IN THE NEW MEXICO COURT OF APPEALS

NOE RODRIGUEZ,
Worker/Appellant

v.

Ct. App. No. 33,104

BRAND WEST DAIRY, uninsured employer and STATE OF NEW MEXICO UNINSURED EMPLOYERS' FUND, Statutory Fund Payor.
Employer/Fund/Appellees.

On Appeal From The Workers' Compensation Administration,
Workers' Compensation Judge Victor Lopez

ANSWER BRIEF OF APPELLEE UNINSURED EMPLOYERS FUND

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ARGUMENT

I. NEITHER THE DISTRICT COURT RULING INVALIDATING THE FARM AND RANCH LABORER EXCLUSION IN *GRIEGO*, NOR THE SUBSEQUENT COURT OF APPEALS MEMORANDUM RULING THAT THE WORKERS' COMPENSATION ADMINISTRATION IS BOUND BY THE DISTRICT COURT RULINGS, ARE BINDING ON APPELLEE STATE OF NEW MEXICO UNINSURED EMPLOYERS' FUND

Appellant ("Worker" or "Appellant") alleges that the Workers' Compensation Administration ("WCA") is bound by the combination of the district court's ruling in *Griego v. New Mexico Workers' Compensation Administration*, Second Jud. Dist. No. CV 2009-20230 ("*Griego* or the district court"), ruling that the farm and ranch laborer exclusion is unconstitutional. Additionally, Appellant alleges that the WCA is likewise bound by this Court's subsequent Memorandum Opinion in *Griego v. NM Workers' Compensation Admin,* Ct. App. No. 32,120, filed Nov. 25, 2013, stating that the WCA is bound by the district court's ruling because of its failure to appeal that issue.

On its face, it is uncertain to whom Appellant is referring by his use of the words "Workers' Compensation Administration." However, that uncertainty is clarified by reference to Appellant's Motion for Summary Reversal, (*Rodriguez v. Brand West Dairy and UEF*, Ct. App. No. 33,104 filed with this Court on January 15, 2014). More specifically, at page 3 of the Motion, Appellant contends that because the Uninsured Employers' Fund ("UEF or the Fund") was created by the

legislature as a part of and administered by the WCA, and because the attorney staff of the UEF are staff of the WCA, as such the UEF is likewise bound by the ruling in *Griego* and the Memorandum Opinion.

To the contrary, the UEF is in fact and in law a separate entity apart and separate from the WCA. That is to say, the WCA was created by the legislature as an entity of state government. *See* 1978 NMSA, as amended, § 52-5-1.2. of the Workers' Compensation Act ("the Act"). At the same time the legislature created the WCA, it also thereafter created the "safety and fraud division," within the WCA. *See* 1978, as amended, § 52-5-1.3. On the other hand, the legislature created the UEF within the state treasury, to be administered by legislative mandate by the WCA as a "separate account." In fact, salaries of attorneys representing the UEF are paid out of the UEF's separate account, and not out of an account for the WCA. *See* NMSA 1978, as amended, § 52-1-9.1(A).

Had the legislature not intended that the UEF be a separate entity apart from the WCA, it could have easily said so when it created the UEF, but chose not to do so. Obviously, the legislature intended to establish a "bright line" separating the WCA as a party litigant, apart from the UEF as a separate party litigant which can be sued separately in matters filed before the WCA. For example, the legislature could have created the UEF within the WCA, as it did with

the aforementioned safety and fraud bureau, but chose not to do so. The legislature is presumed to know the laws it enacts. *See Bettini v. City of Las Cruces*, 171-NMSC-054, 82 N.M. 633, 485 P.2d 967 (1971), (referring to New Mexico statutory and judicial law).

Other facts distinguishing the UEF apart from the WCA are that the WCA is funded by as assessment of four-dollars per worker per quarter, split between worker and employer. On the other hand, the UEF is funded through a separate assessment of thirty cents, paid quarterly solely by an employer for each employee covered by the Act. *See* NMSA 1978, as amended, § 52-5-19(A) and §52-1-9.1(B). There are also different statutes and rules applicable to the UEF compared to other entities that pay workers' compensation benefits. As a few examples, UEF benefits are payable only should the injured worker's disability occur in New Mexico (§ 52-1-9.1.D.); the rights of an injured worker inure to the UEF against an employer failing to make compensation payments (§ 52-1-9.1. E.); the liability of the UEF and the state treasurer is limited to its assets and is a payor of last resort (§ 52-1-9.1. H. and I). The UEF also has a cap on the amount of benefits that can be paid out to protect it from running out of money (NMAC 11.4.12.11).

