IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ORAL ARGUMENT CALENDAR

MONDAY, AUGUST 22, 2011

2:00 P.M.

No. 29,609

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs,

vs.

L.C.I.2, INC., a New Mexico Corporation, — **Paul S. Grand**

Defendant-Appellee,

and

NATIONWIDE MUTUAL INSURANCE COMPANY, — **Kevin M. Sexton, Shannon A. Parden**

Intervenor-Appellant.

Sean R. Calvert (Amicus Curiae)

***PANEL: JUDGES BUSTAMANTE, FRY AND VIGIL**

*Court of Appeals' panel members are listed in seniority order.

Panels may be changed without notice.

Oral Argument will be held in the Albuquerque Court of Appeals Pamela B. Minzner Law Center, 2211 Tucker NE., Albuquerque, NM 87106

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Plaintiffs,

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L.C.I.2, INC., a New Mexico corporation,

Defendant/Appellee,

and

Court of Appeals No. 29, 609

NATIONWIDE MUTUAL INSURANCE COMPANY,

Intervention / Appellant.

ANSWER BRIEF OF DEFENDANT/APPELLEE L.C.I.2, INC., A NEW MEXICO CORPORATION, TO APPELLANT'S BRIEF IN CHIEF AND TO BRIEF OF AMICI CURIAE

Appeal from the Eighth Judicial District Court
Taos County, New Mexico
Cause No. D-820-CV-200600208

The Honorable Michael E. Vigil, District Judge

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Pursuant to Rule 12-213(A)(1)(b), references to recorded transcript are by elapsed time from the start of the recording as "[Tr___]". All referenced to the Record Proper are identified as "[RP___]", with citation to the relevant page of the Record Proper.

STATEMENT OF COMPLIANCE

The body of this Answer Brief exceeds the thirty-five page limit contained in Rule 12-213 NMRA. The font used is Times New Roman 14 point and the word count is 9,253 words, excluding the portions of the brief that are exempt from the relevant limitations in Rule 12-213 NMRA. This complies with the limitations of Rule 12-213F. NMRA.

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO STATUTES

OTHER JURISDICTIONS

FEDERAL CASES

SUMMARY OF PROCEEDINGS

I. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The following supplements the Appellant's Summary of Proceedings.

A. On November 24, 2008 the District Court granted L.C.I.2, Inc's ("LCI2") Motion for Summary Judgment against the Plaintiffs, Bobby and Vickie Windham. [RP 1038-1040] The gravamen of LCI2's Motion was that

> the undisputed facts are that Windham and Newt & Butch chose and determined the manner and details of their installation of the roof, that LCI2 had no right to control, nor did control, the manner and details by which Windham and Newt & Butch installed the roof, and that the accident occurred as a result of conditions created by Windham and Newt & Butch. New Mexico law is well-settled that a general contractor, who does not retain control of the work premises or of the manner in which a subcontractor's work is performed, is not liable for injuries to the subcontractor's employee, Bobby Windham, which result from an unsafe work place or condition created by the subcontractor. [citations]

[RP 468] The Court's allowance of this Motion belies any contention of control by LCI2 as alleged in the Brief in Chief. [BIC 6-7]

Plaintiffs have appealed the Order granting LCI2's Motion for Summary Judgment [RP 1036]

B. By letter dated January 7, 2007, Nationwide agreed to defend LCI2 in the underlying litigation filed by Bobby and Vickie Windham, under a reservation of rights. [RP 976-979] However, Nationwide did not make any reservation of

rights based upon NMSA 1978, §56-7-1. (Section 56-7-1 or the "Statute") [RP 976-979]

C. LCI2's Motion for Summary Judgment re: Complaint for Declaratory Judgment was based upon two primary grounds: 1) LCI2 was an additional insured on a policy of insurance issued to Newt and Butch by Nationwide. As such, Nationwide owed LCI2 a defense of the claims asserted against LCI2 in the underlying Windham litigation, and such defense does not violate NMSA 1978, Section 56-7-1. 2) Nationwide did not make any reservation of rights based upon NMSA 1978, Section 56-7-1, and is precluded from raising such defense in its Complaint for Declaratory Judgment. [RP 932-982]

D. Oral Argument on LCI2's Motion for Summary Judgment re: Complaint for Declaratory Judgment, was held on March 2, 2009. [Tr. 1-29] The Order granting the Motion was entered on April 29, 2009. [RP 1081-1082]

At oral argument, the Court stated that allowance of the Motion was based upon a holding that the Statute did not prohibit Nationwide's defense of LCI2 [Tr. 1-29]

The Order granting the Motion, however, did not specify the grounds upon which the Motion was allowed. [RP 1081-1082]

II. SUMMARY OF ARGUMENT

Nationwide issued to Newt & Butch a general liability insurance policy. It contained an endorsement which added L.C.I.2 as an additional insured, if two criteria were satisfied: 1) if Newt & Butch and L.C.I.2 had agreed in writing that L.C.I.2 would be added as an additional insured, and 2) with respect to L.C.I.2's liability arising out of Newt & Butch's ongoing operations for LCI2 Both of these criteria are satisfied. Therefore, pursuant to the terms of the policy, L.C.I.2 is an additional insured and is entitled to defense and indemnification[1] of the claims brought against it by the Plaintiffs in the underlying litigation.

Nationwide does not contend that LCI2 is not an additional insured under the Nationwide policy. Nationwide's appeal is based upon a contention that despite LCI2's status as an additional insured, Nationwide's duty to defend LCI2 is prohibited by NMSA 1978, §56-7-1 (2003). As set forth herein, under the facts of this case, section B of that Statute does not prohibit Nationwide from insuring, and thus defending, LCI2. Appellant's contention, that defense and indemnity of LCI2 violates NMSA 1978, §56-7-1, has been rejected in the case of *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146.

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[1] In view of the District Court's allowance of LCI2's Motion for Summary Judgment dismissing the Plaintiffs' claims, the issue of indemnification currently is moot.

Additionally, a defense of non-coverage based upon that Statute was not raised by Nationwide in its reservation of rights. Therefore, pursuant to well-settled law, Nationwide is precluded and estopped from raising the Statute as a defense at this time.

III. SUMMARY OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

The following facts, numbered 1-7, 17, were admitted by Nationwide. Facts 9, 11, 14 and 15 were neither admitted nor denied by Nationwide. Fact 18 was denied. [RP 1022-1023] The remaining facts, while part of the Record Proper, were not listed in LCI2's Motion for Summary Judgment.

