defendants. The plaintiff alleged that the guardian ad litem blocked contact between the siblings, committed prima facie tort, breached her fiduciary duty, and invaded the privacy of the minor child. After finding that neither parent was capable of being objective and that Section 40-4-8 and Rule 1-053.3 deprive parents of standing to bring this type of lawsuit, the district court dismissed the plaintiff’s complaint. The New Mexico Court of Appeals reversed the district court, and held that parents retain standing to sue the guardian ad litem, subject to absolute immunity for conduct within the scope of employment. The New Mexico Supreme Court granted certiorari.

The Supreme Court reversed the Court of Appeals and affirmed the district court’s grant of summary judgment to the guardian ad litem. The Court stated that, pursuant to *Collins ex rel. Collins v. Tabet,* 1991–NMSC–013, ¶ 10, 111 N.M. 391, 806 P.2d 40, a guardian ad litem acting as an arm of the court in accordance with Rule 1-053.3 is entitled to absolute immunity for actions within the scope of appointment. The Court noted that the threat of civil litigation could restrict the guardian ad litem’s ability to investigate the case and that there are procedural safeguards that obviate the need for civil litigation—such as the parents’ ability to appeal and the court not being bound by the recommendation of the guardian ad litem. The Court then concluded that a guardian ad litem is not protected by absolute immunity for actions that clearly and completely fall outside the scope of appointment; however, conduct is not clearly and completely outside the scope of appointment when it is related to communications involving the family or gathering information in order to report to the court.

Observing that the appointing court would be best suited to evaluate the guardian ad litem’s conduct, the Court held that parents must bring their concerns about the guardian ad litem to the appointing court. The appointing court may then determine whether the guardian ad litem’s conduct was outside the scope of appointment and, if so, take appropriate action. The appointing court may limit the guardian ad litem’s duties, remove the guardian ad litem from the case, and appoint a new guardian ad litem to represent the minor if the minor experienced harm.

Regarding parents’ standing to sue a guardian ad litem on behalf of their child during a custody dispute, the Court held that parents do not have standing, because it would create a conflict of interest and the custody court has already determined that the parents cannot act in the child’s best interests.

Finding that the actions of the guardian ad litem in this case were not clearly and completely outside the scope of appointment in this case, the Court determined that the guardian ad litem was immune from suit.

First Amendment / Immunity

NM Bar Bulletin – September 24, 2014
Vol. 53, No. 39

*Galetti v. Reeve,*
2014-NMCA-079
No. 32,625 (filed May 28, 2014)

The plaintiff’s claims arose out of an employment dispute with her former employer, Crestview Elementary School (Crestview). Crestview is a religious school operated by the Seventh-Day Adventist Church (the Church). The plaintiff named the Church and three Crestview employees as defendants. The plaintiff claimed that she was harassed by her supervisor and that, after she reported the harassment and submitted an EEOC charge of discrimination, the defendants retaliated against her by terminating her employment. The plaintiff asserted claims for breach of contract and retaliatory discharge, among others. The defendants moved to dismiss the plaintiff’s complaint on the basis that the claims were barred by the church autonomy doctrine. The district court granted the defendants’ motion, and the plaintiff appealed.

On appeal, the plaintiff argued that the church autonomy doctrine does not apply to breach of contract claims or individuals sued in their individual capacities. The Court of Appeals began its analysis by discussing the background of the church autonomy doctrine. The Court noted that the doctrine, which “prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity,” is based on the First Amendment and both “prevents civil legal entanglement between government and religious establishments” and protects
the free exercise of religion. Despite the protections afforded by the church autonomy doctrine, the doctrine does not provide absolute immunity and is inapplicable to purely secular decisions. Furthermore, in cases potentially involving immunity by the church autonomy doctrine, the court must first determine whether religious beliefs are intertwined with the purported misconduct. Finding that the district court did not consider this threshold issue, the Court reviewed the plaintiff’s allegations and the remedy sought.

