DLA NEW MEXICO
Defense Lawyers Association

DEFENSE news

The Legal News Journal for New Mexico Civil Defense Lawyers

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IN THIS Edition

New Mexico Defense Lawyers Association
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2017 NMDLA BOARD OF DIRECTORS

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.

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MESSAGE FROM THE PRESIDENT

By Courtenay L. Keller, Esq.
Riley, Shane & Keller, P.A.

Dear Members:

I hope the first quarter of 2017 treated you well. In this letter I share some thoughts on innovation and provide a report on an Amicus Brief filed by the NMDLA, a recent NMDLA Student Chapter event, and the first "Brownbag Roundtable."

In March, the NMDLA filed an Amicus Brief in the case *Beaudry v. Farmers Ins. Exchange, et al.*; No. S-1-SC-36181. The case is before the New Mexico Supreme Court on a Writ of Certiorari to review the Court of Appeals' opinion in *Beaudry v. Farmers Ins. Exchange, et al.*, 2017-NMCA-016. The case arose from the termination of Craig Beaudry's "Agent Appointment Agreement" with Farmers. Beaudry pled contract and contract-based tort claims as well as a cause of action for prima facie tort, which was based on the allegation the Defendants "intended to injure" Beaudry in terminating the Agreement. The district court denied summary judgment on the prima facie tort claim, which went to a jury and resulted in a verdict in favor of Beaudry. The Court of Appeals issued a three-way split opinion affirming the verdict. The NMDLA advocated for reversal arguing the Court of Appeals' decision threatens to "upend decades' worth of contract and tort jurisprudence on which ordinary persons rely, and threatens to burden the courts of this state with unceasing litigation by grafting a tort claim into every contract entered into in this state or by its residents." The New Mexico Supreme Court approved the filing of the NMDLA's Amicus Brief, which was written by Mark D. Standridge of Jarmie & Associates, and filed on March 7, 2017. The brief can be found on the NMDLA website.

Recently, I had the opportunity to visit with members of the NMDLA Student Chapter during a mixer event at the UNM School of Law on March 2nd. This was a refreshing experience that reminded me of the wealth of enthusiasm and talent that our young (and future) members bring to the table. In my first quarter letter to the members I suggested innovation and adaptability may be key to flourishing in the current culture of the insurance defense industry. According to a Pew Research Center analysis of U.S. Census Bureau data, Millennials (adults between the ages of 18-34) have become the largest generation in the American workforce.[1] Millennials have a different perception of work-life balance and reject the "old school" notion that you get to have a certain quality of life only after you have "paid your dues." Millennials are also a much faster moving generation than Gen Xers and Baby Boomers. They have uber-strong technology skills, which tends to make them more efficient, and they are much more willing to change jobs, if not careers. And this is just the tip of the iceberg. The bottom line is, Millennials reflect a reality the Gen Xers and Baby Boomers must face, and embrace.

In that regard, the NMDLA Young Lawyers Division and the NMDLA Student Chapter present an opportunity for all of us to interact with Millennials who are (or will become) members of the New Mexico Bar. The NMDLA Young Lawyers Division will be hosting another "YLD mixer" in the next few months, so please stay tuned for details. On the national level, the DRI Young Lawyers Committee will hold the 2017 Young Lawyers Seminar in Austin, Texas from June 21 to June 23, which includes a session that will address the "generation gap" between young lawyers and clients, experts, judges, jurors, and opposing counsel. The DRI Young Lawyers Committee includes members from across the country practicing in a wide variety of substantive areas in civil defense. I encourage the young lawyer members of NMDLA to consider joining the DRI Young Lawyers Committee to take advantage of its outstanding CLE programs, information exchange, and networking opportunities.

Finally, we launched our telephonic "Brownbag Roundtable" program in February, which got off to a good start. This program is intended to enhance communication among our members. The first topic was "Demands that insurers not issue 1099s in connection with settlements." We had seventeen registrants and an informative discussion that may lead to a full-blown CLE on the subject. Please consider joining us for the next telephonic "Brownbag Roundtable", which will be held in the middle of April. Watch for email notices announcing the topic and providing a link to a call-in number and access code.

Courtenay L. Keller, Esq.
Riley, Shane & Keller, P.A.
2017 NMDLA President

[1] See Fry, Richard. "Millennials surpass Gen Xers as the largest generation in U.S. labor force." Pew Research Center, May 11, 2015. http://www.pewresearch.org/fact-tank/2015/05/11/millennials-surpass-gen-xers-as-the-largest-generation-in-u-s-labor-force/.

New Mexico's Forum Shopping Problem

This article was chosen as the winning entry in the 2016 NMDLA Student Writing Competition open to all current UNM Law students.

By Dominic A. Martinez
UNM School of Law

In the course of litigating a civil case, both plaintiffs and defendants avail themselves of procedural tactics and loopholes as they zealously jockey for advantages over the opposing party. Plaintiffs shape the litigation by deciding which claims to bring and which defendants to hale into court, while defendants have the opportunity to prevent a case from going to a jury via motions to dismiss and motions for summary judgment. For plaintiffs, civil procedure offers tactical advantages before even the filing of a lawsuit, during the forum selection phase. By selecting where to file a lawsuit, plaintiffs can dictate, among other things, the substantive law that will govern their case, the geographic location where the parties will try the case, and what the jury will look like. For wrongful death cases in New Mexico, plaintiffs can appoint a personal representative from a forum of their choice. Savvy plaintiffs' attorneys can seek out personal representatives from forums that have historically rewarded big-dollar verdicts, in order to gain leverage over defendants in settlement negotiations. This practice, called "forum shopping," does a disservice to both defendants and courts in New Mexico, despite the procedural tools that are in place for defendants to push back.

"This practice, called 'forum shopping,' does a disservice to both defendants and courts in New Mexico, despite the procedural tools that are in place for defendants to push back."

I. The Problems Created By Forum Shopping

A. Forums With No Connection To The Case

Under New Mexico's Wrongful Death Act, a plaintiff can bring a wrongful death action "in the name of a personal representative" in any forum in the state. This is markedly different from New Mexico's venue laws that govern other types of civil actions. In a non-wrongful death case, plaintiffs are limited to three basic venue choices: 1) where the plaintiff resides, 2) where the defendant resides (or, for businesses, is registered), or 3) where the cause of action originated. By contrast, the Wrongful Death Act permits plaintiffs' attorneys to appoint a personal representative from a faraway, generous-verdict forum that is inconvenient for the defendant and bears no connection to the cause of action. Attorneys often use this provision to their advantage, but they should not be condemned for doing so. Rather, the New Mexico Legislature should amend the Wrongful Death Act, because the Act in its current form can

Continued from Page 4

produce unfair and unprincipled results.

For example, suppose that a car accident occurred in Albuquerque (Bernalillo County) between a family's vehicle and a semi-truck owned by a company based in Texas. The semi-truck driver fell asleep at the wheel and drifted into the family's lane, ultimately colliding into them. Suppose that the accident resulted in major damage to the family's vehicle, but none of the occupants were seriously harmed. In this scenario, if the family wanted to recover damages from the Texas company, New Mexico law would permit three basic venue choices: 1) where the family resides, 2) where the company is registered to accept service in New Mexico, and 3) where the accident occurred: Bernalillo County. Within the confines of these three choices, the family's attorney would be free to research, strategize, and select the most advantageous forum.

Now, suppose that the exact same accident occurred in the exact same location, but that the family's injuries were much worse. Rather than sustaining only minor injuries, the mother of the family was killed in the crash. In this scenario, if the family wanted to sue the Texas company, they would no longer have three forum choices. Under the New Mexico Wrongful Death Act, they could appoint a personal representative from anywhere in the state and file their wrongful death action in his/her name, and in his/her home forum. While the mother's death in this hypothetical scenario certainly makes the family's situation more tragic, such tragedy is not a valid reason for our laws to abandon logic and principle. The family should be able to recover damages from the Texas company for the mother's death, but should be restricted to the forum choices that would be permitted if the same accident occurred with a less tragic outcome.

B. Burdens To Courts In Plaintiff-Friendly Districts

In addition, the forums in New Mexico that are most plaintiff-friendly are not unknown to New Mexico attorneys. Areas in the northern part of the state, such as San Miguel County, Rio Arriba County, and Santa Fe County, tend to award larger verdicts to plaintiffs than areas in southern New Mexico. In fact, the largest verdict awarded to date in New Mexico history was a $165.5 million verdict against FedEx by a Santa Fe jury. Because of the potential for windfalls for plaintiffs in northern New Mexico, and because of the discrepancy in verdicts across the state, there is an incentive for plaintiffs' attorneys to take all of their wrongful death cases to the north. And although New Mexico is a large state, the inconveniences and travel costs associated with trying a Hobbs case before a Santa Fe jury are not nearly sufficient to cut against this incentive.

Thus, if we assume that all plaintiffs' attorneys believe that it is in their clients' best interests to have a friendly jury, we arrive at a scenario in which all wrongful death actions in New Mexico are filed in only a handful of courts. Courts and judges in Santa Fe and Las Vegas will be burdened with hearing all of these high-stakes cases, even when the parties are from different parts of the state and the deaths occurred hundreds of miles away. More cases will be heaped on the docket for busy judges, and more courts will have their administrative resources sapped, all without a principled reason for such an outcome.

II. The (Insufficient) Procedural Tools Already In Place to Counter Forum Shopping

It could be argued that forum shopping in New Mexico should be a permitted practice because there are procedural tools already in place for defendants to push back. Proponents of this argument might cite to removal, change of venue statutes, motions to dismiss based on venue or forum non conveniens, and ethics rules as examples of procedural tools available to defendants. However, none of these tools are sufficient to rectify the problems that forum shopping creates for defendants and courts in New Mexico.

A. Removal To Federal Court

Among the procedural tools that can be used to cabin forum shopping, removal to federal court is perhaps most widely used by defense attorneys. When plaintiffs file a lawsuit in a forum of their choice—after having shopped around for the forum that they perceive as most advantageous—defendants can remove the case to federal court. Removal can be used as long as the plaintiff's claim could have originally been filed in federal court, and there is complete diversity among the plaintiff and the defendants.

Removal is a procedural tool that is exclusively available to defendants, and it can offset plaintiffs' advantages from forum selection for a subset of cases. For example, suppose a plaintiff opted to file a wrongful death action against an out-of-state defendant in a New Mexico state court in Santa Fe—again, where some of the state's largest verdicts have been awarded. Assuming that the plaintiff was not also suing a New Mexico defendant, the out-of-state defendant could remove the case to federal court, stripping the plaintiff of a potential windfall from a Santa Fe jury. In addition, aside from avoiding a hand-picked generous jury, defendants may have other reasons for preferring federal court to New Mexico state court. For example, New Mexico state court adheres to a notice pleading standard, whereas federal courts require plaintiffs' complaints to allege sufficient facts such that their claims are "plausible." As a result, plaintiffs' cases that are removed to federal court are more likely to be dismissed on the pleadings than those that remain in New Mexico state court. Thus, while

Continued from Page 5

forum shopping is a plaintiff-exclusive tactic that can be exploited to gain an edge, defendants in some cases can counter by removing cases to federal court.

However, the biggest problem with defendants relying on removal to counter forum shopping is that removal is not available in many cases because of the complete diversity requirement. A case can only be removed if all of the defendants are from a diverse jurisdiction from the plaintiff. In New Mexico, this means that when a plaintiff sues an out-of-state company, he/she can prevent removal to federal court by suing as a co-defendant a New Mexico resident (for example, the company's New Mexico employee). In practice, this dramatically reduces defendants' ability to remove cases to federal court and deprives them of a tool to push back against forum shopping.