1. Nationwide issued a Commercial General Liability Insurance Policy, No. ACP GLO 7211266174, to Newt & Butch's Roofing & Sheetmetal, Inc., effective 04/01/04 to 04/01/05 ("the policy"). [RP 752, 950-953]

2. The policy contained endorsement CG 20 33 which provided:

> **ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU**
>
> . . .
>
> A. **Section II – Who is an insured** is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations

> performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed. [RP 752, 951]

3. The policy contains an "Insuring Agreement" which provides "We [Nationwide] will have the right and duty to defend the insured [LCI2] against any "suit" seeking those damages [bodily injury]." [RP 952] The policy defines "Suit" as a civil proceeding in which damages because of bodily injury are alleged. [RP 953]

4. On or about August 6, 2003, LCI2 and Newt & Butch entered into a Subcontract, pursuant to which Newt & Butch agreed to install the entire roof, including but not limited to tectum roof panels, over a structure which was part of a pool addition for the Town of Taos. [RP 752, 960, 963-966]

5. Pursuant to the Subcontract, LCI2 was to be named as an additional insured on Newt & Butch's insurance policy. [RP 752, 964, 966]

6. At the time of his accident, Bobby Windham was Newt & Butch's job foreman/superintendent for the project. [RP 955, 968. 971]

7. Windham's accident and resulting injuries occurred while he was performing work for Newt & Butch, specifically, laying the TPO membrane (vinyl), pursuant to its Subcontract with LCI2 [RP 143, 144, 958, 959]

8. As foreman, Bobby Windham instructed his crew to install the vinyl by first rolling it over the skylight openings. This masked, or covered, the skylight

openings, so that they could not be seen. He instructed his crew then to cut the vinyl around the perimeter of the skylight. [RP 969, 970, 973, 975]

9. Bobby Windham fell into a skylight opening which had just been covered by his crew while they were cutting the vinyl around the skylight opening. [RP 974]

10. It is up to Newt & Butch and Bobby Windham to decide whether or not to use safety harnesses. [RP 491, p. 57:18-22, 58:1-15, 59:5-13] By his own decision, Windham took no personal safety precautions while working around the nine skylight openings. [RP 521] By his own decision, Bobby Windham was not wearing a safety harness. [RP 518]

11. Newt & Butch knew that, in laying the TPO membrane (vinyl), skylight openings would have to be dealt with. Doing so safely was part of its subcontract, and Newt & Butch and Bobby Windham determined the manner and details of how to deal with that hazard. [RP 497, p. 81:15-25, 82:1-25, 83:1-13; RP 503, p.129:16-25, 130:1-12, 959, 962]

12. Newt & Butch and Bobby Windham knew that a 40 foot fall hazard was intrinsic to installation of the tectum deck, as well as to all of the work Newt & Butch was hired to do. [RP 491, p. 58:3-8; 493, p. 66:18-20]

13. Newt & Butch created their own shop drawings, and also procured shop drawings from the tectum representative, to show how they would detail and install

the roof decking, which drawings were provided to the project architect for comments and approval. [RP 488]

14. Newt & Butch determined the method and manner in which to lay the tectum around the skylights, and all safety considerations relating thereto. [RP 956]

15. Newt & Butch determined the manner in which to install the deck and the insulation, the details and specifics of their installation, and determined all safety precautions that were to be utilized. [RP 956, 957, 961]

16. As part of its subcontract, Newt & Butch undertook to deal with all safety issues relating to fall hazards, and relied upon no one else to do so. [RP 493, p. 66:21-25, 67:1-6]

17. By letter dated January 7, 2007, Nationwide agreed to defend LCI2 in the underlying litigation, under a reservation of rights. [RP 976-979]

18. Nationwide did not make any reservation of rights based upon NMSA 1978, §56-7-1. [RP 976-979].

ARGUMENT

THE DISTRICT COURT RULING WAS CORRECT AND SHOULD BE AFFIRMED

IV. STANDARD OF REVIEW

Summary judgment is reviewed on appeal de novo. *Celaya v. Hall*, 2004-NMSC-005 ¶7, 135 N.M.115, 85 P.3d 239, *Self v. United Parcel Serv., Inc.*, 1998-

NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "This Court will affirm the grant of summary judgment when there is no evidence raising a reasonable doubt about any genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Cain v. Champion Window Co. of Albuquerque*, 2007-NMCA-085 ¶6, 142 N.M. 209, 164 P.3d 90. "[i]f no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081 ¶7, 146 N.M. 717, 213 P.3d 1146.

V. LCI2 IS AN ADDITIONAL INSURED UNDER THE POLICY ISSUED BY NATIONWIDE TO NEWT & BUTCH

A. Insurance Policy and Legal Definition of "Arising Out Of."

Nationwide issued a Commercial General Liability Insurance Policy, No. ACP GLO 7211266174 to Newt & Butch, effective 04/01/04 to 04/01/05. [RP 752, 950-953]. The policy also insured L.C.I.2, by virtue of an endorsement which contains two requirements for additional insured status, both of which are met. The first is that Newt & Butch and LCI2 have agreed in writing that LCI2 be added as an additional insured on the policy. [RP 752, 951] This requirement is met by the subcontract between these entities which states, in Section 7, that "The Subcontractor [Newt & Butch] shall furnish the Contractor [LCI2] with a certificate of insurance which will name LCI2, Inc. insured...," and by the

Subcontract Amendment, which states, in ¶2, "Certificate of insurance must be received...listing LCI2 Inc. as additional insured...." [RP 752, 960, 963-966]

The second requirement is that LCI2's liability arise out of Newt & Butch's ongoing operations performed for LCI2 [RP 752, 951] This raises the issue of what is meant by the words "arising out of" in the insurance policy.

> The words "arising out of" are very broad, general and comprehensive terms, ordinarily understood to mean "originating from," "having its origin in," "growing out of" or "flowing from. See *Schmidt v. Utilities Ins .Co.*, 353 Mo. 213, 182 S.W.2d 181, 154 A.L.R. 1088 (1944); *Carter v. Bergeron*, 102 N.H. 464, 160 A.2d 348, 89 A.L.R.2d 142 (1960). Also cases cited in the Anno. 89 A.L.R.2d 150 (1963). Compare *Berry v. J. C. Penney Co.*, 74 N.M. 484, 394 P.2d 996 (1964); *Martinez v. Fidel*, 61 N.M. 6, 293 P.2d 654 (1956); *Merrill v. Penasco Lumber Co.*, 27 N.M. 632, 204 P. 72 (1922).