Regarding the plaintiff’s breach of contract claim, the Court found that determining whether the defendants breached their express and implied promises and failed to comply with their contractual obligations would not require religious intrusion. Moreover, the requested monetary damages would not excessively interfere with operations of the Church. Thus, the Court found that the church autonomy doctrine was not implicated with respect to the breach of contract claim and the district court erred when it dismissed the claim. Regarding the plaintiff’s claims against the individual defendants, the Court noted that the claims did not explicitly involve religious issues and a factual inquiry would be necessary to determine whether judicial involvement would violate the First Amendment. As with the breach of contract claim, the Court found that the church autonomy doctrine was not implicated, because religious entanglement was not readily apparent. The Court stated, however, that this may be revisited later in the litigation if it appears that religious entanglement has become an issue. As such, the Court reversed and remanded back to the district court.

NMDLA Civil Case Summaries
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Workers’ Compensation Jurisdiction

The sole issue decided on appeal was whether the WCA had jurisdiction to resolve a dispute that did not involve the worker. The Court of Appeals reasoned that the WCA did not have jurisdiction because, as a creation of the Legislature, the WCA’s jurisdiction is limited to matters expressly granted to it by statute. As resolving disputes between insurers is not included in the Workers’ Compensation Act and does not involve a worker’s claim for benefits, the WCA lacks jurisdiction over such disputes. The Court of Appeals reversed and remanded with instructions to dismiss the complaint.

Public Works Minimum Wage Act

The Public Works Minimum Wage Act (PWMWA) requires that laborers hired to perform work as part of a public construction contract must be paid in accordance with minimum wage standards set by the Director of the Labor Relations Division, which is part of the Department of Workforce Solutions. In 2009, the Director determined that the PWMWA applied to two projects undertaken by the Board of Regents of the University of New Mexico, Sandia Foundation, and Enterprise Builders (the Builders). The Builders appealed the decision, but the appeal was later dismissed as a part of a settlement agreement that required the Builders to pay $930,000 to workers on the two projects. The petitioners filed suit to enforce the settlement agreement after the Builders failed to make payments. While the suit was pending, however, the Secretary of the Department of Workforce Solutions issued a letter on December 6, 2011, that reversed the Director’s determination that the PWMWA applied and concluded that the settlement agreement was no longer necessary. The letter was only sent to the attorney for one of the Builders, but that attorney then forwarded it to the petitioners’ attorney on the same day. The petitioners appealed the Secretary’s determination on February 3, 2012. The petitioners’ appeal was determined to be untimely, because it was filed more than fifteen days after the Secretary’s determination.

On appeal, the petitioners argued that the Secretary’s letter was insufficient to provide notice of the determination, and thus trigger the appeal deadline, because it was only sent to one of the Builders and because the letter itself did not comply with the statutory requirements for notice under the PWMWA. The Court of Appeals addressed each of these arguments and was not persuaded. First, the fact that the letter was signed by the Secretary rather than the Director did not render the notice inadequate, because the Secretary is the Director’s supervisor and has the same powers as the Director. Second, the letter was sufficient to indicate that it was a final appealable action despite not expressly stating as much, because the PWMWA does not require that determination notices state that they are final appealable actions. Third, the petitioners’ due process rights were not violated due to the Secretary only sending the letter to the attorney for one of the parties. The letter was immediately forwarded to the petitioners’ attorney on the same day that the Secretary sent the letter. Therefore, the petitioners received notice of the determination on the same day as the other parties. Accordingly, the Court of Appeals affirmed the dismissal of the petitioners’ appeal.

Medical Marijuana / Workers’ Compensation

The sole issue decided on appeal was whether the Secretary’s letter was insufficient to provide notice of the determination, and thus trigger the appeal deadline, because it was only sent to one of the Builders and because the letter itself did not comply with the statutory requirements for notice under the PWMWA. The Court of Appeals addressed each of these arguments and was not persuaded. First, the fact that the letter was signed by the Secretary rather than the Director did not render the notice inadequate, because the Secretary is the Director’s supervisor and has the same powers as the Director. Second, the letter was sufficient to indicate that it was a final appealable action despite not expressly stating as much, because the PWMWA does not require that determination notices state that they are final appealable actions. Third, the petitioners’ due process rights were not violated due to the Secretary only sending the letter to the attorney for one of the parties. The letter was immediately forwarded to the petitioners’ attorney on the same day that the Secretary sent the letter. Therefore, the petitioners received notice of the determination on the same day as the other parties. Accordingly, the Court of Appeals affirmed the dismissal of the petitioners’ appeal.