B. Change of Venue

Another tool that defendants can use to attempt to counter forum shopping is New Mexico's change of venue statute. The New Mexico Legislature, under NMSA 1978, Section 38-3-3, has empowered defendants to file a motion for a transfer of venue in a number of circumstances, including if they cannot obtain a fair trial in the plaintiffs' chosen forum. This statute specifically contemplates scenarios in which the plaintiff chooses a forum where potential jury members are prejudiced either in favor of the plaintiff or against the defendant. As a result, the statute captures some of the potential most nefarious abuses of forum shopping: scenarios where plaintiffs shop for a forum where defendants cannot receive a fair trial.

Still, Section 38-3-3 does not do enough to protect New Mexico defendants and courts from the harms of forum shopping. For example, the statute allows defendants to file a motion to transfer their case from Santa Fe County to Bernalillo County if bias or prejudice exists in Santa Fe County against the defendants. However, as the moving party, defendants would have the burden of proving bias or prejudice in order to be granted a change of venue. Only certain defendants would be able to meet this burden, and it is extremely unlikely that any defendant would meet it by citing a general pro-plaintiff attitude in northern New Mexico communities. Therefore, the vast majority of defendants would remain in plaintiffs' chosen forum with the possibility of a nine-figure verdict looming over settlement negotiations.

C. Ethics Rules

Opponents of forum shopping might also hope to find salvage from the practice in the rules of professional conduct. However, though forum shopping may be criticized as an unethical practice, it is likely not unethical under the Model Rules of Professional Conduct. Model Rule 3.1 provides, generally, that lawyers shall not bring or defend meritless claims. The comment to rule 3.1 advises that lawyers have "a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Opponents of forum shopping might argue that it is an abuse of legal procedure, but its proponents could retort that they are using legal procedure for their client's fullest benefit. It is unlikely that forum shopping will be seen as a procedural abuse, since the Wrongful Death Act permits personal representatives to be chosen from anywhere, and the New Mexico Supreme Court has acknowledged that forum shopping is a potential consequence of the Wrongful Death Act.

III. Conclusion

In sum, because the New Mexico Wrongful Death Act allows plaintiffs to appoint a personal representative from anywhere in the state, it incentivizes plaintiffs' attorneys to forum shop at the expense of defendants and courts in certain communities. A couple of New Mexico counties have historically been plaintiff-friendly, so the practice of forum shopping has the potential to flood dockets in these areas with parties and causes of action that bear no connection to the counties.

In *First Financial Trust Co. v. Scott*, 1996-NMSC-065, ¶ 18, 122 N.M. 572, 577, 929 P.2d 263, 268, a case premised on the doctrine of forum non conveniens, the New Mexico Supreme Court stated that "[i]f intrastate forum shopping is objectionable, then this must be remedied by legislative action not judicial invention." This article calls for such legislative action. The New Mexico Legislature can fix the forum shopping problem by amending the Wrongful Death Act to provide the typical venue choices to wrongful death plaintiffs. On this point, I feel inclined to stress that such an amendment is neither pro-defendant nor anti-plaintiff, but pro-principle. Plaintiffs in wrongful death actions should absolutely have the power to recover the damages to which they are entitled from all those who are legally responsible. However, they should not have the ability to hand-pick a forum that is foreign to both them and their case in pursuing their recovery.

Further, I also feel inclined to stress that it is not my intention to malign or criticize attorneys who have taken their clients' wrongful death actions to more favorable forums. These attorneys are acting as zealous advocates within the bounds of the law, and they are using a procedural tactic for their clients' benefit. It is within their legal and ethical rights to do so. Instead, I place the onus for fixing New Mexico's forum shopping problem with our policymakers, and I write with the hope that they will one day act to correct this problematic and unprincipled provision in our wrongful death law.

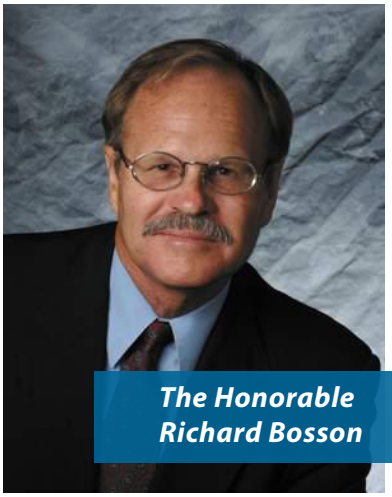
A life and legal career, well, truly lived: An interview with Retired Justice Richard Bosson

By Cristina Mulcahy, Esq.
Modrall, Sperling, Roehl, Harris & Sisk, PA

One of my favorite Oscar Wilde quotes goes, "I knew a phoenix in my youth, so let them have their day." On the cool December morning in 2015 that I sat down with Justice Richard Bosson at the now sadly defunct Santa Fe Baking Co., Justice Bosson—true to his roots and attired in a Boston Red Sox baseball cap—appeared more akin to the phoenix of Wilde's youth than a jurist who just retired after spending nearly a decade on the bench of the New Mexico Court of Appeals, another decade and a half on the bench of the New Mexico Supreme Court, and two and a half decades in private practice prior to his time on the bench. Justice Bosson, always appreciative of quick wit and a good sense of humor—equally likely a product of his years spent on the bench as it is a product of his years spent in and around athletic fields, both as a participant and as referee—answered nearly four hours of my questions, which ranged in topic from the impact of the American civil rights movement on his decision to become a lawyer, how he originally came to New Mexico, the hijacking of the American jury system because of mandatory arbitration provisions, his wife's unyielding influence on his decision to run for the Court of Appeals, road biking accidents, and whether lacrosse or soccer is really the greatest sport ever. His responses, which are mix of jest and reflective seriousness, provide insight for a great range of legal practitioners from seasoned to newly minted, and are demonstrative of a career and life, well, truly lived.

Cristina Mulcahy (CM): What's next? What plans do you have for your retirement?

Justice Richard Bosson (JRB):
My wife and I are going to Africa—Tanzania—in May [2016]. This is her project and I get to choose the next one. Also, five years ago, I took up golf. I never got really good at it, so I am, hopefully, going to take some time and actually learn to play golf. I had a knee replacement in September 2014, the result of too much running—in the end being a soccer referee for all those years really cost me—and so I hope to do more road biking, because running is no longer an option, and generally just be outdoors more often. I also intend to read more for fun [what's that?] I am currently reading a book that's a dissection of the Gettysburg Address. It's fascinating. What is rarely mentioned in American history is that Emerson Everett spoke for nearly two and a half hours and they just 'squeezed in' President



The Honorable Richard Bosson

Lincoln at the end. Lincoln's speech was brief and contained messages about the importance of preserving the Union and yet that's the speech that we all know and remember. Also, interestingly, slavery was never mentioned in President Lincoln's address and yet that was the underlying basis of the entire Civil War.

Professionally, now that remains to be seen. I may possibly become a Judge Pro Tem, like Judge Hall. I may do some mediation. All I can say is that it's to be decided.

CM: **What advice do you have for new lawyers?**

JRB: Your reputation is everything in this business. Guard it carefully. Be honest, be hard-working, be reasonable, and do not overstate your position. Who you are is very important because a judge has to trust you. What you build day one in practice you will be judged by for years and years to come. When you appear before any court, come in knowing everything you can about the subject. Which leads me to my next point, detail, detail, detail. Candidly, I was not always the best at being detail-oriented, but the best lawyers are. Continuing on my point about detail and learning other 'tools of the trade,' it's very difficult for civil lawyers to learn key tools of the trade—such as a trial technique—nowadays because civil cases simply are not tried. Criminal cases are still tried. On the other hand, civil cases do not get tried as much anymore because of changes in the law and pressures to settle. Two of my colleagues, Justices Chavez and Daniels were two of the best trial attorneys I know.

One of my concerns is that in the context of boilerplate arbitration clauses, the United States Supreme Court, in its jurisprudence, has seemingly hijacked the jury system [meaning federal precedent requires that cases be arbitrated when contracts contain arbitration clauses whether or not those clauses may be unconscionable under state law]. This is one hundred percent wrong and several of its implications violate what are [inherent] characteristics of American jurisprudence. But, because its federal law we have to follow it. In New Mexico, *Bergman v. Skilled Healthcare Grp., Inc.*, [is representative of such hijacking].

Judge Hartz, of the Tenth Circuit, wrote a very important opinion in which he summarizes the United States' Supreme Court jurisprudence on mandatory arbitration clauses. While it's not expressly stated in Judge Hartz's opinion, the implications of these precedents is that people contract away their right to a jury, even when the language in the contract is boilerplate language, and may not be freely consented to. Because it is boilerplate, this language often times is not bargained for between the parties. Of course, a [further and indirect] implication of these precedents is that we are erasing the importance of the jury trial in American jurisprudence. Both the federal and state Constitutions have a provision guaranteeing the right to jury trials . . . meaning they are of significant value, in the context of American jurisprudence, and, yet, they're all but disappearing in certain civil contexts because of this precedent requiring mandatory arbitration. I have great respect for Judge Hartz and something tells me that on a personal level he may not agree completely with the direction of federal jurisprudence, but of course, he feels bound by it.

Another indirect implication of the mandatory arbitration clauses is that we do not get to develop New Mexico case law on some subjects, examining and analyzing the legal issues, and so in the rare instance a civil case does go to trial we're stuck with looking outside of New Mexico to examine and analyze the legal issues.

CM: **It's interesting that you mention mandatory arbitration agreements as vehicles through which the American jury system has been effectively hijacked because the *New York Times* recently did an extensive, multi-article piece that examined several aspects and implications of mandatory arbitration provisions. In the article one of the implications that stuck out the most to me was the disproportionate number of awards in favor of defendants when it's a corporate defendant.**

JRB: I have not read that article, so I cannot say whether I agree or disagree with the study and its outcomes. What I can say is that I lament the loss of the jury trial, for the reasons we discussed. Arbitrating and settling cases is a big [change] that has occurred in the profession during the span of my career.

CM: **Do you have a response to those critics that would say mandatory arbitration provisions are the result of run-away jury awards?**

Interview with Retired Justice Richard Bosson

Continued from Page 10

JRB: Sure [Justice Bosson replied with his signature chuckle!] I would say that we run the risk of extrapolating too much from those one-off large jury awards. In my experience juries are not apt to get carried-away. Instead, it's just the opposite: juries tend to be very responsible.

CM: **What about the $165 million dollar FedEx verdict? Was that the result of a responsible jury?**

JRB: Not knowing much about the details of that award, I would say that Randi McGinn was a key part of that legal team . . . and so what I can say about it is, if you've ever seen Randi McGinn in court you'd understand exactly how that verdict came about. She's an exceptionally fine lawyer. One of the best in the State and in the Country . . . I, again, would say that that verdict is the exception and not the rule and you run the risk of extrapolating too much about the jury system by looking too closely at one case.

CM: **Why did you want to become a lawyer in the first place?**

JRB: During the Civil Rights Movement, I drove down to Washington, D.C. [from the Hanford area] to see Dr. Martin Luther King, Jr. speak at the March on Washington. I was nineteen-years-old. It had a profound effect on me. That was 1963. Then in 1965, I was one of many students lobbying Congress to pass the Voting Rights Act of 1965. Later that year, while I was a student at Wesleyan, I participated in a voter-registration project, whereby we got on a bus and drove to Mississippi to register voters because of the passage of the Voting Rights Act. These events were what made me excited about attending law school. These events made me want to be a lawyer. My great grandfather was a Harvard-educated lawyer, a Judge in Chelsea, Massachusetts—and actually as a side note, there's a portrait of him in his robes from the 1890's that still hangs in the Chelsea public library that I discovered almost by chance when someone told me it might be his portrait—but the Civil Rights Movement was what truly impelled me to want to become a lawyer-to make a difference.