Baca v. New Mexico State Highway Department, 82 N.M. 689, 692, 486 P.2d 625 (1971).

The same definition cited in Baca was applied in *Servants of the Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F Supp. 822, 836-37 (D.N.M. 1994).

Our courts have interpreted the phrase "arising or in any way resulting from" broadly in the insurance context. *Krieger v. Wilson Corp,* 2006-NMCA-034 ¶14, 139 N.M. 274, 131 P.3d 661.

In *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613, 281 Wis.2d 712 (2005), the Court interpreted an additional insured endorsement which was identical to the one at bar. It concluded,

> The phrase "arising out of" has been construed broadly--"commonly understood to mean originating from, growing out of, or flowing from, and require[s] only that there be some causal relationship between the injury and the risk for which coverage is provided[,] *Lawver v. Boling*, 71 Wis.2d 408, 415, 238 N.W.2d 514 (1976).

Mikula at 620-621.

The court in *Mikula* also held that the owner of the project was deemed to be an additional insured on the policy of the general contractor, and that the "arising out of" requirement was satisfied, merely by virtue to the fact that an employee of a subcontractor was injured in the course of his work. *Id.* at 621. The Court noted that the majority of cases supported this analysis. See also *Marathon Ashland Pipe Line LLC v. Maryland Casualty Co.*, 243 F.3d 1232 (10th Cir. 2001), and *Regal Homes, Inc. v. CNA Insurance*, 171 P.3d 610, 217 Ariz. 159 (2007).

> The general rule is that the words "arising out of" are "broad, general, and comprehensive terms effecting broad coverage." *Farmers Ins. Co. v. Till*, 170 Ariz. 429, 430, 825 P.2d 954, 955 (App. 1992); see also *Transp. Indem. Co. v. Carolina Cas. Ins. Co.*, 133 Ariz. 395, 399, 652 P.2d 134, 138 (1982) (explaining that phrase "arising out of" in insurance policy did not require traditional proximate cause); *Brenner v. Aetna Ins. Co.*, 8 Ariz. App. 272, 276, 445 P.2d 474, 478 (App. 1968) (same).
>
> . . .
>
> The causal connection required is not proximate cause; i.e., the business of the named insured need not have caused the occurrence, it need only be related to it." Id. at 399, 652 P.2d at 138 (emphasis added); see also *Meadow Valley Contractors, Inc. v. Transcon. Ins. Co.*, 27 P.3d 594, 597 (Utah App. 2001) (holding, under an additional insured endorsement similar to CNA's endorsement here, that the

> commonly understood meaning of the words "arising out of" requires only some causal relationship between the injury and the risk for which coverage was provided).

Regal Homes at 614-615.

The rule in California is the same:

> California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.

Acceptance Insurance Co. v. Syufy Enterprises, 69 Cal. App.4th 321 ¶27, 81 Cal. Rptr.2d 557 (1999). See also *Equilon Enterprises, LLC v. Great American Alliance Ins. Co.*, 132 Wn. App. 430, 438 (2006).

Based upon the foregoing, well-settled law, in New Mexico and elsewhere, to be an additional insured on the policy, LCI2's "liability" must only "originate from," "have its origin in," "grow out of," "flow from" be "related to," or "broadly linked" to the operations of Newt & Butch. Based upon the undisputed facts, this standard, which is much lower than requiring negligence or proximate cause, is satisfied.

B. LCI2's Alleged Liability "Arises Out Of" Newt & Butch's Operations, Acts or Omissions - Application of Law to Facts

It is undisputed that Newt & Butch subcontracted to install the roof on the pool structure, to provide all labor, materials, tools, equipment, and supplies

necessary for performance of the subcontract, and to do so in a workmanlike manner, including compliance with all OSHA regulations. [RP 752, 963-966] Newt & Butch was involved in the design of the roof. Newt & Butch created their own shop drawings, and also procured shop drawings from the tectum representative, to show how they would "detail and install" the roof decking. These drawings were provided to the project architect for comments and approval. [RP 488]

At all material times, Bobby Windham was an employee of Newt & Butch. [RP 143, 144] He was their job foreman/superintendent for the project. [RP 955, 968, 971] Bobby Windham's accident occurred in the course of his installation of the roof as an employee of Newt & Butch. It occurred while he was installing the TPO membrane (vinyl) portion of the roof, the installation of which was part of the subcontract. [RP 143, 144, 958, 959] Specifically, it occurred when he was walking across the roofing materials and fell 37 feet through a cutout, which the roofing material covered. [RP 143, 144] The "cutout" into which Bobby Windham fell was a skylight opening. That this opening had not been covered earlier, or had no barriers placed around it, was a decision made by Windham. [RP 526, RP 533, RP 534] At the time of the accident, Windham had instructed his crew to cover the skylight opening with vinyl. This masked, or covered, the opening, so it could not be seen. He then instructed his crew to cut the vinyl

around the perimeter of the skylight. Windham fell into the skylight which had just been covered with vinyl by his own crew, and while they were cutting the vinyl around the skylight opening. [RP 969, 970, 973, 974, 975,]

By his own decision, Bobby Windham was not wearing a safety harness. [RP 518, p. 50:13-18] Per Butch Wilson, Bobby Windham's boss, it was wrong for Bobby Windham to roll the vinyl over the skylight and cover, and thus mask, the skylight hole. Windham knew this was wrong. It created a danger, of which Windham was aware, of stepping into the hole and falling. [RP 486, p. 15:11-13, 80:7-21; RP 499]

Newt & Butch knew that, in laying the vinyl TPO membrane, skylight openings would have to be dealt with. Doing so safely was part of its subcontract, and Newt & Butch and Bobby Windham determined the manner and details of how to deal with that hazard. [RP 959, 962] Newt & Butch determined the method and manner in which to lay the tectum roofing around the skylights, and all safety considerations relating thereto. [RP 956]

Newt & Butch determined the manner in which to install the roof deck and the roof insulation, the details and specifics of their installation, and determined all safety precautions that were to be utilized. [RP 956, 957, 961] The work involved a fall hazard, and a plan for addressing it was formulated by Newt & Butch. Dealing with that fall hazard was Newt & Butch's responsibility. [RP 489, p. 46:3-

25, 47:1-11] As part of its subcontract, Newt & Butch undertook to deal with all safety issues relating to fall hazards, and relied upon no one else to do so. [RP 493, p. 66:21-25, 67:1-6]

Bobby Windham's accident occurred in the course of installation of a roof. The method, manner and details of the installation were completely determined and under the control of Bobby Windham and Newt & Butch.