Medical Marijuana / Workers’ Compensation

NM Bar Bulletin – October 1, 2014
Vol. 53, No. 40

Garcia v. The Board of Regents of the University of New Mexico, 2014-NMCA-083
No. 32,758 (filed June 2, 2014)
As a result of a severely debilitating low back injury suffered during employment, the worker sought and received workers’ compensation benefits. The worker’s health care provider and an additional medical doctor certified the worker for a medical marijuana treatment program due to his chronic pain. After the worker filed an application for approval of the medical treatment and after a hearing on the issue, the workers’ compensation judge (WCJ) found that the worker was entitled to reasonable medical care from his health care provider and referrals therefrom. The WCJ found that the worker qualified for medical marijuana use, as authorized by the Lynn and Erin Compassionate Use Act (the Compassionate Use Act), and that the medical marijuana treatment program would be reasonable and necessary medical care. The WCJ ordered the worker to pay for the medical marijuana and ordered his employer and the employer’s workers’ compensation carrier to reimburse the worker. The employer and its insurer appealed.

The Court of Appeals first discussed the employer and insurer’s argument that the Workers’ Compensation Act (the Act) and associated regulations do not permit reimbursement for medical marijuana. The Court reviewed the plain language of the Act and associated regulations and found that injured workers are entitled to reasonable and necessary medical care from a health care provider. The regulations broadly define a “health care provider” as “any person, entity, or facility authorized to furnish health care to an injured or disabled worker.” The regulations also broadly define the term “services” to include reasonable and necessary products received from suppliers. Considering the regulations, and that the worker’s health care provider determined that the medical marijuana program was reasonable and necessary, the Court reasoned that providers other than a health care provider may provide reasonable and necessary services that are overseen by the health care provider. Thus, even though the medical marijuana program is not a health care provider, it can provide reasonable and necessary services pursuant to the direction of a health care provider.

After rejecting the employer and insurer’s argument that medical marijuana must be classified as a prescription drug, which would ignore its reasonable classification as “services,” the Court briefly discussed the legislative intent behind the Act and the Compassionate Use Act. When viewed as a whole, the Court found that the Legislature intended for a worker’s treatment to fall within the Act if it is authorized by the Compassionate Use Act and determined by a WCJ to be reasonable and necessary.

Last, the Court addressed the employer and insurer’s arguments that reimbursing the worker for medical marijuana would be in violation of federal law and against public policy. The Court determined that, in accordance with the Supremacy Clause, any conflicts between the Compassionate Use Act and the federal Controlled Substances Act (CSA) would be resolved in favor of the CSA. However, such a conflict does not exist in this case, because the employer and insurer did not challenge the legality of the Compassionate Use Act; instead, they asserted that the WCJ’s order would require them to violate federal law by reimbursing expenses for a controlled substance. Since the employer and insurer did not cite any statute in support of their argument, the Court did not consider it. With respect to public policy considerations, the Court found that New Mexico public policy is in support of medical marijuana, as evidenced by the Compassionate Use Act. Moreover, federal public policy is in flux and in some aspects has recently shifted to a position of deference to the states. Therefore, the Court of Appeals affirmed the WCJ’s order.

Independent Intervening Cause

NM Bar Bulletin – October 8, 2014
Vol. 53, No. 41

Silva v. Lovelace Health System, Inc.,
2014-NMCA-086
No. 31,723 (filed May 6, 2014);
Certiorari Granted, Aug. 1, 2014, No. 34,784

The decedent began treating with Dr. Lopez-Colberg in May 2004 for anxiety. Dr. Lopez-Colberg prescribed Paxil, which is generally used to treat anxiety and depression, but has an increased risk for suicidal behavior in adults. The decedent changed insurance carriers and physicians in November 2004, but continued to take Paxil. In October 2005, the decedent resumed her care with Dr. Lopez-Colberg. By then, the decedent’s Paxil dosage had increased and she was taking another prescription medication for breakthrough anxiety. With the decedent having been on the increased dose of Paxil for seventeen months at that point, Dr. Lopez-Colberg did not believe that the anxiety was under control and wanted to increase her Paxil dosage. Dr. Lopez-Colberg prescribed the decedent one year’s worth of Paxil and requested that the decedent return when she wanted to increase her dosage. The decedent was found dead in her apartment in April 2006. She had bled to death due to self-inflicted cuts on various body parts, and she had had over twenty times the therapeutic dose of Paxil in her body at the time of death.