I can still remember where I was when news broke that Dr. King had been shot. I was in tax class at Georgetown Law. Riots broke out all over D.C. and you could smell the smoke in our classroom. My tax professor continued to hold class, stating, 'we will not be deterred by the mob.' Eventually, we got the hell out of there in a hurry!

It's a day I'll never forget and, for me, really represents the tumultuous period that was the 1960s in America.

CM: **Was becoming a member of the bench something you always aspired to and planned for or did it occur more organically?**

JRB: It was a little of both. I was always open to the possibility of sitting on the bench —even in law school, I thought about how I would have come out on various cases and wondered if I could have applied the law better than the court in the respective case—but ultimately it came down a lot to fate. My good friend Justice Stanley Frost made me aware that Judge Ben Chavez was going to retire from the Court of Appeals and he encouraged me to run for the job, but I felt I was not yet ready and another opportunity would arise in the future. That was until I talked with my wife Gloria who told me that I would be 'crazy' not to run. She was right. Since the first day that I walked into my office, as a member of the Court of Appeals, I loved it. As I reflect on it, I don't think I ever had a bad day and I hope that my opinions and other works reflects that.

CM: **New Mexico is one of the few states where the majority of Justices on the State's highest court are female. Have we turned a corner in terms of equality in the legal profession?**

JRB: I don't know that we've turned the corner in terms of equality in the legal profession and do think that there's been a glass ceiling for women in a lot of ways in this profession. What I can say is that there's been a tremendous increase in the number of women in this profession and that's a great thing for everyone. For most of my time on the New Mexico Supreme Court there were at least two women on the Court. During my time on the New Mexico Court of Appeals there were always two or three women on the Court. Women really did not begin attending law school in large numbers until the late 1970s and so its taken until now for the bench to equalize. I think the number of women in the judiciary will only continue to increase and that's a good thing for the profession and for the state.

Interview with Retired Justice Richard Bosson

Continued from Page 11

CM: **What cases do you believe most define your career or do you most remember? What cases do you believe others in the public and in the profession define your career?**

JRB: There's really too many 'defining cases.' I can say that the one that attracted the most attention was certainly *Elane Photography v. Willock*. It's also a case that I received an enormous amount of both praise and highly critical mail [Justice Bosson laughs a bit to himself, as if recalling the particulars of some of that critical mail]. I'm very proud of the special concurring opinion I wrote for that case—it was an unusual issue—and the civil rights overtones really made me think back to the reasons I went to law school in the first place ... the American civil rights movement.

I also had a special process for drafting my opinion in that case because initially my vote drifted in various directions. None of the briefs we received were particularly persuasive and did not address the issues in the manner I felt was required. So I had this whole process—which was external to the briefs—whereby I analyzed the issues and drafted the entire opinion in my head before I ever drafted anything on paper or on the computer, more likely. As a result there is a lot of back and forth in the opinion-almost as if I were having a debate with another form of myself-especially because I believed that the defendants in that case were not bigots or despots, but had sincerely held religious beliefs. The problem was not with their beliefs, being protected by the constitution, as much as it was with the conflict inherent in this particular exercise of those beliefs—running headlong into constitutionally protected rights of others, the plaintiffs in this case. A true conundrum, not at all easy to sort out, requiring as much work and worry as anything I have ever written. This is the kind of genuine, sincere conflict that our courts are tasked with sorting out and resolving to the best of our ability. I am confident that we came out on the right side of the law and I'm proud of it.

CM: **What about in the criminal context, are there any cases that you remember particularly?**

JRB: I'm sure there's some, but none that particularly stick out at this moment in my head.

CM: **How about *Bullcoming v. New Mexico*? This was a Sixth Amendment case that received national attention. Did the United States Supreme Court get it right? Was this merely a change in the Court's direction on the Sixth Amendment's Confrontation Clause analysis regarding "testimonial statements"? Where do you see the Court going on this issue in the future?**

JRB: [Pensively,] you came out swinging on this one [Justice Bosson, laughing]. The SCOTUS got it right in principle. What the Confrontation Clause [of the Sixth Amendment] means and requires had gotten off-track in a bunch of the cases leading up to *Bullcoming*, namely in regards to the 'exceptions' to the Amendment that had developed. Scalia righted that ship in *Cranford,* but *Bullcoming* was faithful to *Cranford*.

Let me also just say this, Scalia was moonlighting as a mystery writer in *Bullcoming*. There were no bad acts, no intrigue, nothing of the sort regarding the evidence, the testing, or the testimony that Scalia implied in *Bullcoming*. That all came from Scalia's imagination, not from any facts. I do, however, agree with Scalia in that the Sixth Amendment is a procedural guarantee. That means witnesses must sit down in court and testify, period. This is one of the areas of the law where I think we should interpret the Constitution as they did 'in the old days,' meaning what jurists understood what the Sixth Amendment required at the time the Bill of Rights were drafted and what is still what is required today ... a witness must sit down in court and testify and subject himself or herself to cross-examination. On that point I fully agree with Justice Scalia.

Of course, practically speaking, the requirements that a lab tech testify in court any time such results are placed into evidence—which is the practical implication of *Bullcoming*—creates a huge burden on states, especially one of New Mexico's geographical size and with limited lab techs. That was not an issue argued in *Bullcoming*, it's just worth noting that sometimes SCOTUS is very impractical. But Scalia's right, it's a procedural guarantee and I see the SCOTUS enforcing it this way for a long-time, especially as long as Justice Ginsburg remains on the Court ...by the way, I have a huge amount of respect for Justice Ginsburg, she's inspiring in a number of ways.

Interview with Retired Justice Richard Bosson

Continued from Page 12

CM: **Did you have a particular type of case that was your favorite to hear on appeal? Why was it your favorite?**

JRB: Any oil and gas case. Oil and gas cases are remarkably complex and often times there are reasonable positions on both sides of the issues. When I first got to the [New Mexico Supreme] Court I realized that there was not a whole lot of oil and gas precedent in this State and so every time we wrote we were making new precedent. The Court's decision on any such matters would have big implications because of the role of oil and gas in the State's economy. It was important work and always very complex.

I also enjoyed water cases for a lot of the same reasons that I enjoyed oil and gas cases, they're complex and water is very important in this State. The Court—in terms of water issues—does a fantastic job of carefully thinking through the policy aspects of any decision involving water. Water issues require an incredible amount of forethought—you can't only think about the state of issues today, you must also think about what these issues will look like down the road a year, five years, ten—the result has to be right today and ten years from now, if not there's a potentially huge and negative impact.

I guess, in hindsight, that's one of the overall aspects that I've enjoyed so much about being on the Court, it's a non-partisan place for a lot of academic legal thought. You have to be thorough and careful because of the implications stemming from everything you do. It is a serious place for serious people. And, of course I got to write everyday. I so much enjoyed the thought and writing process on the Court. Synthesizing the law and drafting opinions that would fairly advance the law was a favorite aspect of being on the bench.

CM: **What is one regret or action that you have, took, or failed to take that if you could, you would do differently a second time around?**

JRB: Professionalism is everything in this business. When I was a young practitioner, I had a momentary lapse in my professionalism in a med-mal case. I was at a session of the medical-legal panel, and one of the opposing attorneys had forgotten to schedule a court reporter to transcribe the session for his client. But, I had remembered to schedule my court reporter to transcribe the session. At the end of the session he asked if he could get a copy of my transcript? I told him 'no' and never gave him a copy. It was stupid and unprofessional of me, an error of judgment that I still think about to this day.

The nature of this profession is adversarial, but do not let that infect your process, your practice, and your interaction with opposing counsel. Fight like hell for your client, but always extend professional courtesies. Justices Daniels and Chavez are good examples of this as attorneys, and one reason they are so admired by their former peers. Strive for that goal. The scorched-earth method may be effective in a given case, but you will pay a heavy price for that kind of behavior in the long run. There's not always a lot that a judge can do about it when counsel engages in this behavior, but judges definitely don't prefer it and will think less of you for it.

CM: **What is one action that you had your doubts about at the time you took it, but you know now was the right decision?**

JRB: Two cases come to mind. The first involved appointments to the Judicial Standards Commission under Governor Richardson. Historically, governors appointed new members of the Commission in staggered terms, so you would have two new members during the respective governor's first term, over a four-year period. For the first time ever, Richardson sacked every member of the Commission subject to gubernatorial appointment, six in all I think, even though their terms were not completed, and appointed all new members immediately after he was elected. The matter came before the New Mexico Supreme Court on several constitutional challenges and led to a 3-2 opinion upholding the Governor. Justice Minzer and I wrote dissenting opinions holding that Governor Richardson's actions were unconstitutional. This was a difficult decision for me to draft because I was a big fan of Richardson as a governor, even though I thought he was wrong in this instance, and I received a lot of heat and a lot of pressure through various back channels for this dissent-even before I wrote it. But I stuck to my guns. People expect that kind of principled independence from the judiciary and they should, but it comes at a personal cost.

The second case involved a recent appropriation for a pay raise for all judges, which of course

Interview with Retired Justice Richard Bosson

Continued from Page 13

would have affected my salary along with every other judge. The legislature passed a pay raise for judges across the board. Governor Martinez line-item vetoed these raises. A number of the judges then filed suit, challenging the veto. Then the question arose whether the New Mexico Supreme Court, because we were all affected by the vetoed pay raise, could sit on the matter? Obviously we were all in a conflict of interest, but acknowledging that, the question still remained: someone must decide this and if not us, then who? There's a U.S. Supreme Court rule called "the Rule of Necessity," which basically says that if everyone has a conflict and no one is conflict-free, then the highest court has a duty to proceed. That came into play here ... because who were we going to have hear the case? A judge from Texas? A judge from Colorado? So I felt duty-bound to proceed and did so, but not without criticism. But it was the right thing to do. Correctly, people expect that from our profession-the courage to stand by our convictions.

CM: **Was there one person, maybe a mentor, professor, or other Judge or Justice whose demeanor you used as a model both in practice and on the bench?**

JRB: Actually, I had a lot of mentors-I was so fortunate in that regard. You could start with the entire Supreme Court from the early 90's-Franchini, Frost, Ransom, Montgomery, Baca, and throw in some colleagues on the Court of Appeals like Donnelly and others who had great wisdom, as well as humility. If forced to select one, Justice Ransom, is probably one of my 'legal-heroes.' Talk about someone who worked hard, endlessly studying our jurisprudence, looking for over arching principles and policy in the time interest of justice, not afraid to challenge conventional wisdom yet faithful to the rule of law. And he was unerringly courteous and respectful towards all—a true professional. Always it seemed with a smile on his face, I think he honestly enjoyed the challenges of being on the court—and there are many—more than anyone I ever met. A terrific writer as well. Ransom is probably the gold standard for me.

CM: **In closing. I have to know, best sport on the planet lacrosse or soccer?**

JRB: Soccer. I loved that sport. I was a soccer parent, a coach, a referee. I never played it growing up because it was just not an option. But I loved it. Ironically, I played four years of Division 1 II college lacrosse, and obviously enjoyed it, but soccer really got into my blood. Even when all those years as a soccer referee, chasing kids half of my age up and down the field and sometimes for two or three games in row, caused me to ultimately have to have knee replacements. I refereed from 1990-2004 and I have only great memories of those days. Soccer.

Break It Up! Bifurcating First-Party Bad Faith Claims in New Mexico

By Justin D. Goodman, Esq.
Stiff, Keith & Garcia, LLC

Why join an insurer in a personal injury action?