Claims involving the UEF are claims brought by a worker against the employer and UEF and not against the WCA. Put another way, if the farm and ranch labor exclusion defense is raised in matters before the WCA, it is a defense asserted by employers or parties stepping into the shoes of the employer, such as the UEF. Pursuant to NMAC 11.4.12.9(G), the UEF is entitled to assert all defenses that would be available to an employer. Just as the WCA cannot infringe on the due process rights of employer litigants from raising any defense established by statute or case law, the WCA cannot infringe on the due process rights of the UEF, which steps into the shoes of employers when asserting defenses to claims.

The UEF is mandated to pay, or oppose, claims on their merits, and to be treated for purposes of mediation and adjudication of disputes as a separate party with all rights and responsibilities applicable under law. *See* NMAC 11.4.12.9(A)(1). In this regard, this Court in the case of *Johnson v. Hoyt & Sons Tree Service and the NM Uninsured Employers' Fund*, 2007-NMCA-072, 141 N.M. 849, 161 P.3rd 994, held that the UEF is a separate and distinct party with separate pecuniary interests in any action filed by a worker before the WCA against an uninsured employer and the UEF. Being that the UEF is a separate litigant entity apart from the WCA, the UEF cannot be bound by, nor can the case at bar be controlled by the Griego ruling.

As set forth in Rule 1-010(A), NMRA 1978, "...In the complaint the title of the action shall include the names of all parties..." The purpose of naming all parties to a lawsuit is of course to give all parties fair notice of claims and defenses, and to give all parties their "day in court." *See Transamerica Ins. Co. v. Sydow*, 1981-NMCA-121, 97 N.M. 51, 636 P.2d 322.

The named Defendants in *Griego* and upon appeal were the New Mexico Workers' Compensation Administration, and its director. No farm and ranch employers ("farm/ranch employers") were named as parties. The significance of this fact is that the district court in *Griego* made no findings in its final judgment that any employer bore any responsibility to the plaintiffs. In fact, the court, at page 1 of the final judgment said, "Pursuant to the Declaratory Judgment Act...the Court enters a declaratory judgment on behalf of plaintiffs..." [RP 140]. That being the case, the district court's ruling can have no binding effect on the UEF because, as a condition precedent to the liability of the UEF, there must be in place an employer who failed to maintain workers' compensation coverage as required by law. *See* NMSA 1978, as amended, § 52-1-9.1(C).

Personal and subject matter jurisdiction of a district court is limited to the parties named in the declaratory action before it. See *Allstate Ins. Co. v. Firemen's Ins.*, 1996-NMSC-120, 76 N.M. 430, 415 P.2d 553 (1966). Neither the

UEF nor the Employer herein, Brand West Dairy, were named as parties to the *Griego* Declaratory Judgment Action. As such, if a party is not named in the lawsuit, that party cannot be bound by any judgment rendered in that action. NMSA 1978 §44-6-12. In accord with this position, the Declaratory Judgment Act provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. Id.

Accordingly, the UEF not being named as a party defendant in *Griego*, it should not be bound by the *Griego* ruling. For this Court to hold otherwise would deprive the UEF of its due process rights. *See Matter of Miller v. County Assessor for Bernalillo County, et al*, 1975-NMCA-116, 88 N.M. 492, 542 P.2d 1182, holding that the Fourteenth Amendment guarantees every person the right to procedural due process, which includes the right to be heard and to present any defense.

The UEF not being bound by the district court's *Griego* ruling, neither is the UEF bound by this Court's unpublished Memorandum Opinion.

As noted in the Memorandum Opinion, there were only two issues before this Court for determination: (1) the jurisdiction of the district court over the Plaintiff's declaratory action, and (2) the power of the district court to order the WCA to re-open the individual Plaintiff's claims. This Court then determined those

two issues to be moot, being that all Plaintiffs settled their claims with the WCA, and dismissed the WCA's appeal.