The decedent’s parents and siblings filed suit against Dr. Lopez-Colberg and Lovelace Health System, Inc., for negligence, wrongful death, and loss of consortium. At trial, the district court refused to allow the defendants’ proposed jury instructions regarding independent intervening cause and denied the defendants’ motion for directed verdict on the loss of consortium claim. The jury returned a verdict for the plaintiffs and the defendants appealed.
The defendants argued that the decedent’s death was the result of intentional and unforeseeable suicide, which acted as an independent intervening cause that absolved them of liability. Beginning its analysis with a review of applicable case law, the Court of Appeals noted that an independent intervening cause instruction is not applicable in cases involving a plaintiff’s comparative negligence or cases involving the sole issue of whether the defendant’s negligence was the cause in fact of the injury. However, the instruction may be applicable when there is a claim that “an intentional or criminal act or an act of nature that is unforeseeable intervenes and disrupts the chain of causation set in motion by a defendant’s negligent conduct.” In conclusion of its review, the Court determined that suicide is generally an intentional, unforeseeable act (justifying an independent intervening cause jury instruction), yet may be foreseeable if a defendant induced a decedent’s mental illness, or if a decedent and a defendant shared a relationship that included knowledge of the risk of suicide. If the suicide was foreseeable, then an independent intervening cause defense is unavailable.

The defendants here argued that the decedent’s suicide was intentional, because a few days before her death she had intentionally ingested a very large, psychosis-inducing dose of Paxil that caused abnormal behavior culminating in her suicide. The defendants also argued that the decedent’s suicide was unforeseeable, so the Court analyzed foreseeability based on the undisputed special relationship between the decedent and Dr. Lopez-Colberg. The parties presented conflicting evidence from expert witnesses and it was not clear whether Dr. Lopez-Colberg should have foreseen the decedent’s overdose and suicide. Due to the conflicting evidence concerning both intent and foreseeability, the Court held that there were factual questions for the jury to decide and that the jury would need instructions on independent intervening cause to determine whether the decedent’s suicide was an intentional and unforeseeable act that broke the chain of causation. Thus, the Court reversed and remanded for a retrial to include jury instructions on independent intervening cause.

Before concluding its opinion, the Court also addressed the defendants’ argument regarding the plaintiffs’ loss of consortium claims. To establish such a claim, the plaintiffs had to prove that they had a “sufficiently close relationship” with the decedent that involved “mutual dependence.” The Court found that the evidence for both the decedent’s parents and siblings did not support the high degree of mutual dependency that is necessary for a loss of consortium claim. The decedent was not a member of the same household as the family members and was not involved in their day-to-day decision. Accordingly, the Court held that the district court erred by denying the defendants’ motion for directed verdict on loss of consortium.

**Rule 1-008 / Medical Negligence**

NM Bar Bulletin – November 26, 2014
Vol. 53, No. 48

Zamora v. St. Vincent Hospital,
2014-NMSC-035
No. 33,770 (filed June 18, 2014)

The plaintiff visited the emergency room at St. Vincent Hospital (the Hospital) complaining of abdominal pain and was examined by an emergency physician and a surgeon. A contract radiologist scanned the plaintiff’s abdomen and concluded that he had a diverticular abscess. The contract radiologist discussed this with the surgeon, and the surgeon recommended that the plaintiff be admitted. The plaintiff refused and was discharged. The contract radiologist dictated his report the next day, during which he stated that, in addition to diverticulitis, cancer could be the second possible cause of the plaintiff’s pain and that he had discussed the results with both the physician and the surgeon. It was not clear whether the cancer possibility was in fact discussed with the surgeon, and the radiology report did not indicate that copies were sent to the physician and the surgeon. The surgeon provided a sworn statement saying that she did not receive the report, yet she would have expected to receive it, and she would have contacted the plaintiff if she had seen the report. The plaintiff received a colon cancer diagnosis fourteen months later and filed suit against the Hospital for negligence in failing to properly forward the radiology report to the surgeon.