The quest for a basis on which to join an insurer in personal injury litigation derives from the claimant's perception that mere joinder, in and of itself, increases settlement leverage. One example of this tactic is the joinder of a first-party insurer with related bad faith claims in a lawsuit against a tortfeasor for personal injuries. Another example is the joinder of a first-party claimant's Uninsured/Underinsured Motorist (UM/UIM) claim with related bad faith claims in a single lawsuit. Inevitably, these practices impose additional costs on the insurers through oppressive discovery on bad faith issues before any judicial determination of a tortious action can be determined.

It is well-settled that an insurer has a right to deny a claim without risking exposure to a bad faith lawsuit if it has reasonable grounds on which to conclude the claim is without merit or overvalued. The success of a first party bad faith claim depends upon proof that the insurer's reasons for denying the claim were frivolous or unfounded. Notwithstanding such a high standard, a disagreement between an insured and insurer on the value of bodily injury damages is often the sole basis of bad faith allegations. Admittedly, a first party claim of bad faith can arise from other aspects of the claim handling process. However, while conclusory assertions may be enough to defeat a Rule 1-012 NMRA motion to dismiss, they do not stand up so well to scrutiny under a motion seeking relief for separate trials under Rule 1-042(B) NMRA.

This article offers legal analysis and practice pointers that may prove useful to practitioners seeking to minimize the effect of such joinders of bad faith claims with an emphasis on the analysis of bifurcating UM/UIM claims from bad faith failure to pay claims.

First Things First

There is a rudimentary problem with pursuing a bad faith claim against an insurer without a judicial determination of fault against the tortfeasor: how can extra-contractual claims be decided without first determining the underlying liability? The best approach to save the time and expense of overly broad bad faith discovery is to seek a stay of the proceedings against the insurer to first allow for a determination of fault against the tortfeasor. Rule 1-042(B) (and its federal counterpart, Rule 42(b)) grant trial courts discretion to select claims or issues and decide them before proceeding to other matters in the same case where bifurcation will further convenience or avoid prejudice, or when separate trials will be conducive to expedition and economy. See *Trotter v. Callens*, 1976-NMCA-0113, 89 N.M. 19, 21, 546 P.2d 867 (upholding trial court's decision to separate the issue of coverage for a future trial if the plaintiff should prevail on liability); *see also State v. Esparza*, 2003-NMCA- 075, ¶ 7, 133 N.M. 772, 70 P.3d 762 (stating that "Bifurcation [pursuant to Rule 1-042] is designed to facilitate the expeditious and economical resolution of cases that involve disparate procedural or substantive issues"). There is no New Mexico case that expressly discusses bifurcation of UM/UIM claims from first party bad faith claims, or, for that matter, bifurcation of first-party bad faith claims from a suit against a tortfeasor. In *Hovet v. Allstate Ins. Co.,* 2004-NMSC-010, 89 P.3d 69, the New Mexico Supreme Court held, "the third-party claimant will not even have an action under Section 59A–16–20(E)

Continued from Page 15

[unfair claims practices], unless and until there has been a judicial determination of the insured's fault and the amount of damages awarded in the underlying negligence action." *Hovet*, however, is in the context of *third-party* claims and therefore is inapplicable to first-party claims of bad faith. Still, a strong argument for bifurcation can be made based on well-settled New Mexico authority.

In New Mexico, UM/UIM claims are governed by NMSA 1978, Section 66-5-301, NMAC 13.12.3.9, and a multitude of judicial decisions. Despite the expansive purpose that underlies New Mexico's UM/UIM law, New Mexico still recognizes that a claimant must establish legal entitlement to recover damages from the uninsured motorist as a condition precedent to recovery of UM/UIM benefits. See NMSA 1978, Section 66-5-301(A) (as amended) (expressly stating the "legally entitled to recover damages" condition precedent to recovery). New Mexico courts have expressly recognized that "a determination that the uninsured motorist is legally liable to the insured is a condition precedent to the obligation of the insurer to pay off on the policy." *Hendren v. Allstate Ins. Co.,* 1983-NMCA-129, ¶ 18, 672 P.2d 1137, 1141 (*quoting Craft v. Economy Fire & Cas. Co.,* 572 F.2d 565 (7th Cir.1978)); *see also State Farm Mut. Auto. Ins. Co. v. Maidment*, 1988-NMCA-060, ¶ 17, 761 P.2d 446, 450. Therefore, if the parties are unable to agree, questions as to the liability of the tortfeasor--including causation, comparative fault, and damages--must be resolved by litigation. *See State Farm Mut. Auto. Ins. Co. v. Barker,* 2004-NMCA-105, ¶ 14, 96 P.3d 336, 339 (providing insurer "had no obligation to pay UIM damages until the factfinder established that Barker was 'legally entitled to collect' from the underinsured motorist"); *Maidment,* 1988-NMCA-060, ¶ 17, 761 P.2d at 450. Afterall, an insured who purchased the UM coverage is in no different position than had he/she been injured by an insured motorist. *See Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC- 015, 141 N.M. 387, 156 P.3d 25 (observing that the legislative purpose behind New Mexico's Uninsured Motorist Act "was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance").

Moreover, an insurer is expressly permitted to "defend" UM/UIM claims on all issues relating to the uninsured motorist's liability and the insured's claimed damages. *See Hendren v. Allstate Ins. Co.*, 1983-NMCA-129, ¶ 18, 672 P.2d 1137, 1141; *see also Burge v. Mid-Continent Cas. Co.,* 1997-NMSC-009, ¶ 26, 933 P.2d 210, 218. In cases involving underinsured motorists, the insured must also prove that the claimed damages exceed the tortfeasor's liability coverage. *Schmick v. State Farm Mut. Auto. Ins. Co.*, 985 -NMSC- 073, ¶ 22, 704 P.2d 1092, 1098. Thus, New Mexico law supports the argument that mere disagreement concerning the value to be assigned to an insured's claimed damages alone cannot logically form the basis of a bad faith claim. Even if the ultimate value assigned to the insured's damages is higher than the insurer offered, so long as the insurer can show it had a reasonable basis for its valuation, there is no basis for a bad faith claim. Therefore, bifurcation of bad faith claims and a stay of discovery as to those claims is warranted where the alleged bad faith derives from the failure to pay based on a valuation dispute.

Jurisdictions Favoring Bifurcation

There is also strong persuasive authority from other jurisdictions that supports bifurcation of bad faith claims from underlying UM/UIM claims. Texas courts routinely sever bad faith claims from UIM claims, staying the contract and bad faith claims until the insured establishes that s/he is entitled to recover UIM damages from the insurer. *In re Am. Nat. Cty. Mut. Ins. Co.,* 384 S.W.3d 429, 436 (Tex.App.2012); *see also In re Allstate County Mut. Ins. Co.,* 447 S.W.3d 497, 501–502 (Tex.App.2014). Courts in other states have come to the same conclusion. *See State Farm Mut. Auto. Ins. Co. v. Wallace*, 743 So.2d 448, 450 (Ala.1999) (limiting an insured's entitlement until the payment becomes due by entry of judgment in the action, stipulation of the parties, or entry of default judgment against the uninsured motorist); *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 494 P.2d 552, 554 (1972) (stating that liability of an insurance company to pay the insured became fixed on the date judgment was entered against the uninsured motorist who caused the damages).

Another primary rationale for bifurcation is to further expedition and economy. In *In re United Fire Lloyds,* 327 S.W.3d 250 (Tex. App. 2010) the court held that "the insurer should not be required to put forth the effort and expense of conducting discovery, preparing for a trial, and conducting voir dire on bad faith claims that could be rendered moot by the portion of the trial relating to UIM benefits, in that to require such would not do justice, avoid prejudice, and further convenience." This is particularly true when the sole basis for the bad faith claim is a valuation dispute. Finally, bifurcation is warranted in these cases due to the distinct evidentiary issues involved in the two types of claims. In *In re Reynolds*, 369 S.W.3d 638, 652 (Tex. App. 2012), the court observed that whether the plaintiff had UM coverage and whether the tortfeasor had insurance coverage in at least the amount of the damages awarded were issues unrelated to the facts and issues pertaining to the negligence claim and severed the claims of the tortfeasor's alleged negligence and the insurer's alleged bad faith. *Id.* at 652. The first phase of a bifurcated case would involve witnesses and evidence concerning whether the insured is "legally entitled" to recover damages such as testimony of the drivers, investigating officer, accident reconstructionists, and medical care providers. In contrast, the second phase, if warranted, would involve wholly distinct issues concerning the insurer's investigation

Break It Up!

Continued from Page 16

and evaluation of the claim. There is neither a logical nor temporal relationship between the two.

Procedural Solution

Simply put, an insurer is not under a contractual duty to pay UM/UIM benefits until the claimant has established the liability and underinsured status of the other motorist. The solution is that lawsuits involving first-party bad faith failure to pay claims should be bifurcated and stayed as to the first-party insurer. The facts and issues in that underlying determination of fault and damages are distinct from the facts and issues in bad faith claims. Furthermore, any evidence regarding bad faith is irrelevant to a determination of the tortfeasor's liability and damages and therefore is inadmissible during a liability proceeding. Until a claimant has demonstrated that s/he is legally entitled to first-party benefits under the terms of his/her policy, an insurer should not be required to conduct discovery or prepare for trial regarding bad faith claims. Bifurcation should be sought zealously to level the playing field and ensure settlements are based on the merits of the claim rather than the threat of bad faith discovery. Bifurcation is especially important in the case of policy limit demands made simply for the sake of employing strong arm tactics to justify bad faith claims.

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Go Sue the Principal: High Court Extends 'Aided in Agency' Liability of Employer for Employee's Intentional Torts

By Geoffrey D. White, Esq.
Park & Associates, LLC

The New Mexico Supreme Court early last year extended the reach of a discredited agency theory that can expose employers to liability for their employees' intentional torts in the workplace. The Court's unanimous[1] holding in *Spurlock v. Townes*, 2016-NMSC-014, 368 P.3d 1213, calls into question the continuing vitality of the general principle that an employer is not vicariously liable for its employees' intentional torts because an employee who injures another is acting outside the scope of employment.

The agency theory the Court extended, known as "aided in agency" or "aided in accomplishing," was intended to extend vicarious liability to a principal where the principal's agent appears to insiders and outsiders alike to be acting within the scope of delegated authority but is not, and where a nexus exists between an act the agent is authorized to perform and the agent's tortious conduct. The theory was first set out in the Restatement (Second) of Agency, published in 1958. The Restatement (Third) of Agency, published in 2006, disavowed the theory, but not before a number of courts, including the United States Supreme Court and the Supreme Court of New Mexico, adopted the theory in forms different from what appears to have been originally intended.

Whether *Spurlock* will drastically change how plaintiffs' attorneys plead and prosecute cases involving workplace violence or other intentional torts at work remains to be seen. It seems reasonable to conclude the conscientious lawyer for plaintiffs will seek to use, and even to extend upon, the holding in *Spurlock* insofar as it could lead to monetary recovery from the employer even where the employer was not negligent in hiring, training, supervising, or retaining the tortfeasor employee. Accordingly, the defense bar should expect to see an increase in "aided in agency" arguments unless or until the Supreme Court of New Mexico definitively delineates the outer limits of the theory.

The defense practitioner who understands the theory as it seems to have been originally intended is best armed to combat attempts at misapplication. That understanding begins, as it must, at the beginning.

The Seed: The Restatement (Second) of Agency, §219(2)(d)

The Restatement (Second) of Agency created the "aided in agency" theory of liability. *Peña v. Greffet*, 110 F.Supp.3d 1103, 1116 (D.N.M. 2015). The theory is found at the end of Restatement (Second) of Agency Section 219, which outlines vicarious liability for workplace or work-related torts:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or

1 Justice Charles W. Daniels authored the opinion, which Chief Justice Barbara Vigil and Justices Petra Jimenez Maes and Edward L. Chavez joined. Justice Judith K. Nakamura did not participate.