Thus, the second requirement for additional insured status, that LCI2's liability "arises out of" Newt & Butch's ongoing operations performed for LCI2, is easily satisfied by the above facts, when applied to the broad construction of the term "arises out of." Nowhere in Nationwide's Brief in Chief does it contend that LCI2 is not an additional insured under its policy.

VI. AS AN ADDITIONAL INSURED ON NATIONWIDE'S INSURANCE POLICY, LCI2 IS ENTITLED TO A DEFENSE IN THE UNDERLYING LITIGATION

As an additional insured on the policy, pursuant to the express terms of the policy, LCI2 is entitled to a defense in the underlying litigation. [RP 952].

VII. DEFENSE OF LCI2 IS NOT PROHIBITED BY NMSA 1978, §56-7-1 (2003).

A. Under The Facts Of This Case, Defense Of LCI2 Is Expressly Allowed By NMSA 1978, §56-7-1 B. (1) (2003)

Section B. (1) of the STATUTE allows Nationwide to defend L.C.I.2 to the extent that L.C.I.2's "liability, damages, losses or costs are caused by, or arise out

of, the acts or omissions of" Newt & Butch. That LCI2's liability arises out of the acts or omissions of Newt and Butch is well established by the facts of this case. Therefore, defense of LCI2 is expressly allowed by NMSA 1978, §56-7-1 B. (1) (2003)

1. Text of NMSA 1978, §56-7-1 (2003)

In pertinent part, §56-7-1 (2003) provides:[2]

56-7-1. Real Property; indemnity agreements; agreements void.

> A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.
>
> B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:
>
> (1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the *liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor* or its officers, employees or agents; or

---

[2] NMSA 1978, 56-7-1 was amended in 2005. The Subcontract between LCI2 and Newt & Butch was executed in 2003, when the 2003 version of the Statute was in force. For consistency with the Appellant's Brief in Chief, the Statute is cited in its 2003 version. See Appellant's BIC pp.9 fn.1, 10.

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

...

E. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.
(emphasis supplied)

2. L.C.I.2's "Liability, Damages, Losses Or Costs Are Caused By, Or Arise Out Of, The Acts Or Omissions Of" Newt & Butch.

The Courts have adopted a broad, expansive definition of the term "arising out of," in the insurance context (see discussion above, p.8-11). The term would be similarly construed and applied in the Statute. This conclusion is supported by the fact that the wording of Section B. (1) of the Statute is essentially identical to the wording in the additional insured endorsement to the Nationwide policy. The Statue states that Nationwide may insure LCI2 "only to the extent that the liability [of LCI2] . . . arise[s] out of the acts or omissions of the indemnitor [Newt & Butch]." The insurance policy provides coverage to LCI2 "only with respect to liability arising out of [Newt & Butch's] ongoing operations performed for [LCI2]." The virtual identity of these clauses mandates that the construction of the term "arise out of" used in the one context should apply to the other.

Moreover, based upon existing case law, the broad definition and construction of the term "arising out of," is not limited to the insurance context. *In City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146, the Court construed the term as it appeared in an indemnity clause in a contract and used the same broad definition as was used in *Krieger.* ("The phrase 'arising out of'" is given a broad interpretation by our courts and is generally 'understood to mean 'originating from,' 'having its origin in,' 'growing out of[,]' or 'flowing from.' *Krieger*, 2006-NMCA-034, ¶14.") BPLW ¶22.

Thus, the Statute allows Nationwide to insure LCI2 in this case as long as the "liability" of LCI2 "originates from," "has its origin in," "grows out of," "flows from" is "related to," or is "broadly linked" to the operations of Newt & Butch. That this is the case is set forth above, in great detail, on p.8-11, based upon undisputed facts.

It bears noting that nowhere in the Brief in Chief does the Appellant deny the above stated undisputed facts, deny that LCI2 is an additional insured under the Nationwide insurance policy, nor, most importantly, deny, based upon the facts adduced through discovery, that LCI2's alleged liability "arises out of" the acts or omissions of Newt & Butch.

B. Appellant's Contention, That Defense And Indemnity Of LCI2 Violates NMSA 1978, §56-7-1, Has Been Rejected In The Case Of *City*

Of Albuquerque V. BPLW Architects & Engineers, Inc., 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146

In *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146, a pedestrian fell off a curb while exiting a car rental building at the Albuquerque International Airport. Pursuant to a contract with the City, BPLW Architects & Engineers (BPLW) had designed the facility and provided construction administration services during its construction. The pedestrian sued both the City and BPLW. The pedestrian's claims against the City were for the City's own negligence in failing to correct a hazardous condition, and failing to inspect and maintain the curb. Neither party disputed that the pedestrian's allegations against the City were that the City, not BPLW, was negligent. *Id.* ¶13

The City filed a claim against BPLW, for defense of the pedestrian's claim, pursuant to an indemnification clause in the contract between them. The District Court granted summary judgment in the City's favor. On appeal, BPLW argued that it had no duty to defend the City because the pedestrian's claims against the City were for the City's direct negligence, not BPLW's. *Id.* ¶6. The Court of Appeals affirmed.

In its decision, the Court acknowledged that the pedestrian was alleging that the City was negligent. However, it found, based upon the facts of the case, that the pedestrian's direct claims against the City, for negligently failing to inspect and maintain the curb, and that the curb was negligently constructed, "ar[o]se from

BPLW's alleged negligence." *Id.* ¶21 ("Thus, the claims that the City failed to inspect and maintain the curb area 'arise from' BPLW's performance of the contract because the claims have their origin in, grow out of, and flow from the allegedly negligent design and construction of the curb by BPLW.") *Id.* ¶24

The case has direct application to instant case because BPLW argued that "requiring it to defend the City for the City's alleged negligence violates the public policy expressed in Section 56-7-1." *Id.* ¶19. The Court rejected this contention. In doing so, The Court quoted and relied upon Section B (1) of the Statute, which states that

> a construction contract may contain a provision that, or shall be enforced only to the extent that, it...requires one party...to indemnify, hold harmless or insure the other party... against liability...only to the extent that the liability [is] caused by, or arises[s] out of, the acts or omissions of the indemnitor....

Id. The Court then stated that "requiring BPLW to fulfill its contractual obligation to defend the City against any suit against the City arising out of BPLW's alleged negligence in the performance of the contract does not violate Section 56-7-1 or the policy behind it." Id. ¶20.