After determining the mentioned issues to be moot, the Court, however, went on to say that because the WCA failed to appeal the district court's ruling on constitutionality, and additionally because the WCA did not seek review of the district court's rejection of *Cueto v. Stahmann Farms,* Inc. *and Commercial United Assurance Co.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535, as being binding precedent on the district court; therefore, the WCA is bound by both of the district court's rulings. The UEF contends that these mentioned pronouncements by the Court following dismissal of the WCA's appeal were unnecessary and beyond the scope of the two issues before the Court, and therefore said pronouncements are "*dicta*" which is neither binding on the UEF in the case at bar, nor for that matter binding on farm/ranch employers for claims filed after the *Griego* decision. *See Kent Nowlin Const. Co. v. Gutierrez*, 1982-NMSC-123, 99 N.M. 389, 658 P.2d 1116, holding that dictum is not binding as a rule of law.

In his Brief in Chief, Worker contends that the *Griego* ruling, declaring the farm and ranch laborer exclusion unconstitutional, in combination with this Court's Memorandum ruling, must govern this appeal, and therefore the Order of the Workers' Compensation Judge ("WCJ") below must be reversed. Worker

contends that in dismissing Worker's claim, the WCJ felt constrained by what he considered to be this Court's precedential ruling in *Cueto*, declaring the farm and ranch laborer exclusion to be constitutional and not in violation of equal protection. Worker contends that the WCJ's reliance on *Cueto* was erroneous because this Court decision therein, was "*dicta*." More specifically, Worker alleges that because this Court in *Cueto* said, Mr. "Cueto also seems to argue that the exemption denies him equal protection," (emphasis added), was not an issue before the Court, but rather a speculative issues observed by this Court. Obviously however, had Mr. Cueto not raised the equal protection issue on appeal; this Court would not have addressed it. Additionally, contrary to Worker's assertion that the district court in *Griego* rejected the *dicta* in *Cueto*, the fact of the matter is that the district court rejected *Cueto* because it was decided prior to the adoption of the modern rational basis test [RP 59].

The WCJ below did exactly what this Court envisioned a WCJ would do – he looked to the district court and to the court of appeals for guidance on whether the exclusion is constitutional. Notably, the WCJ concluded:

> Despite the interest in respecting the District Court judgment and comity, the WCA Judges, like the District Court Judges, are bound to follow precedents of the Court of Appeals and of the New Mexico Supreme Court. *Alexander v. Delgado*, 1973-NMSC-30, 84 N.M. 717, 507 P.2d 778 (1973).

Assuming *arguendo* that this Court should decide that the UEF is bound by the *Griego* and Memorandum rulings, there would remain to be answered by this Court, the scope of retroactive application, if any, which would apply to Appellant- Rodriguez's, case and all pending and future cases of similarly interested persons. The scope of application is addressed by the UEF in its Argument II.

ARGUMENT

II. THE UNINSURED EMPLOYERS' FUND TAKES NO POSITION AS TO WHETHER THE FARM AND RANCH LABORER EXCLUSION UNDER THE WORKERS' COMPENSATION ACT IS CONSTITUTIONAL OR UNCONSTITUTIONAL, BUT RATHER INVITES THIS COURT TO DECIDE THE CONSTITUTIONAL ISSUE AND, IF NEED BE, ITS APPLICATION

There exists a significant degree of uncertainty in the farm and ranch community, as well with the UEF and legal community at large, as to binding application, if any, of the district court's ruling in *Griego*, *Id.* As such, and considering both the reasons advanced by Worker in his Brief in Chief for a declaration by this Court that the farm/ranch exclusion be declared unconstitutional, as well as considering out-of-state cases advancing the reasons for and against the farm/ ranch exclusion, the UEF takes no position either for or against constitutionality, but rather would respectfully invite this Court to decide

the constitutional issue and thereby provide state wide clarification for all interested participants.

Being that a Workers' Compensation Judge has no authority to determine constitutional challenges to the Workers' Compensation Act; this higher Court does have such authority to do so. *See Madrid v. St. Joseph Hospital*, 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250 (explaining that claimants challenging constitutionality of Workers' Compensation Act brought challenge to Appellate Court because WCA had no authority to determine such issue); and *Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, 143 N.M. 726, 181 P.3d 718 (noting that the workers' compensation judge lacked authority to determine whether statute violated equal protection, but proceeded to consider the issue on appeal).