Go Sue the Principal

Continued from Page 20

> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, ***or he was aided in accomplishing the tort by the existence of the agency relation.***

Restatement (Second) of Agency §219 (emphasis added). As the emphasized words indicate, "aided in agency" makes a principal vicariously liable for acts that are both outside the scope of employment, and also outside apparent authority. Alan J. Oxford II, *When Agents Attack: Judicial Misinterpretation of Vicarious Liability Under "Aided in Accomplishing the Tort by the Existence of the Agency Relation" and Reinstatement 3rd's Failure to Properly "Restate" the Ill-Fated Section 219(2)(d) Provision (hereafter, When Agents Attack),* 37 OKLA. CITY U. L. REV. 157, 177 (2012) (contrasting apparent authority and "aided in agency"). "Aided in agency" is not, based on a textual reading, another species of apparent authority.

A plain text, out-of-context reading of the second clause of Subsection 2(d) (the tortfeasor "was aided in accomplishing the tort by the existence of the agency relation") has an "obvious defect":

> [I]t comes close to creating strict vicarious liability for employers, and, despite purporting to be an exception, it nearly swallows the general rule that respondeat superior does not attach to intentional torts. If § 219(2)(d) cl. 2 were read literally, a creative plaintiff's lawyer could make a colorable argument for vicarious liability in almost every intentional tort case in which the tortfeasor happens to be gainfully employed. If a barista poisoned a patron's coffee, the patron could sue the coffee shop under the theory that the barista was only able to commit the tort because he or she worked for the coffee shop. If a utility worker used his uniform and credentials to get invited into a woman's home, and then proceeded to sexually assault the woman, the utility worker's agency relationship with the utility company could be said to have aided him in his sexual assault. If a drive-by shooting was committed using a company car or a police department- or security company-issued gun, then the plaintiff could name the issuing employer. Most open-endedly of all, a plaintiff might even be able to name a tortfeasor's employer in a drive-by shooting, even if the employer issued neither the gun nor the car, if the tortfeasor bought the gun or the car using his or her salary – which, after all, he or she obtained by virtue of the employment (i.e., agency) relationship.

Peña, 110 F.Supp.3d at 1118. Accordingly, the practitioner must look beyond the plain text to other indicia of the American Law Institute's intent regarding Section 219(2)(d).

Section 219's commentary gives the following two examples of where the "aided in agency" theory might apply: "[T]he servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons, [or where] the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position." Restatement (Second) of Agency §219 cmt. e. Significantly, in the view of one scholar, the comments "provide no examples of Aided in Accomplishing creating vicarious liability for intentional physical torts." Oxford, *When Agents Attack*, 37 OKLA. CITY U. L. REV. at 182. "The absence of examples does not preclude such liability, but the Comment's reference to vicarious liability for physical torts under the apparent authority doctrine" – and not under the "aided in agency" theory – "further supports the position that the ALI did not anticipate vicarious liability for physical torts" under its newly articulated agency theory. *Id.*

"It is evident the Reporter [of the Restatement (Second) of Agency] intended this distinction by his further reference to Restatement section 261 following the telegraph operator example." *Id.* at 184 (citing Restatement (Second) of Agency §219 cmt. e). "Section 261 deals with a principal's liability for an agent's fraud committed against a third party. Comment (a) explains that liability exists because 'the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction *seems regular on its face* and the agent *appears to be acting in the ordinary course of the business confided to him*." *Id.* at 184-85 (citing Restatement (Second) of Agency §261 cmt. a) (emphasis in original). In practice, an employee's intentional physical torts seldom will seem regular on their face, and an employee rarely will appear to be acting in the ordinary course of his or her business during the commission of an intentional physical tort. Accordingly, the "aided in agency" theory appears designed for one or two exceptionally rare fact patterns.

A closer look at the examples in Section 219's commentary helps to clarify the intended scope of the "aided in agency" theory. "When a telegraph operator sends a false message, the telegraph operator is doing the very job to which he is assigned – that of sending telegrams. Because the telegraph operator's job is to send messages, this 'position as an agent' permitted and facilitated the false message." Oxford, *When Agents Attack*, 37 OKLA. CITY U. L. REV. at 184. Likewise, "the store manager is able to cheat customers because the manager is performing the exact task to which he is assigned – that of charging customers and giving change – and in doing so appears to be acting in the ordinary course of the business confided to him." *Id.*

at 185 (internal punctuation omitted).

"In both of these examples, vicarious liability attaches not because either agent 'purported to act or to speak on behalf of the principal' and not because the injured party reasonably 'reli[ed] upon apparent authority.' " *Id.* (citing Restatement (Second) of Agency §219(2)(d)). "Vicarious liability attaches because, by all appearances to not only the third party but also to the principal and all disinterested observers, the telegraph operator's action appears 'regular on its face'; by all appearances, the store manager 'appears to be acting in the ordinary course of the task the principal assigned.' " *Id.* (citing Restatement (Second) of Agency §261 cmt. a). Again, an intentional physical tort, such as battery, will seldom if ever satisfy these requirements. Moreover, where an employee's authorized act might satisfy these requirements – say, a bouncer using too much force when expelling a nightclub patron – the third party frequently, if not always, will have recourse against the employer under the theory of negligent hiring, training, supervision, or retention, rendering the "aided in agency" theory superfluous.

Instead, the "aided in agency" theory appears designed to protect a third party who wrongfully, but reasonably, relies on objective indicia of an employee's agency relationship where no evidence exists of negligence on the employer's part:

> If a principal employs an agent to serve as a telegraph operator, and if that agent actually performs the duties of a telegraph operator, the purported sender – as well as the rest of the world – should be entitled to a reasonable belief that any telegraph messages sent from the telegraph office are legitimate. Because the store manager's assigned duty is to correctly charge customers and to correctly make change at the register, the world should be entitled to rely upon the agent's representation of the price of the purchased goods and return of the correct change. The unknown or undisclosed principal should not be able to escape liability simply because the injured third party did not know of the existence of the agency relationship at the time of the agent's tortious conduct.
>
> For vicarious liability to attach to the principal, Aided in Accomplishing requires something more than the mere existence of the agency relation. The examples make clear that there must be a nexus between the act authorized and the act committed such that to the principal and to the casual observer it appears that the agent acts within the scope of employment when the agent does not – that to all, including the principal, the agent's act appears "regular on its face."

Oxford, *When Agents Attack*, 37 OKLA. CITY U. L. REV. at 186-87 (internal citations omitted).

Importantly, the "aided in agency" theory was not designed to hold an employer vicariously liable when the third party has no reason to suppose the tortfeasor's acts were explicitly or implicitly authorized:

> When a dentist rapes or sexually assaults his patients, neither the principal nor the victim reasonably believes the dentist does so for any purpose other than the dentist's own. No one can look at such an assault and view the assault as within the scope for which the dental corporation employed the dentist. … In no way does the sexual assault "appear regular on its face" or appear to be "an act in the ordinary course of business." … Vicarious liability attaches to the principal under Aided in Accomplishing even when the third party has no reasonable belief of apparent authority, but only if a nexus exists between the act authorized *and* act committed[,] and if the act committed appears regular on its face.

Id. at 187. Thus, where the nexus does not exist, the third-party victim who wishes to recover from the tortfeasor's employer must make one of the other showings allowed by the Restatement (Second) of Agency Section 219, such as ratification of the tortious conduct, intentional torts by the employer, or negligent hiring, training, supervision, or retention. The "aided in agency" theory as it was originally intended does not apply where the nexus is missing.

"It seems obvious that the *Restatement* did not intend to open up virtually limitless vicarious liability by way of a short, unexplained, and uncited clause pinned – almost as an afterthought – to the end of a section devoted primarily to much theoretically narrower grounds of vicarious liability." *Peña*, 110 F.Supp.3d at 1119. Nonetheless, courts – including the United States Supreme Court – have applied the theory in ways that start the common law down the road to replacing limited employer vicarious liability for employee intentional torts with employer strict liability in tort. Thus, it falls to the civil defense bar to ensure the courts, having sown the wind of expanded employer vicarious liability, do not reap the whirlwind of employer strict liability.[2]

The Flower: The Twin SCOTUS Cases of *Ellerth* and *Faragher*

The United States Supreme Court adopted a version of the "aided in agency" theory to make employers

2 "For they sow the wind, and they shall reap the whirlwind." Hosea 8:7.

vicariously liable for workplace sexual harassment committed by employee supervisors acting outside the scope of employment. The Court did not adopt the theory wholesale into the common law, however. "The Supreme Court's cases are as much about modifying general agency principles for use in the Title VII context as they are about doing a descriptive, retrospective analysis of the common law of agency. They did not necessarily alter what aided-in-agency means, but, rather, set forth the manner in which the aided-in-agency theory should apply in the Title VII context." *Peña*, 110 F.Supp.3d at 1121. As such, a compelling argument could be made that "aided in agency" ought to be confined to the Title VII context, and only in its modified form.

The Court's modified formulation occurred in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998). *Ellerth* concerned a sales employee subjected to threatening and unwanted sexual advances by a midlevel manager. 524 U.S. at 747, 118 S.Ct. at 2262. The employee suffered no adverse, tangible job consequences for rejecting the manager's advances, however. 524 U.S. at 748, 118 S.Ct. at 2262. *Faragher* involved a female lifeguard subjected to uninvited and offensive touching, lewd remarks, and disparaging comments about women by her male supervisors. 524 U.S. at 780-82, 118 S.Ct. at 2280-81. The supervisors' conduct was not authorized by, and was contrary to, the employer's policies. *Id.* Each case required the Court to determine whether the employee could hold the employer liable for supervisor conduct that occurred during working hours but was unauthorized by the employer and beyond the supervisor employees' scope of employment. The Court answered the question in the affirmative.

> Each opinion contains the following summary paragraph announcing the holding:
>
> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence[.] The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 762-63, 118 S.Ct. at 2269, *Faragher,* 524 U.S. at 807-08, 118 S.Ct. at 2292-93. "In a nutshell, these decisions limit the aided-in-agency theory's applicability in two important ways: (i) the theory applies only to supervisors' acts against subordinates, and not to coworkers-on-coworker torts …; [and] (ii) vicarious liability is unrebuttable when the supervisor commits a 'tangible employment action' – a firing, a passing-over for promotion, or an undesirable reassignment – but is subject to an affirmative defense when the supervisor simply makes the employee uncomfortable[.]" *Peña*, 110 F.Supp.3d at 1121.

In reaching its holding, the Court was mindful that "aided in agency" could be read so broadly as to eliminate respondeat superior. "In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. … The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself." *Ellerth*, 524 U.S. at 760, 118 S.Ct. at 2268. The Court found that "something more" in the power supervisors wield over employees, and the consequences that result from using that power wrongfully. "[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided in the agency relation." *Id.* 524 U.S. at 763, 118 S.Ct. at 2269. "[W]e have already noted some examples of liability provided by the Restatement itself, which suggest that an affirmative misuse of power might be required." *Id.* at 805, 118 S.Ct. at 2291. Thus, liability on the employer under this version of "aided in agency" is based primarily (if not wholly) on the employer creating a supervisor-employee power imbalance that exposes the employee to victimization by the supervisor.[3]

"The opinions hinge heavily on Title VII-specific policy considerations, getting deep into the weeds of the

3 Why this approach needed to be based on "aided in agency" rather than negligent supervision is not immediately apparent to this author.