BPLW was decided under an earlier version of the Statute. However, the Court held that the difference was not pertinent, because "Both the current version and the version in effect at the time the contract was executed...have the same effect because both ensure that an indemnitor only has to indemnity for causes of

action that arise from the indemnitor's own negligent conduct. *Id.* ¶19. Alternatively stated, the Court in BPLW held that even if allegations of direct negligence are made by the plaintiff against the indemnitee, the public policy underlying the 2003 version of the Statute, (which applies in the instant case), allows defense and indemnification, to the extent that the liability is caused by, or arises out of, the acts or omissions of the indemnitor.

BPLW is directly on point, is dispositive of the issues raised by this appeal, and warrants affirmance of the District Court's ruling. The facts are remarkably similar. In *BPLW*, the City, and in the instant case, LCI2, were sued based upon allegations that each was directly negligent. However, in both cases, the evidence showed that the alleged liability of these indemnitees was caused by, or arose out of, the acts or omissions of the indemnitors, BPLW and Newt & Butch. In *BPLW* the appellant argued that enforcing the contract requiring it to defend the City would violate the public policy expressed in Section 56-7-1. The Court rejected BPLW's argument. *Id.* ¶19 In so holding, the Court stated that requiring BPLW to defend the City violated neither the earlier nor the 2003 versions of the Statute, or the policy behind, it but promotes it. *Id.* ¶20 As BPLW's contractual obligation to defend the City did not violate the Statute, Nationwide's obligation to defend LCI2 does not violate the Statute.

C. Nationwide's obligation to defend LCI2 does not violate the public policy expressed in Section 56-7-1. – Response to Brief of Amici Curiae

Appellant contends that Section 56-7-1 prohibits Nationwide from defending LCI2 in this case. Amici Curiae makes the same contention, but focuses upon the public policy underpinnings of the Statute.

Surprisingly, if not shockingly, Amici Curiae fails to cite or discuss the *BPLW* case, which addresses, and rejects, Amici Curiae's arguments.

In *BPLW*, in rejecting BPLW's contention that requiring it to defend the City for the City's alleged negligence violated the public policy expressed in Section 56-7-1, the Court of Appeals discussed the public policy considerations which underlie both the earlier version of Section 56-7-1, and the 2003 amendment. The Court stated, "both versions of the Statute are based on a public policy promoting safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence." Id. ¶19. "[t]he purpose of [Section 56-7-1] is to protect construction workers and future occupants of a building by ensuring that all those involved in its construction know that they will be held financially liable for their negligence." *Id.*, quoting *Tucker v. R.A. Hanson Co.,* 956 F.2d 215, 218 (10th Cir. 1992),

The Court went on to explain that by requiring BPLW to fulfill its contractual obligation to defend the City against a suit arising out of BPLW's

alleged negligence not only does not violate the Statute or the public policy behind it, but "promotes safety in the construction project because it ensures that BPLW will be accountable for any harm caused by its performance of the agreement." [Pedestrian's] claims 'arise from' BPLW's Design and Construction of the Facility. *Id.* ¶20.

As discussed in detail above on p. 8-11, Windham's claims 'arise from,' ie., originate from, have their origin in, grow out of, or flow from, the acts and omissions of Windham and Newt & Butch. The evidence of Windham and Newt & Butch's acts and omissions as contributing, if not being the sole, cause of Windham's accident, is overwhelming. The evidence of LCI2's lack of involvement, control or responsibility for Windham's accident is underscored by the fact that the District Court issued summary judgment in favor of LCI2, against Windham's claims.

The point to be made is that since Windham's claims 'arise from' the acts or omissions of Windham and Newt & Butch, the public policy of the Statute is served, and certainly not violated, by having Nationwide fulfill its contractual obligation to defend LCI2 in this case. Despite the fact that LCI2's alleged liability arises out of the acts or omissions of Newt & Butch, Appellant seeks to have Newt & Butch, or in this instance its insurer, Nationwide, escape any financial responsibility. Such a result would undermine the public policy of the Statute.

Alternatively stated, in this case Newt and Butch employed Windham. As a result, Newt and Butch is immune from suit by Windham, pursuant to the laws of worker's compensation. If the Statute is construed as Appellant and Amici Curiae propose, then Newt & Butch has no incentive to operate safely, because it would not be accountable for the harm it caused. This is because 1) it cannot be sued directly, and 2) it would have no obligation to defend LCI2, even if LCI2's liability arises out of Newt and Butch's acts or omissions. Such a result completely undermines the public policy behind the Statute.

D. The Legislature Did Not Intend To Exclude A Defense Obligation In Section B (1) Of The Statute

The briefs of both Amici Curiae and Appellant argue that Section 56-7-1 B (1) prohibits Newt & Butch or Nationwide from defending LCI2, even if LCI2's liability arises out of the acts or omissions of Newt and Butch. [BIC 11, Amicus Brief 4-6] The contention is based upon the fact that the word "defend" appears in Subsection A of the Statute, but is absent in Subsection B (1). This contention fails for the following reasons.

1. Subsection B (1) allows one party to "indemnify" "hold harmless" or "insure" the other. Appellant acknowledges that

> "in standard usage 'indemnify' means
>
> [t]o restore the victim of a loss, in whole or in part, by payment, repair or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an

> anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him.

Walsh Construction Co. v. Mutual of Enumclaw, 189 Or. App. 400, 406, 76 P.3d 164, 167 (Or. App. 2003), affirmed 104 P.3d 1146 (2005) [quoting Black's law Dictionary 692 (5th ed. 1979] [See BIC 14] See also *Hasbrouck v. Carr*, 19 N.M. 586, 596 (1914). "Suffice it to say that common-law indemnity refers to a total shifting of economic loss to the party chiefly responsible (28 NY Jur, Indemnity, § 1)." *Anthony Berardi v. Getty Refining & Marketing Co.* 435 N.Y.S.2d 212, 219, 107 Misc. 2d 451 (1980)

Based upon the above, the standard meaning of the word "indemnify" includes an obligation to pay the indemnitee for all loss incurred, including, if applicable, the reimbursement of attorneys fees, costs, or any other expense incurred by the indemnitee. i.e., it includes the cost of defense. The all-inclusive meaning of "indemnify" precludes a contention that it includes all losses incurred except defense costs.