The plaintiff did not disclose any expert witnesses during discovery. The Hospital moved for summary judgment based on the plaintiff’s failure to identify an expert witness to establish the standard of care and whether the delayed diagnosis caused the plaintiff’s injury. The Hospital also argued that the plaintiff’s complaint failed to state a vicarious liability or apparent agency theory of recovery. The plaintiff responded and filed his own motion for summary judgment with affidavits from his oncologist and a radiologist, which addressed the standard of care and causation concerns. The district court granted the Hospital’s motion and found that the complaint did not provide notice of a vicarious liability claim, the plaintiff did not provide the required expert testimony for standard of care, and the plaintiff’s discovery responses failed to identify an expert. The Court of Appeals affirmed and held that there was insufficient notice of a vicarious liability claim, pursuant to Rule 1-008 NMRA, and that the plaintiff failed to provide evidence of a breach of the standard of care. The Supreme Court granted certiorari.
Pursuant to New Mexico’s notice pleading standard and preference that disputes are resolved on their merits rather than by technicalities, the Court determined that the plaintiff did not need to plead specific theories of liability and that the complaint gave fair notice to the Hospital of the cause of action asserted against it. The plaintiff’s complaint was in compliance with Rule 1-008, even though it was rudimentary; its allegations of mishandling the cancer diagnosis and inclusion of several involved persons by name were sufficient. Moreover, one or more affirmative defenses contained in the Hospital’s answer to the plaintiff’s first amended complaint suggested that the Hospital had notice of the nature of the plaintiff’s claim. The Court next addressed whether the plaintiff raised a genuine issue of material fact through the affidavits of the surgeon, the oncologist, and the radiologist. In concluding that he did, the Court focused on several statements in the affidavits, including: (1) the statement in the surgeon’s affidavit that she would have done whatever possible to contact the plaintiff, had she known about the possible cancer; (2) the oncologist’s statement that the delay in diagnosis had a “significant impact” on the plaintiff’s prognosis; and (3) the radiologist’s statement that transmitting the cancer diagnosis was a basic communication issue. The Court found that these facts were material and that expert testimony was not required, because the ordinary negligence standard of care applied—communication of a diagnosis between doctors is common knowledge that does not require the determination of any medical issues. In further discussion of why expert testimony was not required, the Court stated that the plaintiff’s complaint did not implicate medical negligence (thus precluding the requirement for expert medical testimony to establish the standard of care) and that courts in other jurisdictions agree that communication between physicians is not outside the realm of common knowledge. Therefore, the Court reversed and remanded for trial on the merits.

School Personnel Act / Substantive and Procedural Rights

Weiss v. The Board of Education of the Santa Fe Public Schools,
2014-NMCA-100
No. 32,844 (filed June 3, 2014)

The plaintiff was a teacher employed by the Santa Fe Public Schools through one-year employment contracts. Two weeks before she completed her third consecutive year of teaching, the Board of Education notified her that it was not going to renew her employment contract for a fourth year. The plaintiff’s request for a hearing was

To Sync or not to Sync
That is the Question?
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denied. She filed suit against the Superintendent and the Board of Education (defendants) seeking a declaratory judgment that she was entitled to a hearing to contest the termination. The district court held that she was entitled to the requested hearing as a certified school instructor employed for three consecutive years, and the defendants appealed.

In its analysis, the Court of Appeals discussed the School Personnel Act (the Act) in depth and the different protections it provides to employees upon their discharge or termination. Teachers qualify as “certified school employees” under the Act, and they are generally hired pursuant to one-year contracts. After three years of consecutive employment, certified school employees can be hired pursuant to contracts up to three years in length and receive additional employment protections. A school board can end a certified school employee’s employment by severing the employment relationship during the middle of the year, which is a “discharge,” or by not renewing the employee’s contract for the following year, which is a “termination.” According to the Act, a certified school employee with fewer than three consecutive years of service may be terminated without cause and with minimal process. On the other hand, terminating a certified school employee with three or more years of consecutive employment requires just cause. Additionally, the employee may request an opportunity to respond to the termination decision at a hearing and may appeal the board’s decision after the hearing.