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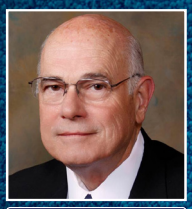

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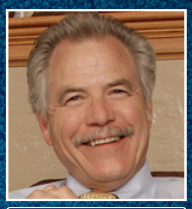

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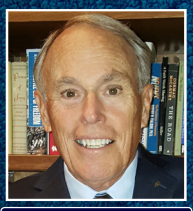

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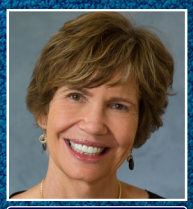

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administrative scheme and Congress' desire to encourage companies to adopt anti-harassment policies[.]" *Peña*, 110 F.Supp.3d at 1120. Indeed, it does not defame the Supreme Court to call the opinions purpose-directed, insofar as Congress "left it to the courts to determine controlling agency principles in a new and difficult area of federal law." *Ellerth*, 524 U.S. at 751, 118 S.Ct. at 2264. Viewed from this perspective, "aided in agency" serves as a judicial rationale for an outcome Congress likely, if not clearly, intended Title VII to accomplish.[4] That the Court intended to restrict the theory to the Title VII context is a logical conclusion, but by no means a mandatory one, given that the Court did not forbid application of the theory outside Title VII.

The Progeny: *Ocana v. American Furniture Company*

In 2004, the Supreme Court of New Mexico incorporated the "aided in agency" theory into New Mexico common law via *Ocana v. American Furniture Company*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58. *Ocana* involved allegations of workplace sexual harassment. 2004-NMSC-018, ¶ 25. The plaintiff alleged the general manager of her retail store sexually harassed her in a variety of ways, including staring at her breasts, touching himself suggestively, and on one occasion rubbing his clothed, erect penis against her. *Id.* She sued the manager and the employer, alleging the torts of assault, battery, and intentional infliction of emotional distress against the manager. *Id.* ¶ 7. She alleged the same causes of action against the employer on a vicarious liability theory. *Id.* She also accused the employer of sexual harassment under a hostile work environment theory, in violation of Title VII and the New Mexico Human Rights Act, NMSA 1978, §§28-1-1 to -14. *Id.*

The case came directly to the Supreme Court after the district judge granted summary judgment in favor of the defendants on all counts of the complaint. *Id.* ¶ 2. The Court adopted the *Faragher* and *Ellerth* standard for determining employer liability for supervisor sexual harassment under the NMHRA. *Id.* ¶ 26. The Court also adopted what appeared to be an unmodified form of "aided in agency" in addressing the employer's potential liability for the manager's alleged intentional torts. *Id.* ¶ 31. The Court's analysis was somewhat cursory, perhaps because it concluded the plaintiff had not developed sufficient facts to hold the employer vicariously liable under the theory. *Id.* ¶¶ 31-32.

> The analysis, with some parentheticals excluded, was as follows:
>
> We do not believe that it would be a radical departure for this Court to adopt the aided-in-agency theory of vicarious liability. New Mexico courts have routinely relied upon the Restatement (Second) of Agency in discussing issues of respondeat superior. … Additionally, adopting the aided-in-agency theory would further the policies that underlie tort law.[5]…
>
> Consequently, the question that we must decide is whether [the plaintiff] presented sufficient evidence showing that [the defendant]'s supervisory authority aided him in the commission of his torts. Employees with such authority have been empowered by the employer to make decisions affecting subordinate employees. It is this authority, bestowed by the employer, that gives the supervising employee the ability to injure the subordinate employee. In this sense, the supervising employee is "aided-in-agency." *See* Restatement (Second) of Agency, §219(2)(d) cmt. e (explaining that the basis for the aided-in-agency theory is that the employee "may be able to cause harm *because of his [or her] position as agent*" of the employer (emphasis added). Here, [the plaintiff] failed to present any evidence showing that [the defendant]'s conduct occurred as a result of an abuse of his supervisory status. Since there is no evidence showing that [the defendant] was able to commit his alleged acts by virtue of his supervisor status, summary judgment on this claim was proper.
>
> *Id.*

In so holding, the Court "retained an important limitation on the theory from the Title VII context: the tortfeasor must be the plaintiff's supervisor, and not merely a coworker, for the employer to be held vicariously liable." *Peña*, 110 F.Supp.3d at 1124. This is so because the supervisor-employee relationship involves the same "something more" the United States Supreme Court required in *Ellerth* and *Faragher* – the power to harm the employee, not merely the physical proximity an employment relationship usually provides.

The Court did not discuss whether "aided in agency" or "aided in accomplishing" would apply outside the context of sexual harassment in employment. For many years, no New Mexico courts addressed the theory in a published opinion. *See, Peña*, 110 F.Supp.3d at 1121-22, and 1122 n.10. Finally, in 2016, the Supreme Court of New Mexico revisited "aided in agency," and it did so outside the sexual harassment context.

4 Whether the Court could have accomplished the same goal more elegantly by declaring failure to adopt some type of antiharassment plan prima facie evidence of negligent supervision is beyond the scope of this article.

5 "[I]n *Ocana* we adopted the Restatement's aided-in-agency theory as consistent with the policies underlying New Mexico tort law that favor compensation of an injured victim, redistribution of economic loss, and deterrence of unreasonable and immoral conduct." *Spurlock*, 2016-NMSC-014, ¶ 14.

Go Sue the Principal

Continued from Page 25

The Second Harvest: *Spurlock v. Townes*

The Supreme Court of New Mexico's most recent discussion of the "aided in agency" theory arose by way of a question certified from the United States Court of Appeals for the Tenth Circuit. *Spurlock*, 2016-NMSC-014, ¶ 1. The case was before the Tenth Circuit on post-trial motions. *Id.* ¶ 10. A jury of the United States District Court for the District of New Mexico found a private prison operator and its employee warden liable for negligent supervision of a male guard who pleaded guilty to raping three female inmates while on duty. *Id.* ¶¶ 2-7. The jury found the warden and the prison operator negligently supervised the guard as to the claims by two of the three plaintiffs. *Id.* ¶ 7. The jury also found those two plaintiffs negligent. *Id.* ¶ 9. The jury awarded each plaintiff compensatory and punitive damages. *Id.* ¶ 8. The jury compared the negligence of the prison operator and the warden to the negligence of the two inmates involved in the negligent supervision cause of action and reduced the final compensatory damages award accordingly. *Id.* ¶ 9. The jury also awarded all three inmates compensatory and punitive damages against the guard based on his intentional torts, and these damages were not subject to comparative fault. *Id.*

> The Tenth Circuit certified the following question to the Supreme Court of New Mexico:
>
> When an inmate is sexually assaulted by a corrections officer, does New Mexico recognize the affirmative defense of comparative fault – permitting the comparison of the correctional facility/employer's alleged negligence with the alleged fault of the inmate victim – for the purpose of reducing the amount of a judgment entered on the inmate's state-law claim of negligent supervision of the tortfeasor-officer by the employer?

Id. ¶ 10. The Supreme Court did not answer the Tenth Circuit's question, however. Instead, it reformulated the question pursuant to Rule 12-607(C)(4) NMRA and addressed the "aided in agency" theory instead. *Id.* ¶ 11.

> The Court stated its reformulated question and answer thus:
>
> [W]e limit our answer to the context of this case where a corrections officer employed by a privately run prison sexually assaulted inmates in the facility while on duty. Within this narrow scope, we hold that under New Mexico law [the private prison operator and warden] are vicariously liable for all compensatory damages caused by the corrections-officer employee when he was aided in accomplishing his assaults by his agency relationship with [the prison operator and warden] who were his employers. No affirmative defense of comparative fault is available in this context because fault attributed to intentional tortfeasor [prison guard] is not subject to reduction based on comparative negligence and because no fault on the part of the vicariously-liable [prison operator and warden] is required.

Id. Further, the Court "decline[d] to determine the availability of an affirmative defense alleging Plaintiffs' comparative fault in a claim of liability for negligent supervision of an intentional torteasor because the vicarious liability of [the operator and warden] makes this determination unnecessary." *Id.* ¶ 12.

In explaining its holding, the *Spurlock* Court first revisited its holding in *Ocana*, explaining what it did – and what it did not do. "[W]e adopted the aided-in-agency theory in our consideration of the plaintiff's common-law claims for the intentional torts of assault, battery, and intentional infliction of emotional distress, and we did not limit the rule to the sexual harassment context." *Spurlock*, 2016-NMSC-014, ¶15. Thus, the Court rejected one obvious means of limiting the "aided in agency" theory's applicability.

The Court went on to address some of the commonly accepted problems with the theory. "We acknowledge the concerns of other courts 'that aided-in-agency as a theory independent of apparent authority risks an unjustified expansion of employer tort liability for acts of employees.' *Id.* ¶ 16 (*citing Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199 (Alaska 2009)). "We agree that the theory should not apply to all situations in which the commission of a tort is facilitated by the tortfeasor's employment." *Id.* Thus, the Court limited its "adoption of aided-in-agency principles extending vicarious liability to 'cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood.' " *Id.* ¶ 17 (*citing Ayuluk*, 201 P.3d at 1199). In addition, the *Spurlock* Court ruled that the trial court, not the jury, must determine whether the "aided-in-agency" theory applies to the facts of any given case. *Id.*

The Court explained that its new carve-out from traditional respondeat superior principles is needed in New Mexico law because "when an employer vests an employee with power over another person – whether the other person is a subordinate employee or a non-employee third party, like an inmate – the employer enables torts that might not otherwise happen – torts that are, essentially, an abuse of that power." *Spurlock,* 2016-NMSC-014, ¶ 17 (*citing Peña*, 110 F.Supp.3d at 1135). According to the Court, "[t]here is danger inherent in granting one person extraordinary power over another, and the granting of that power should, thus, carry with it some accountability." *Id.*

Go Sue the Principal

Continued from Page 26

Applying its refined "aided in agency" theory to the facts of *Spurlock,* the Court concluded the prison guard "was aided in accomplishing his assaults by his status as a corrections officer that afforded him substantial power and control over Plaintiffs." *Id.* ¶ 18. The Court noted as a general matter that corrections officers often "are vested with extraordinary authority over inmates, substantially more than the authority of police officers over non-incarcerated citizens." *Id.* In addition, the acknowledged rapist in *Spurlock*" had the authority to enter Plaintiffs' residential block unescorted and unannounced, to remove Plaintiffs from their cells or from their work stations, to move Plaintiffs around the facility including to out-of-the-way areas, and to exercise his authority at any hour of the day or night, and to bestow favors or impose sanctions for inmate behavior." *Id.* ¶ 20. Further, inmates under the guard's authority "were told to follow the directions of the corrections officers quickly, without question or argument, and feared retaliation if they did not obey[.]" *Id.* Given these facts and inferences, the Court concluded the guard was aided in accomplishing his torts by the existence of the agency relationship with his employer and supervisor. *Id.*

Spurlock in particular, and the expansion of "aided in agency" in general, leave themselves open to principled criticism. In *Spurlock*, the Court achieved a result – a full monetary recovery to three rape victims preyed on by one of their state-sanctioned captors – that feels good, and likely represents good public policy. This type of public policy declaration might be better suited to the Legislature, however, given that it was the Legislature, and not the Court, that authorized private prisons in the first instance. The Court is obliged to answer questions squarely presented to it, of course, but it did not do so in *Spurlock*. Rather than answer the question presented, the Court answered a question it chose to pose to itself. Although reformulating the question is permitted, and at times might be necessary, the Court's decision to do so in *Spurlock* leaves it open to criticism that went out of its way to reinforce its oft-stated policy of rewarding deserving plaintiffs[6], and that it did so at the expense of clarity and consistency in New Mexico law.