Secton B (1) also allows one party to hold another harmless. "Hold harmless' is synonymous with 'indemnify.' *Black's Law Dictionary* 749 (8th ed. 2004)." *In re Marriage of Ginsberg*, 750 N.W.2d 520, 522 (Iowa 2008)

> As a result of its traditional usage, the phrase indemnify and hold harmless just naturally rolls off the tongue (and out of the word processors) of American commercial lawyers. The two terms almost always go together. Indeed, modern authorities confirm that hold

> harmless has little, if any, different meaning than the word indemnify. Black's Law Dictionary in fact defines hold harmless by using the word indemnify. [40] It defines hold harmless agreement as a contract in which one party agrees to indemnify the other. [41] In defining hold harmless clause, it simply says [s]ee INDEMNITY CLAUSE. [42]

Majkowski v. American Imaging Management Services, LLC, 913 A.2d 572, 589 (Del.Ch. 2006)

The words indemnify and hold harmless are synonymous. Both include the obligation to reimburse the indemnitee any attorneys fees or costs incurred.

Section B (1) of the Statute also allows one party to "insure" the other. One need look no farther than the insurance policy issued by Nationwide to see that the term "insure" encompasses a defense obligation. It states in the insuring agreement that "We [Nationwide] will have the right and duty to defend the insured [LCI2] against any "suit" seeking those injuries [bodily injury]." [RP 952, 953]

Thus, all three terms used in Section B. (1) of the Statute, "indemnify," "hold harmless" and "insure," encompass the defense obligation. All three terms are extremely broad and all-inclusive. As such, there is little merit to the contention that the mere absence of the word "defense" in the subsection means that the legislature intended to carve it out as an exclusion from the broad, inclusiveness of the three preceeding terms.

2. The wording of Sections A and B of the Statute are not identical. Section A uses the phrase "...including the other party's employees or agents,...." Section B adds the word "officers,' stating "including its officers, employees or agents..."

Under the reasoning of Appellants and Amici Curiae, the inclusion of the word "officers" in Section B, and the omission of the term "officers" in subsection A, means that "officers" are not included in Section A. Such a construction makes no sense. "Officers" are included in Section A, because they are included within the term "employees and agents" in subsection A. Therefore, the omission of the word "officers" does not mean that they are excluded.

The same applies to the omission of the word "defense" in section B (1). The point is that the mere omission of a term in a series, particularly when the term is included within the definition of other terms contained in the series, does not warrant the conclusion that the term is excluded. The construction proferred by Appellant and Amici Curae leads to an absurd result.

3. As regards legislative intent, it is suggested that if the legislature intended to exclude the term "defense" from section B, it would have made such intent clear. This is particularly true in this situation, where the term "defense" is included in the adjacent terms "indemnify," "hold harmless" and "insure."

The gravamen of the Statute is to address the circumstances when, broadly speaking, "indemnification agreements" will be allowed. The intent is not to make fine distinctions between the terms "indemnify," "hold harmless," "insure" and "defend." Had the legislature so intended, they would have said so.

E. The District Court "Determined" That LCI2's Liability Arose Out Of The Acts Or Omissions Of Newt & Butch

By granting LCI2's Motion for Summary Judgment and denying Nationwide's Motion for Summary Judgment, the District Court "determined" that LCI2's liability arose out of the acts or omissions of Newt and Butch.

On pages 11 and 14 of the Brief in Chief, Appellant appears to argue that LCI2 is not entitled to a defense until a "determination" has been made "that claimant's damages were caused by, or arose out of, the acts or omissions of the indemnitor." [BIC 11]

The parties filed cross motions for summary judgment. As shown above, LCI2 was an additional insured on the Nationwide insurance policy, and as such, was entitled to a defense of the Plaintiff's claim. The only remaining question was whether Nationwide's defense was prohibited by Section 56-7-1. Also as shown above, LCI2 produced overwhelming evidence that its liability arose out of the acts or omissions of Windham and Newt and Butch. The District Court agreed, [Tr. 25, RP 1081] and ruled accordingly. The District Court previously had granted LCI2's Motion for Summary Judgment against the claims made by the Plaintiffs, adjudging that it had no liability to the Plaintiffs. It is unclear what "determination" is lacking, as alleged by the Appellant.

F. Section 56-7-1 Does Not Prohibit Nationwide From Defending LCI2 Pursuant To The Additional Insured Endorsement.

In Section II. A. 3. b. of its Brief in Chief [BIC 15-20], appellant argues that Section 56-7-1 prohibits Nationwide from defending LCI2 pursuant to the additional insured endorsement. The basis for the argument appears to be identical to that set forth previously: that "Plaintiff's Complaints only allege that LCI2 was negligent." [BIC 16] This contention was rejected in *BPLW*, as discussed above.

Appellant further contends that LCI2 is trying to get "indirectly [through the additional insured endorsement] what it knows it can't get directly. [BIC 16] This contention is without merit, because whether through a contractual indemnification clause, or by virtue of its status as an additional insured, the reason that LCI2 is entitled to a defense is because the facts show that it satisfies section B (1) of the Statute, i.e., because its alleged liability arises out of the acts or omissions of Newt and Butch.

G. Interpreting Section 56-7-1 as a Consistent Whole.

Section 56-7-1 B (1) of the Statute does not prohibit Nationwide from defending LCI2, as an additional insured on its insurance policy, because LCI2's alleged liability arises out of the acts or omissions of Newt and Butch. This result is clearly mandated by the ruling in *BPLW*.

The question arises as to the effect of section A of the Statute. Reading Sections A and B together, as a consistent whole, Section A would have

application to situations in which the indemnitee's [LCI2's] liability, did not arise out of the acts of the indemnitor (Newt & Butch). In those situations the STATUTE would bar indemnification. That is not the case here.

Alternatively, LCI2 would not be indemnified if it were solely negligent. However, there may be situations where the indemnitee's alleged liability arises out of the acts or omissions of the indemnitor, entitling the indemnitee to a defense pursuant to section B of the Statute, but in which a jury allocates a certain degree of negligence to indemnitee. That also is not the case here, as LCI2 was granted summary judgment as to the claims asserted against it by the Plaintiff. However, in such situation, it is suggested that a party would not be indemnified for any percentage of negligence allocated to it by a jury. This result would best serve the public policy underpinnings of the Statute, by ensuring that parties are financially responsible for their own wrongdoing.

Under the interpretation of the Statute promoted by the Appellant, a mere allegation of negligence against an indemnitee, however baseless, precludes its defense. Defense of the indemnitee would also be precluded when the liability of the indemnitee arises out of the acts or omissions of the indemnitor. Appellant's interpretation negates, and renders meaningless, Section (B) of the Statute, and is contrary to the holding in *BPLW*. The interpretation suggested herein, however,

gives effect to both sections of the Statute, furthers the public policy which underlies the Statute, and is consistent with the holding in *BPLW*.