Applying the Act’s provisions to this case, the Court limited the issue to whether the plaintiff was entitled to the additional protections given to employees employed for three or more years, even though she had not completed all three years when she received the termination notice. The Court determined that the termination of a certified school employee must occur at the end of the school year, because the Act refers to termination as the non-renewal of an employee’s contract for the next school year. The employee will accordingly complete the school year, even if she receives the notice of termination before the end of the year. Thus, in this case, the Court determined that the plaintiff was entitled to the additional protections (i.e., just cause and opportunity to be heard at a hearing) under the Act for an employee employed three or more consecutive years. The Court affirmed the district court.

Kenneth Mills (Mills), a violent, convicted sex offender, was under the supervision of the New Mexico Department of Corrections, Adult Probation and Parole Division (APPD), from 2004 to 2008, during which time he violated his probation numerous times without any meaningful consequences. In 2008, Mills was able to be near the plaintiff’s home in violation of his parole. He ultimately kidnapped and raped the plaintiff’s minor daughter. As natural parent and next friend of her minor daughter, the plaintiff filed suit against the APPD and individual APPD officers and employees (collectively the “defendants”). The plaintiff alleged that the APPD was liable under respondeat superior for the negligence of its officers and employees and that the defendants failed to properly handle, control, and supervise Mills’ parole. The defendants moved for summary judgment on the basis that they were immune from suit under the New Mexico Tort Claims Act (the TCA), because they were not “law enforcement officers” whose immunity is waived under the TCA. The district court granted the motion. The plaintiff appealed.

On appeal, the Court narrowed its analysis to the dispositive issue of whether the defendants qualify as law enforcement officers according to the definition in the TCA, which is strictly interpreted, and relevant case law. The Court stated that the inquiry is a practical approach, but requires that the defendants’ principal duties be of a “law enforcement nature,” which includes holding accused criminals in custody, maintaining public order, and making arrests for crimes. Next, the Court analyzed its prior decision in Vigil v. Martinez, 1992-NMCA-033, 113 N.M. 714, 832 P.2d 405, where it held that probation and parole officers were not law enforcement officers for purposes of the TCA’s immunity waiver, because the officers’ principal duties focused on rehabilitation, rather than the principal duties of law enforcement officers that are enumerated in the TCA, which are holding accused criminals in custody, maintaining public order, and making arrests.

The Court noted that there has not been any change in the law since it decided Vigil. Accordingly, the only question left for the Court was whether a factual change in the principal duties of probation and parole officers had occurred since Vigil was decided so as to cause probation and parole officers to qualify as “law enforcement officers” under one of the three categories of principal duties of law enforcement officers enumerated in the TCA. First, the plaintiff admitted that probation and parole officers
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Personal Jurisdiction

NM Bar Bulletin – December 17, 2014
Vol. 53, No. 51
Trei v. AMTX Hotel Corporation,
2014-NMCA-104
No. 33,048 (filed June 24, 2014)

The plaintiff, a New Mexico resident, sued the defendant, a New York corporation doing business as a “Holiday Inn” hotel in Texas pursuant to a franchise agreement with IHG. The plaintiff filed suit in New Mexico state court for injuries she received while using exercise equipment at the hotel. The defendant moved to dismiss based on lack of jurisdiction, filed an answer to the complaint, and served written discovery requests on the plaintiff. The district court granted the defendant’s motion to dismiss due to insufficient contacts between the defendant and New Mexico to exercise jurisdiction. The plaintiff appealed.

The Court of Appeals identified the issue on appeal as whether, in accordance with specific personal jurisdiction, the defendant “purposely established contact with New Mexico and, if so, whether [the plaintiff’s] cause of action arose out of those contacts with New Mexico.” As the defendant had zero presence in New Mexico, the plaintiff argued that an agency theory should be applied to impute IHG’s national advertising to the defendant as proof of purposeful contacts. The Court rejected the plaintiff’s argument, because the franchisor-franchisee relationship alone does not establish a principal-agent relationship, there was no evidence that the defendant exerted any control over IHG (the party with alleged contacts in New Mexico due to advertising), and national advertisements by a non-resident defendant are insufficient by themselves to establish personal jurisdiction over that defendant. The Court also held that the defendant did not waive its jurisdictional defense by serving discovery requests and seeking defensive relief in its answer; the defendant properly preserved its defense by asserting it in both its answer and in a separate motion, and discovery requests do not have to be limited to jurisdictional issues. Therefore, the Court affirmed the district court’s dismissal of the plaintiff’s complaint.