In addition, while *Spurlock* does not explicitly declare that private prison operators now are strictly liable for the intentional torts of their employees, it also does not rule out the possibility. As a practical matter, until the law is better clarified or changed, it appears private prison operators in New Mexico should conduct their operations as though they are strictly liable for, at a minimum, sexual assaults on inmates by corrections officers in the officers' workplace. This is so even as the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27, immunizes the state and its prison guards from tort liability. *See*, NMSA 1978, §41-4-4(A). The *Spurlock* Court offered no explanation for this inconsistency.

Moreover, by adopting "aided in agency" in the private prison context, the *Spurlock* Court created a perverse incentive for inmates to seek transfer to privately operated prisons. At private prisons, prisoners now are nearly assured a payday if sexually victimized by their state-sanctioned captors, whereas they could (and often will) recover nothing if victimized at a state-operated penal institution. Is this a result the Legislature intended when it authorized the privatization of prison services and operations? Is this an outcome the Legislature would choose to write into statute? Is encouraging inmates to prison-shop good public policy?

The Pruning Shears: Principled Opposition to Employer Strict Liability

The "aided in agency" theory in its intended form applied, if at all, to situations so rare and hard to describe that even its chief proponent, the Reporter of the Restatement (Second) of Agency, had difficulty explaining the theory to fellow legal scholars. Oxford, *When Agents Attack*, 37 OKLA. CITY U. L. REV. at 176-82. Thus, attorneys should not be surprised by the difficulty the theory has posed to the bar and the courts. Indeed, the appealingly straightforward language of the theory – the tortfeasor "was aided in accomplishing the tort by the existence of the agency relation" – may only make its misapplication more likely.

"Aided in agency," however, is not straightforward. It is not another flavor of apparent authority, and its reach does not extend far:

> Aided in Accomplishing cannot create liability where liability already exists under apparent authority. Aided in Accomplishing also cannot encompass all situations where apparent authority does not exist, or together apparent authority and Aided in Accomplishing create absolute liability. If Restatement 2nd intended that vicarious liability be strict liability, then there would be no need to distinguish between acts within or outside the scope of employment. Accordingly, if Aided in Accomplishing stands alone, it must create principal vicarious liability for agent acts that are outside apparent authority, but that also fall short of creating strict liability.

Oxford, *When Agents Attack*, 37 OKLA. CITY U. L. REV. at 177. This point is key, because the theory "nearly swallows the general rule that respondeat superior does not attach to intentional torts" if courts do not limit it in a principled way, as the **Peña** court made clear. 110 F.Supp.3d at 1118.

Today, in the wake of *Ellerth, Faragher, Ocana*, and

6 *Supra*, n.5.

Continued from Page 27

Spurlock, the "aided in agency" theory as it exists in New Mexico applies to a wider swath of conduct than the framers of the theory appear to have originally intended. The defense bar is as likely to succeed at returning "aided in agency" to its original confines as it is to squeeze toothpaste back into the tube. Civil defense lawyers can, however, resist efforts by plaintiffs' lawyers to squeeze more exceptions to bedrock respondeat superior principles from "aided in agency." They can do so by exposing the consequences of misapplying the "aided in agency" theory and simultaneously encouraging courts to hold the "aided in agency" theory to the confines of the cases that have adopted it.

What are those confines? First, as a matter of black-letter federal and state law, a modified form of "aided in agency" applies to workplace sexual harassment by supervisors against subordinates. The theory, however, should apply only as narrowed by *Ellerth, Faragher, Ocana*, and their progeny, and no further. Importantly, the modified form of "aided in agency" in the workplace sexual harassment context, whether under Title VII or the NMHRA, requires the supervisor to have genuine power and control over the employee, and he or she must abuse that authority in order to sexually harass the employee. Absent all these elements, traditional respondeat superior principles should apply to employee intentional torts.

Second, as articulated in *Ocana*, but also as limited by the specific holding in *Ocana*, the "aided in agency" theory sometimes might apply to intentional torts in the workplace by supervisors against subordinates that arise out of or are related to sexual harassment. Again, however, a mere supervisor-employee relationship is not sufficient. The supervisor must have significant power and control over the employee's work life, the power and control must be granted the supervisor by the employer, and the supervisor must abuse the authority granted by the employer in order to commit one or more intentional torts. As above, absent all these elements, traditional respondeat superior principles should apply to employee intentional torts.

Third, as articulated in *Spurlock,* but also as limited by the specific holding in *Spurlock,* "aided in agency" principles might apply to intentional torts arising from sexual misconduct by a private prison guard against inmates under his or her charge. The "aided in agency" theory should only apply, however, where the guard was given extraordinary authority over the inmate by his or her employer, a private prison operator; and where the guard exercised that delegated power over the inmate by limiting or specifying the inmate's movements, manipulating the inmate's housing, work, or activity schedules, and granting or denying the inmate favors or favored treatment. Absent all the limiting principles and specific abuses of power articulated in *Spurlock*, traditional respondeat superior principles should apply to employee intentional torts.

Ellerth, Faragher, Ocana, and *Spurlock* involve sexual misconduct by supervisors, but the conduct the "aided in agency" theory punishes in each case is the employer's delegation of significant power and control over a subordinate to a supervisor who abuses that power. Theoretically, the "aided in agency" theory could be correctly applied under the confines of existing law to a supervisor's abuse of power that does not involve sexual misconduct. Until that fact pattern arises, however, the defense practitioner may wish to emphasize the sexual misconduct thread that runs through the reported cases as another means of creating a distinction between the "aided in agency" cases and those that should reflect traditional respondeat superior principles.

Finally, in attacking "aided in agency" arguments, the defense practitioner ought to emphasize New Mexico's comparative fault regime. If an employer negligently hired, trained, supervised, or retained a tortfeasor employee (or engaged in other conduct that would result in direct liability), the employer should be held to account upon proper proof by the victim plaintiff. Courts should not permit plaintiffs to rely on vicarious liability when the employer is directly liable, and could be proved so. As such, the defense bar might encourage New Mexico's courts to view the "aided in agency" theory as a disfavored shortcut, much in the same way New Mexico's courts skeptically view summary judgment. After all, if New Mexico law favors giving plaintiffs the opportunity to prove their cases, New Mexico law should not be hypocritical about it by allowing certain favored plaintiffs to seek and obtain judgments against employers the plaintiffs have not earned from the trier of fact.

The Conclusion: Expect 'Aided in Agency' to Sprout Like a Weed

In conclusion, New Mexico defense practitioners should prepare for the plaintiffs' bar to plead and argue the "aided in agency" theory with increasing frequency, because the theory allows plaintiffs to recover from an employer for an employee's intentional torts without proving any negligence, ratification, or intentional misconduct by the employer. Helpfully, the courts are aware of many of the flaws in the theory and have attempted to confine it. When confronted with "aided in agency" arguments, the defense bar should highlight the theory's flaws, the courts' limitations on the theory to address those flaws, and the lack of need for the theory where facts would plausibly support an employer's direct liability. Consistent, articulate, and principled opposition by the defense bar might be enough to confine the discredited "aided in agency" theory to its present boundaries in New Mexico.

NMDLA Civil Case Summaries
July 2016 - August 2016

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Statute of Limitations

NM Bulletin – December 21, 2016
Vol. 55, No. 51

Damon v. McGill,
2016-NMCA-083, 381 P.3d 679.
No. 33,775 (filed July 12, 2016)

The issue presented to the New Mexico Court of Appeals was whether a homeowners' claims were barred by the ten-year statute of repose. On December 22, 2000, Vista del Norte Development, LLC ("Vista") entered into an agreement with the City of Albuquerque to develop a subdivision. As part of the agreement, Vista was required to install and complete "to the satisfaction of the City" specific infrastructure improvements to the subdivision. On May 1, 2001, Vista and Stillbrooke Homes, Inc. ("Stillbrooke") entered into a purchase agreement where Stillbrooke purchased the subdivision from Vista and built homes on the subdivision. On February 26, 2002, the City issued Vista a Certificate of Completion and Acceptance certifying that Vista constructed the infrastructure improvements to the December 22, 2000 agreement. On February 2004, Brian and Janelle McGill purchased a house built by Stillbrooke, and on June 11, 2006, Jason and Michelle Damon purchased the home from the McGills.

On December 7, 2012, the Damons filed suit claiming structural failures to their property. Vista filed a Motion for Summary Judgment arguing the Damons' claims were barred by the ten-year statute of repose pursuant to NMSA 1978, § 37-1-27. Specifically, Vista argued that under NMSA 1978, § 37-1-27 the statute of limitations began from the date of "substantial completion" of a physical improvement to real property, which was when the City issued the Certificate of Completion and Acceptance on February 26, 2002. The district court granted the Motion, and the Damons appealed.

In affirming the district court, the Court of Appeals looked into the language of NMSA 1978, § 37-1-27, which defines "date of substantial completion" as (1) the date when construction is sufficiently completed so the owner can occupy or use the improvement for the purpose for which was intended, (2) the date when the owner occupies or uses the improvement, or (3) the later of the date established by the contractor as the date of substantial completion. The Court of Appeals determined that the City's issuance of the Certificate of Completion and Acceptance was prima facie evidence of substantial completion of the infrastructure improvements. Because the Damons filed suit on December 7, 2012, more than ten years after issuance of the Certificate of Completion and Acceptance, the suit was barred under NMSA 1978, § 37-1-27.

Continued from Page 29

Judgments

NM Bulletin – December 28, 2016
Vol. 55, No. 52

Marquez v. Larrabee,
2016-NMCA-087, 382 P.3d 968.
No. 33,370 (filed July 21, 2016)

Henry Marquez sued Frank Larrabee and others arguing the house he bought suffered from construction defects and there was a violation of warranty made to him under the purchase agreement. Larrabee and others were represented by Peter Everett, who at the time was suffering from numerous health issues which allegedly prevented him from discharging his responsibilities as counsel. Mr. Everett also filed frivolous motions and other pleadings, refused to participate in discovery, and failed to attend scheduled hearings. Mr. Marquez filed a Motion for Default Judgment for Larrabee's failure to comply with an Order to Compel. Mr. Everett and his clients failed to attend the hearing on the motion. The district court granted the Motion, and held a second hearing to determine damages. Mr. Everett and his clients failed to attend the damages hearing, and the district court awarded damages. Mr. Everett filed a motion to set aside the default judgment, and explained to the Court that he was in intensive care, however the Court denied the Motion. Larrabee and others appealed.

In reversing the district court, the Court of Appeals analyzed Rule 1-060 NMRA on whether Mr. Everett's actions were considered "gross negligence" showing exceptional circumstances and permitting relief from the Default Judgment. The Court looked to *Resolution Tr. Corp. v. Ferri,* 1995-NMSC-055, 120 N.M. 320, 901 P.2d 738, where the New Mexico Supreme Court held that mere attorney negligence does not constitute exceptional circumstances for purposes of applying Rule 1-060, and a claimant's recourse is to sue the attorney for malpractice. However, *Ferri* also stated that if an attorney's failures rise to the level of gross negligence, the district court may find exceptional circumstances to reopen the Default Judgment. The Court also looked at *Meiboom v. Watson*, 2000-NMSC-004, 128 N.M. 536, 994 P.2d 1154, which modified the *Ferri* rule adding two additional factors for the moving party to establish: (1) the moving party had a legitimate claim or defense and (2) there is little, if any, likelihood of prejudice that reopening the judgment would visit on the judgment creditor. The Court of Appeals concluded that *Ferri* and *Meiboom* provide district courts wide latitude when reopening default judgments based on allegations of gross negligence by an attorney.

The Court of Appeals held that although the records support gross attorney negligence, there was no evidence of Mr. Larrabee's personal acquiescence with his attorney's conduct, or whether they were aware of their attorney's gross negligence. The Court of Appeals remanded the case and required the district court to hold an evidentiary hearing on Mr. Everett's actions and the conduct of the parties.