VIII. PLAINTIFF'S CONTENTION THAT "A DUTY TO DEFEND DOES NOT EXIST WHEN THE PURPORTED INDEMNITOR IS NOT A PARTY TO THE LAWSUIT AND IS NOT ALLEGED TO BE NEGLIGENT," IS AN INCORRECT STATEMENT OF THE LAW, AND IS NOT SUPPORTED BY THE CITED CASE LAW.

In section II. A. 3. c. of its Brief in Chief, Plaintiff contends that "a duty to defend does not exist when the purported indemnitor is not a party to the lawsuit and is not alleged to be negligent." In support of this contention, Plaintiff cites the cases of *Gilbane Building Company v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291, (Ct. App. Tx. First District 2007) and *Fisk Electric Co., v. Constructors & Assoc.*, 888 S.W.2d 813 (Tex. 1994), upon which *Gilbane* relied. Both cases are inapposite to the case at bar, and neither stands for the proposed point of law.

In *Gilbane*, the general contractor, Gilbane, sued the subcontractor, Keystone, for indemnification based upon an indemnification agreement. The trial court granted summary judgment to Keystone.

Gilbane argued that under the indemnity agreement, it was entitled to indemnification if the claim against Gilbane "arose in whole or in part by any negligent act or omission of Keystone...." *Id.* at 296. Keystone argued that the indemnity provision was not enforceable because Gilbane was sued for its own

negligence, the indemnity provision does not expressly indemnify Gilbane for its own negligence, and *the provision does not comply with the express negligence test mandated by Texas law. Id.* (emphasis supplied) The Court of Appeals agreed with Keystone, because "the contractual language does not meet the express negligence test because it does not expressly provide that Keystone will indemnify Gilbane for Gilbane's own negligence." *Id.* at 297.

Similarly, *Fisk* held that "'no obligation to indemnify an indemnitee for the costs or expenses resulting from a claim made against it for its own negligence arises unless the indemnification agreement complies with the express negligence test.'" *Id.* at 297-298, citing *Fisk* at 813-814

In both *Gilbane* and *Fisk* the Court held that the contractual indemnification agreements were unenforceable because they did not comply with a unique aspect of Texas law, "the express negligence doctrine." Neither case has applicability to the case at bar, in which there is no dispute that Nationwide owes LCI2 a duty to defend as an additional insured under its insurance policy, and the sole issue is whether that duty to defend is prohibited by Section 56-7-1.

IX. LCI2 WAS ENTITLED TO SUMMARY JUDGMENT, EVEN IF IT WAS ALLEGED TO BE NEGLIGENT; THE DISTRICT COURT WAS ALLOWED TO CONSIDER THAT LCI2 WAS GRANTED SUMMARY JUDGMENT IN THE UNDERLYING ACTION

In Section II. A. 3. d. of its Brief in Chief Appellant argues that "The trial Court clearly erred in finding that there were no allegations that LCI2 was

negligent." [BIC 24] Appellant's point apparently is that if the Court had understood that allegations were made directly against LCI2, the result would have been different.

First, Appellant's citation of the Court's statement is taken out of context, as there were numerous instances where the Court acknowledged that allegations had been made that LCI2 was negligent. For example:

MR. JUDSON: The allegations of the Complaint were that L.C.I.2 negligently supervised....

...

The only actions that L.C.I.2 is in Court in this case for were its own actions...

THE COURT: I understand.

[Tr. 4].

Second, appellant's point is without merit because the fact that allegations were made in the Complaint directly against LCI2 does not alter the result. LCI2 is entitled to defense of the claim because it is an additional insured on an insurance policy which provides for its defense, and such defense is not prohibited by Section 56-7-1, because LCI2's alleged liability arises out of Windham's and Newt & Butch's acts or omissions. This is true even if the Plaintiff made allegations against LCI2 That is the exact holding in *BPLW*.

In the same subsection of the Brief in Chief, appellant contends that the District Court erred "by basing its decision, regarding Newt & Butch's (and Nationwide's) duty to defend, on its grant of LCI2's MSJ on negligence, which

was entered two and one half years after the initial complaint was filed." [BIC 24] In support of its argument, Nationwide makes numerous references to *BPLW,* and appears to rely upon a contention that "the duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract." [BIC 27]

As stated above, in the instant case, there was no dispute that LCI2 was an additional insured on Nationwide's policy, and that the policy obligated Nationwide to defend LCI2 in the underlying litigation. The only question was whether LCI2's additional insured status and its defense by Nationwide was prohibited by the Statute. This raised the issue of whether LCI2's alleged liability arose out of the acts or omissions of Windham and Newt & Butch, as allowed by the Section B (1) of the Statute. Based upon overwhelming factual evidence submitted, the District Court found that LCI2's alleged liability did arise out of the acts or omissions of Windham and Newt & Butch, and granted summary judgment. If, in considering all of the factors relevant to the "arising out of" issue, the District Court considered the fact that LCI2 was issued summary judgment, the underlying facts of which were a matter of record, there was no reason not to do so.

X. CONTRARY TO APPELLANT'S CONTENTION, THE TRIAL COURT DID NOT MAKE, AND WAS NOT REQUIRED TO MAKE, A FACTUAL DETERMINATION THAT THE ALLEGATIONS AGAINST LCI2 AROSE SOLELY FROM THE ACTS OR OMISSIONS OF NEWT & BUTCH

In Section II. A. 3. e. of the Brief in Chief, appellant contends that "it was error for the trial court to make a factual determination that the allegations against LCI2 arose solely from the acts or omissions of Newt & Butch." [BIC 27] Appellant provides no citation to the record proper for this contention, as none exists. Rather, Appellant contends that the court "*necessarily* found that Plaintiff's damages arose *solely* from the acts and/or omissions of Newt & Butch (a non-party to the litigation.)" [BIC 28] (emphasis supplied)

Appellant's contention is based upon a faulty premise: that in order to find that the Statute did not prohibit Nationwide from defending LCI2 as an additional insured, the District Court *necessarily* had to find that LCI2 was *solely* liable for the plaintiff's damages. First, although not stated by the District Court, the judge may indeed have determined that LCI2 had no liability for the Plaintiff's damages. After all, LCI2 had been granted summary judgment against all of the claims asserted against it by the Plaintiff, and the Plaintiff's Complaint against LCI2 was dismissed. Second, on the record before it, the judge may have determined that Nationwide did not create a genuine issue of material fact regarding LCI2's negligence. Either of these determinations would warrant affirmance of the District Court's ruling.