Assuming this Court determines the farm/ranch exclusion to be unconstitutional; such new rule would involve significant changes in the liability of both the UEF, as a governmental state fund, and upon farm and ranch employers state wide, leaving unanswered the scope of the new rule's application retroactively or prospectively. If unanswered by this Court, the result would be on-going appellate litigation for clarity. *See Lopez v. Maez*, 1992-NMSC-103, 98 N.M. 625, 651 P.2d 1269 (stating that it is within the power of the state's higher

courts to give a decision prospective or retrospective application without offending constitutional principles).

Should this Court declare the farm/ranch exclusion unconstitutional, the UEF respectfully requests that this Court apply the new rule with "purely prospectively," limiting its application only to cases which may arise in the future, and not to Appellant-Rodriguez's case at bar before the Court for decision. *See Navajo Freight Lines, Inc., v. Baldonado*, 1977-NMSC-025, 90 N.M. 264, 562 P.2d 497, (holding that "all cases that may arise in the future," means all cases filed after the new decision is announced by the Court).

In the case of *Padilla v. Wall Colmonoy Corp.* 2006-NMCA-137, 140 N.M. 630, 145 P.3rd 110, this Court declared that,

> Absent an express statement that limits a decision to prospective application, our Supreme Court has established the presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively, with application to causes of action accruing before the announcement of a new rule; to the case at bar pending before the court for decision; to similar pending cases, and to cases arising in the future after announcement of the new rule; however, this presumption can be overcome if the guidelines articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L. Ed.2d 296 (1971), overruled by ***634** ****114** *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 96-97, 113 S.Ct. 2510, L.Ed.2d 74 (1993), provide sufficient justification for avoiding retroactive application.

The guidelines or factors set forth by this Court in *Padilla*, Id. as announced more fully beforehand in the case of *Beavers v. Johnson Controls World Services, Inc.*, 1994-NMSC-094 118 N.M. 391, 881 P.2d 1376, as justification for avoiding retroactive application are as follows:

> First, "the new decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed."
>
> Second, "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, "we have weighed the inequity by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardships by a holding of nonretroactivity."
>
> Third, "we have weighed the inequity by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardships by a holding of nonretroactivity."

As discussed in *Beavers, Id.,* our Supreme Court stated that the presumption against retroactivity can be overcome by a sufficiently weighty combination of <u>one or more</u> of the *Chevron Oil* factors (emphasis added)

> **Prospective Application is appropriate where a ruling declaring the farm and ranch laborer exclusion is unconstitutional will create a new rule of law and impose substantially different legal obligations.**

As enacted by our legislature in the year 1937, **Ch. 92, s 2**., as amended, §52-1-6(A), formerly § 59-10-4(A), excluded farm/ranch laborers from the provisions of the Act, and in turn exempting farm/ranch employers from insurance coverage requirement for their laborers. On two occasions thereafter, this Court addressed the farm/ranch exclusion. In *Varela v. J.B. Mounho*, 1978-NMCA-086, 92 N.M. 147, 584 P.2d 194, this Court continued to recognize the validity of the farm/ranch exclusion, (holding that laborers working in commercial dairies were included in the definition of farm/ranch laborers and not entitled to coverage under the Act). Additionally, in the case of *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, 94 N.M. 223, 608 P.2d 535, this Court declared that the farm/ranch exclusion was not vague or arbitrary, but rather has a reasonable basis and thus did not violate equal protection.

Should this Court declare the farm/ranch exclusion unconstitutional, the effect of the new rule would result in a new principle of law overruling both past existing statutory and common law precedent, and creating new uninsured liability obligations, the resolution of which was not clearly foreseen by the farm/ranch community or the UEF.

As observed by this Court in *Padilla*, and by our Supreme Court in *Beavers*, even though the new rule establishes a new principle of law changing prior

existing law, there remains for consideration the sub factor of the degree of the parties "reliance" on the preexisting law. As expounded by this Court in *Padilla*, in reference to the *Beavers* case, our Supreme Court stated that "the extent to which the parties in a lawsuit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized. The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction...the workplace is of course a commercial setting in the general sense, and...employment is contractual in nature."