Statute of Repose / Unlicensed Contractor

NM Bar Bulletin – December 17, 2014
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Little v. Jacobs,
2014-NMCA-010
No. 33,215 (filed July 1, 2014)

The plaintiff was injured in 2009 when he fell off of a deck built on a rental property owned by Paulette Jacobs (Jacobs). The defendant, an unlicensed contractor, built the deck for Jacobs in 2000. The plaintiff filed suit against Jacobs in 2011 and amended his complaint to add the defendant in 2013. Pursuant to NMSA 1978, Section 37-1-27 (a statute of repose), the defendant filed a motion to dismiss on the basis that the plaintiff’s claim was filed more than ten years after the deck was substantially completed. The plaintiff responded that the defendant was not entitled to the benefits of the statute, because he was an unlicensed contractor at the time he built the deck. The district court granted the defendant’s motion and the plaintiff appealed.

The sole issue presented on appeal was whether Section 37-1-27 applies to unlicensed contractors, which was a matter of first impression. The Court of Appeals first discussed its ability to use two different approaches for statutory interpretation in order to give effect to the Legislature’s intent. The Court could use the “plain meaning” rule or the “rejection-of-literal-language” approach—the latter of the two being appropriate when the exact wording of the statute would lead to undesired or unjust consequences. The Court then noted that the Legislature enacted the statute because licensed contractors were being exposed to liability well after completing a project. The statute limits liability to injuries occurring within ten years of the project’s date of substantial completion. Considering the legislative intent, the Court then examined New Mexico’s treatment of unlicensed contractors. The Court found a strong public policy against unlicensed contractors, which was supported by both the Legislature and by common law. As such, the Court determined that, while the plain language of the statute supported the defendant’s argument, the statute requires the “rejection-of-literal-language” interpretation, because the Legislature did not desire that Section 37-1-27 to apply to unlicensed contractors.
contractors. Thus, the Court reversed the district court’s order of dismissal.

Subject Matter Jurisdiction / Sovereignty

NM Bar Bulletin – December 24, 2014
Vol. 53, No. 52

South v. Lujan,
2014-NMCA-109
No. 32,015 (filed Aug. 11, 2014)

The plaintiff, neither an Indian nor a Pueblo member, was an officer with the Sandia Pueblo Police Department. Defendant Lujan, an Indian and member of the Pueblo, was the Chief of the Department. Defendant Duran, neither an Indian nor a Pueblo member, was the Captain of the department. Defendant Brogdon, neither an Indian nor a Pueblo member, was the employee relations manager for the Pueblo. The plaintiff filed suit against the defendants for sexual harassment, retaliatory discharge, and tortious interference of contract. The defendants moved to dismiss the complaint, because the New Mexico Human Rights Act (NMHRA) does not apply to the Pueblo and its employees, the court lacked subject matter jurisdiction due to the Pueblo’s sovereign immunity, and the Pueblo was a necessary party that could not be joined. The district court granted the motion and dismissed with prejudice. The plaintiff appealed.

The Court of Appeals begins its analysis by discussing factors affecting state court jurisdiction involving Indians and tribes, which include whether the conduct occurred on the reservation and in the scope of employment, whether the Pueblo is a necessary party, and the extent the Pueblo sought to regulate employee disputes when employees are sued individually in tort. The Court acknowledged that these are fact-intensive questions and noted that the factual record was not developed to the extent necessary for the Court to determine whether it was proper for the district court to grant the defendants’ motion to dismiss. Considering the state of the record, the Court moved forward with an analysis of subject matter jurisdiction, while also discussing why it cannot properly review the district court’s ruling. With respect to the standard of review, the Court determined that, due to the defendants’ factual attack both on the plaintiff’s complaint and on the court’s subject matter jurisdiction, it need not accept the factual allegations in the complaint as true and may instead rely on the district court’s findings of fact. However, two integral factual issues were not sufficiently developed for the Court to rely on: whether the alleged conduct occurred within the scope of employment by the Pueblo and whether state court jurisdiction would infringe on the Pueblo’s sovereignty. Since the Court needed to rely on the district court’s factual findings, and since those findings were not sufficiently developed, the Court reversed and remanded so the district court could enter findings of fact.
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