Most importantly, the District Court had only to determine, as it did, that LCI2's alleged liability arose out of the acts or omissions of Newt and Butch. As

discussed above, the phrase "arise out of" means "originating from," "having its origin in," "growing out of" or "flowing from." It does not mean that Newt & Butch had to be *solely* liable for the Plaintiff's accident.

Plaintiff contends that the District Court necessarily had to find that Plaintiff's damages arose solely from the acts or omissions of Newt & Butch. In the same section of the Brief in Chief, Plaintiff states that *BPLW* "does not allow for a duty to defend when the negligence of the indemnitee is alleged, in whole or in part." [BIC 29] These statements, which underlie the basis of the entire appeal, are wrong. The holding in *BPLW* makes clear that a duty to defend is allowed, even when the indemnitee is alleged to be negligent. In view of the Appellant's erroneous contentions, which appear throughout the Brief in Chief, a few points deserve emphasis. In *BPLW*, the negligence of the indemnitee, the City of Albuquerque, was indeed alleged, and such allegation was not disputed by either party. *BPLW* at ¶13. The District Court made no finding in *BPLW* that the indemnitee, the City, was 0% negligent, nor was there a finding that BPLW was *solely* negligent. The District Court found only that "BPLW was required to defend the City in the lawsuit brought by the pedestrian because the claim arose from BPLW's design and construction of the facility." *BPLW* at ¶1. The Court of Appeals held that the Statute did not prohibit BPLW's duty to defend.

XI. NATIONWIDE DID NOT MAKE ANY RESERVATION OF RIGHTS BASED UPON NMSA 1978, §56-7-1, AND IS ESTOPPED FROM RAISING IT

This argument was raised in LCI2's Motion for Summary Judgment. The District Court did not rule upon it, having granted summary judgment upon other grounds. "However, we will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant." *Moffat v. Branch*, 2002-NMCA-067 ¶12, 132 N.M. 412, 49 P.3d 673.

Nationwide did not assert any reservation of rights based upon NMSA 1978, §56-7-1. The Statute is not mentioned in Nationwide's reservation of rights letter. [RP 976-979] The basis for the reservation of rights is stated on page 3 of the letter:

> As set forth in the above policy language, CG2033 provides that L.C.I.2 is an additional insured under this policy for damages arising out of our insured's ongoing operations performed for LCI2 We are accepting this tender under a reservation of rights because at this time, it is uncertain whether this incident arose out of Mr. Windham's work for Newt & Butch's or whether Mr. Windham's injuries arose out of L.C.I.2's individual negligence. Nationwide reserves its right to not defend or indemnify LCI2 for any damages arising out of its individual negligence.

As stated therein, the reservation of rights is based upon the terms of the insurance policy. It is not based upon any Statute. It is based upon a contention that under the policy language set forth in endorsement CG 20 33 [RP 752, 951] L.C.I.2 is not an insured.

The policy states that L.C.I. 2 "is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured." In its reservation of rights, Nationwide unilaterally interprets this language to mean that L.C.I.2 is not an insured for liability arising out of its individual negligence. The important point is that it is only in the context of the policy language, and whether L.C.I.2 is an additional insured under the policy, that the concept of L.C.I.2's individual negligence is raised by Nationwide. Thus, although Nationwide uses the phrase "L.C.I.2's individual negligence," it does so solely based upon its interpretation of the policy language, not upon the Statute.

Nationwide may not assert a basis for non-coverage which was not included in its reservation of rights. In *Pendleton v. Pan Am. Fire & Cas. Co.*, 317 F.2d 96, 99 (10th Cir. 1963), a New Mexico case, the Court recognized

> the long established rule that a liability insurance carrier, which assumes and conducts the defense of an action brought against its insured with knowledge of a ground of forfeiture or non-coverage under the policy, and without disclaiming liability or giving notice of a reservation of its right to deny coverage, is thereafter precluded in an action upon the policy from setting up the ground of forfeiture or non-coverage as a defense.
>
> . . .
>
> Indeed, by the weight of authority, it is not necessary for the insured to show prejudice in such a situation because he is presumed to have been prejudiced by virtue of the insurer's assumption of the defense.

Pendleton at 99.

This rule was cited in *American General Fire and Cas. Co., v. Progressive Cas. Co.,* 110 N.M. 741, 745, 799 P.2d 1113 (1990). ("[T]he insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of non-coverage.") In *Pendleton* and *American General*, the insurers made no reservation of rights at all. However, there is no difference between making no reservation of rights, or later denying coverage on a basis for which no reservation has been made. The possible ground of non-coverage based upon the Statute was known to Nationwide at all times. It chose not to assert the Statute in its reservation of rights. As such, Nationwide is precluded and estopped from raising the Statute as a ground for non-coverage at this time.

CONCLUSION

LCI2 is an additional insured on Nationwide's insurance policy, and is entitled to a defense of the underlying claim by the Plaintiffs. Defense of LCI2 is not prohibited by NMSA 1978, §56-7-1, and the *BPLW* case belies any contention to the contrary.

Additionally, a defense of non-coverage based upon that Statute was not raised by Nationwide in its reservation of rights. Therefore, pursuant to well-settled law, Nationwide is precluded and estopped from raising the Statute as a defense at this time.

For the above reasons, the ruling of the District Court should be affirmed.

LAW OFFICES OF PAUL S. GRAND, P.A.

By: _____

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CERTIFICATE OF SERVICE

It is hereby certified that on this 9th day of April, 2010, a true and correct copy of the foregoing has been mailed, via first class mail, postage prepaid and properly addressed Bernabe P. Struck, Taos County Court Clerk, Taos County Courthouse, 105 Albright St. #H, Taos, New Mexico 875871; Sean R. Calbert, Calbert Menicucci, P.C. 8900 Washington St., NE, Suite A, Albuquerque, New Mexico 87113; Kevin M. Sexton, Esq. at Montgomery & Andrews, P. A., Post Office Box 36210, Albuquerque, New Mexico 87176-6210; David. M. Houliston, Esq. Will Ferguson & Associates, 1720 Louisiana Boulevard NE, Suite 100, Albuquerque, New Mexico 87110-7069; and Josh A. Harris, Esq. Beall & Biehler, 6715 Academy Road, NE, Albuquerque, New Mexico 87109-3365.

_____
Paul S. Grand