Employment Law/Claim Preclusion

NM Bar Bulletin – December 28, 2016
Vol. 55, No. 52

Armijo v. City of Espanola,
2016-NMCA-086, 382 P.3d 957,
cert. denied, September 22, 2016 (No.S-1-SC-36064)
No. 34,083 (filed July 13, 2016)

Marvin Armijo was hired by the City of Espanola as a police officer. He was terminated after his employer determined he failed to report and repay an overpayment. Mr. Armijo appealed to the City's grievance board, and the grievance hearing officer upheld the decision. Mr. Armijo appealed that decision to the district court, and filed a second suit against the City for breach of contract. He later amended his complaint in the second suit for breach of implied contract, and breach of the covenant of good faith and fair dealing. The City filed a motion to stay the second proceeding pending the appeal on the first claim. The court denied the motion, and the district court entered judgment on the breach of contract claim. Mr. Armijo filed a motion for reinstatement in the pending administrative appeal arguing that the district court's judgment in the contract claim was binding in the administrative appeal under the doctrine of issue preclusion. The City appealed.

In reversing the district court, the Court of Appeals reversed and held that Mr. Armijo's contractual claim was barred by claim preclusion. The purpose of claim preclusion is to protect individuals from multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent judgment. The party asserting claim preclusion must establish there was a final judgment in the earlier action, the earlier judgment was on the merits, the parties in the two suites are the same, and the cause of action is the same in both trials. The Court of Appeals held that the grievance board's decision is considered a final judgment, and the issue was whether Mr. Armijo had full and fair opportunity to litigate issues arising out of his claims.

The Court of Appeals noted that the hearing officer found that Mr. Armijo's termination was for cause, and the questions addressed by the hearing officer overlapped with the questions addressed in Mr. Armijo's contract action because their disposition requires an examination of the facts surrounding Mr. Armijo's termination. The Court

Continued from Page 30

of Appeals concluded that Mr. Armijo's second complaint arose from the same transaction, and therefore the claim was barred because he had a full and fair opportunity to litigate his contract claim in the grievance proceeding. The Court of Appeals also went on to state that Mr. Armijo could have and should have brought all of his claims related to his termination before the hearing officer in the interest of judicial economy.

Sovereign Immunity

NM Bar Bulletin – January 18, 2017
Vol. 56, No. 3

Milliron v. Cty. of San Juan,
2016-NMCA-096, 384 P.3d 1089.
No. 34,347 (filed August 4, 2016)

Sherry Milliron was traveling on Highway 550 in Bloomfield, New Mexico where she struck a pedestrian, Jasper Lopez, an intoxicated pedestrian. Before the accident, Mr. Lopez was released by Deputy Richard Stevens after receiving an emergency call related to a traffic accident. Ms. Milliron filed suit against Deputy Stevens and San Juan County for personal injury and property damage. Ms. Milliron also alleged that Deputy Stevens' negligence waived immunity under the New Mexico Tort Claims Act. Deputy Stevens and San Juan County filed a Motion to Dismiss the claims, and the district court granted the Motion.

In affirming the district court's decision, the Court of Appeals looked at the New Mexico Tort Claims Act, specifically that tort liability for governmental entities is waived with respect to law enforcement officers acting within the scope of their duties. Even if a third party is the direct cause of an injury, the immunity from tort liability for governmental entities is waived if a plaintiff demonstrates that the defendants were law enforcement officers acting within the scope of their duties, and that the plaintiff's injuries arose out of either a tort enumerated in the statute governing waiver of immunity with respect to law enforcement officers acting within the scope of their duties or a deprivation of a right secured by law.

The Court of Appeals looked at Ms. Milliron's Complaint, where the only tort enumerated under the Tort Claims Act was battery. However, the Court concluded that Mr. Lopez did not commit battery against Ms. Milliron and therefore Deputy Stevens did not waive his immunity from tort liability. The injury was not a substantially certain outcome of pedestrian's conduct of walking on the highway and therefore battery could not inferred.

The Court of Appeals next addressed Ms. Milliron's argument that her injuries resulted from a deprivation of a statutory right under the Detoxification Reform Act and the Motor Vehicle Code. The Court held that the Legislature did not enact a criminal statute prohibiting public intoxication, and therefore Mr. Lopez was not in violation of statute simply because he was intoxicated. Because Deputy Stevens was under no statutory obligation to detain or transport Mr. Lopez under the Detoxification Reform Act, his decision not to transport him cannot be considered a deprivation of a statutory right. Moreover, Deputy Stevens lacked the statutory duty to place Mr. Lopez under arrest for violation of the Motor Vehicle Code. Therefore, the dismissal of Ms. Milliron's claim was proper.

Employment Law

NM Bar Bulletin – January 18, 2017
Vol. 56, No. 3

Noice v. BNSF RR Co.,
2016-NMSC-032, 383 P.3d 761.
No. S-1-SC-35198 (filed August 18, 2016)

The issue presented to the Supreme Court of New Mexico was whether the Federal Railroad Safety Act ("FRSA") precluded an excessive-speed claim under the Federal Employee's Liability Act ("FELA"). Lenard Noice was killed in the course and scope of his employment with BNSF Railway Company ("BNSF"). Mr. Noice's Estate filed suit against BNSF arguing that BNSF negligently permitted the train to operate at an excessive-speed. BNSF moved for Summary Judgment arguing that the FELA excessive speed claim was precluded by the FRSA. The district court granted the Motion, and the Estate appealed. The Court of Appeals reversed the district court concluding that FRSA does not preclude a FELA excessive-speed claim.

In affirming the Court of Appeals, the Supreme Court of New Mexico held that the FRSA does not mention the FELA, and if Congress intended FRSA to preclude FELA claims, Congress presumably would have done so. Moreover, because Congress included in FRSA an express provision pre-empting only state law and state-law claims, it was inferred that FRSA did not intend to preclude FELA claims or other federal causes of action.

The Court addressed BNSF's argument that permitting the Estate's FELA excessive-speed claim to proceed would undermine the uniformity of these standards and derail FRSA's core principle. The Court held that permitting the Estate's FELA claims would enhance the overall safety of railroad operation. They also held that the FELA claims may shed light upon potentially dangerous circumstances that regulators might otherwise not identify or that are less amenable to uniform, regulatory solutions. Allowing FELA claims like those from the Estate would be consistent with

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Continued from Page 31

the congressional design to enact two different statutes, each with their own mechanisms to enhance railroad safety. As a result, the Estate could bring their excessive-speed claim against BNSF.

Medical Malpractice

NM Bar Bulletin – January 1, 2017
Vol. 56, No. 5

Christopherson v. St. Vincent Hospital,
2016-NMCA-097, 384 P.3d 1098,
cert. denied, October 4, 2016 (No. S-1-SC-36078)
No. 33,784 (filed August 4, 2016)

As a matter of first impression, the Supreme Court of New Mexico considered whether a partial retrial on the issue of causation was permitted. Mercedes Christopherson died following treatment at St. Vincent's Hospital for pancreatitis and an abdominal infection. Ms. Christopherson's Estate filed suit against St. Vincent Hospital for medical malpractice. At trial, the jury found St. Vincent Hospital was negligent but hung on whether the hospital's negligence caused Ms. Christopherson's death. The district court ordered a partial retrial on causation only, and the jury gave a defense verdict. The Estate moved for a new trial arguing that the jury verdict was induced by misconduct of defense counsel statements which were intentional, irrelevant, inadmissible, unethical, and prejudicial. The district court granted the motion, and the third partial trial resulted in a verdict against St. Vincent Hospital for $2,250,000. St. Vincent Hospital appealed.

In affirming the district court's decision, the Court of Appeals stated that New Mexico cases have not dealt with the issue of partial trials on causation. The Court looked at the "general verdict rule" where a general verdict may be affirmed under any theory supported by evidence unless an erroneous jury instruction was given. The Court concluded that the district court did not err in ordering a partial trial limited to causation.

Next, the Court of Appeals addressed the conduct of St. Vincent Hospital's counsel for the second trial. A new trial based on counsel misconduct is warranted if the conduct was improper, and it was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. The burden is upon the party claiming error to demonstrate that his/her rights were prejudiced by the claimed error. The Court of Appeals noted that during the second trial the district court warned defense counsel on numerous occasions about inappropriate comments, questions and demeanor. Because the district court heard the entire trial, and was in the best position to determine the prejudicial effect of the attorney misconduct, the district court's decision to order a third trial was proper. Therefore, having the third partial trial was proper.

Whistleblower Protection Act (WPA)

NM Bar Bulletin – January 25, 2017
Vol. 56, No. 4

Flores v. Herrera,
2016-NMSC-033, 384 P.3d 1070
No. S-1-SC-35286 (filed August 18, 2016)

This case involved an issue of first impression regarding the interpretation of the Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010): "Does the WPA allow a state employee to assert a claim against a state officer in the officer's individual capacity?" The former Secretary of State terminated the employment of two employees. Each asserted a WPA claim against the Secretary in her individual capacity. Even though Mary Herrera was no longer the Secretary of State, the employees sought to proceed with individual-capacity WPA claims against her. The Court of Appeals held the WPA allowed them to do so, but the New Mexico Supreme Court held the WPA does not permit a public employee to assert a claim against a state officer in his or her individual capacity, reversing the Court of Appeals and remanding the cases to the district courts for proceedings consistent with the opinion.

The Supreme Court held the WPA does not create a right of action against a current or former state officer in his or her personal capacity. First, the text of the WPA provides no indication that the Legislature intended to create a personal-capacity officer suit. Second, the remedies that Section 10-16C-4(A) provides demonstrate the WPA creates an official-capacity suit against state officers. Third, to effectuate the remedial purpose of Section 10-16C-4(A), it is unnecessary to interpret the WPA to allow personal-capacity officer suits. Finally, to interpret the WPA to allow a plaintiff to seek recovery against a state officer's personal assets could entail undesirable consequences for the operation of state government.

Sovereign Immunity

NM Bar Bulletin – February 15, 2017
Vol. 56, No. 7

Quevedo v. CYFD,
2016-NMCA-101, 385 P.3d 657,
cert. denied, October 27, 2016 (S-1-SC-36107)
No. 34,345 (filed August 31, 2016)

The issue presented to the Court of Appeals was

Continued from Page 33

whether CYFD was immune from suit in a lawsuit made by former participants in a program administered by businesses providing services for troubled adolescents. Tierra Blanca Ranch High Country Youth Program ("TBR") provides troubled adolescents with schooling, counseling, and therapy. Various participants at TBR filed suit against TBR and CYFD alleging they were physically and emotionally abused by TBR staff. CYFD filed a Motion for Summary Judgment arguing the "building waiver" under NMSA 1978, § 41-4-6(A) (2007) of the New Mexico Tort Claims Act. The district court granted the Motion and the participants appealed.

In reversing the district court, the Court of Appeals looked in the "building waiver" provision in the Tort Claims Act which waives governmental immunity for damages caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment, or furnishings. The Court stated NMSA 1978, § 41-4-6(A) should be broadly interpreted to waive immunity where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government. The Court then looked into the relationship between CYFD and the requirements it places on institutions concerning minimum health and safety standards. CYFD has an obligation to house children in its care in homes and facilities, and must provide minimum requirements for health and safety. The Court of Appeals also stated the obligation may create a relationship between CYFD, the homes or facilities where children are placed, and the children. The Court concluded that the waiver of immunity in NMSA 1978, § 41-4-6(A) permits suits against CYFD when such a relationship exists. Therefore, the district court's granting of CYFD's Motion for Summary Judgment was improper because questions of material fact exist on the issue of whether the TCA's building waiver applies to permit the plaintiffs' suit. As such, the Court of Appeals reversed and remanded to the district court for further proceedings.

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