In *Beavers, Id.* our Supreme Court set forth examples of the extent to which parties in a law suit, or others, may have relied on the state of the law before a law-changing decision has been issued, citing *Hicks v. State*, 1975-NMSC-056, 88 N.M. at 594, 544 P.2d at 1159 (pure prospectivity accorded to decision abolishing sovereign immunity because governmental entities had conducted their affairs in reliance upon prior state law); *Lopez v. Maez*, 1992-NMSC-103, 98 N.M. at 632, 651 P.2d at 1276 (selective prospectivity applied to decision imposing liability on travenkeepers selling liquor to intoxicated person because travenkeepers might not have acquired necessary insurance); *Whenry v.Whenry*, 1982-NMSC-067 98

N.M. at 739, 652 P.2d at 1190 (rule announced in case overruling previous cases holding military retirement pay to be community property held not retroactive because attorneys and courts had relied on previous rule).

As far back as the year 1937, farm/ranch employers were statutorily not required to have workers' compensation insurance coverage in place for their laborers. This historical reliance was based upon the plain language of § 52-1-6(A), and on prior decisions of this Court upholding the farm/ranch exclusion without any foreshadowing whatsoever by prior court decisions that the exclusion would be changed. To apply a new rule retroactively, declaring the farm/ranch exception unconstitutional, to farm/ranch employers who historically and justifiably relied on the exclusion's constitutionality, would expose such employers to existing uninsured liability to defend against farm/ranch claims not previously required to be insured, and to defend against unfounded claims occurring before the announcement of the new rule.

If retroactive application of a new law attaches new legal consequences to events completed beforehand, substantial rights are affected, and prospective application is generally required. *See Landgraf v. USE Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (stating that presumption against statutory retroactivity is based on the unfairness that results when new burdens

are placed on persons after the fact); *see also Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668 (clarifying that if retroactive application of a new law results in attaching legal consequences to events completed before the new law, prospective application may be required by the New Mexico Constitution), *Jojola v. Aetna Life and Casualty*, 1989-NMCA-085, 109 N.M. 142, 782 P.2d 395 (finding, "we would find it offensive to impose a statutory requirement retroactively when the affected party would have no reason to know of the requirement in time to comply with it, particularly when compliance would have been relatively easy)."

Prospective application is appropriate because retroactive application will not advance operation of the new law and would substantially impede the administration of justice.

The purpose of a new rule declaring the farm/ranch exclusion unconstitutional would be to bring farm/ranch laborers, for the first time, within the insurance coverage requirements of the Act. However, to apply the new rule retroactively would not advance the operation of the new rule, but rather would significantly impact the administration of justice, because it would require farm/ranch employers, as well as the UEF, to potentially pay benefits to farm/ranch laborers who were not previously entitled to such benefits. Retroactive application could also subject such employers to the payment of

interest, penalties and costs they otherwise would not have been exposed to. In addition, because the UEF is only funded by thirty-cent contributions and cannot spend below zero, such ruling would gut the Fund and potentially leave non-farm/ranch workers who are currently counting on benefits out in the cold.

Furthermore, if the new rule is given retroactive application, it would impede the Act's purpose of promoting efficient resolution of workplace injury cases. More specifically, retroactive application would thwart the stated legislative intent of the quick and efficient delivery of benefits, as referenced in NMSA 1978, as amended, § 52-5-1, because the new rule would significantly expand the number of farm/ranch claims that could efficiently be resolved at a mediation conference, but for farm/ranch employers valid rejections of a recommended resolution on the grounds they were not required to carry workers' compensation insurance at the time of a worker's job accident. Moreover, retroactive application of the new rule would not treat similarly situated farm/ranch employers equally, but rather would favor those farm/ranch employers who purchased insurance coverage after the announcement of the new rule, over those employers who relied to their detriment on the prior existing law and did not purchase insurance coverage.

Prospective application should be required given the extensive historical reliance on the exclusion by farm and ranch employers who have relied on the exclusion as a defense.

While the final factor requires an evaluation of the inequity, injustice or hardship that would be imposed upon the parties by retroactive application of a new rule, the Court in *Beavers*, *Id.* stated that beyond this evaluation,

> we think at least one of the powerful considerations informing the inequity factor is the degree of reliance that persons affected or potentially affected, by the rule may have placed on the state of the law antedating the rule. The greater the extent a potential defendant can be said to have relied on the law as it stood at the time he or she acted, the more inequitable it would be to apply the new rule retroactively...one of the cherished fundamental principles of this nation's jurisprudence is that persons are at least entitled to know in advance what consequences adhere to their actions.

The history of the farm/ranch exclusionary rule clearly demonstrates that because of the legal exclusion, *per se*, farm/ranch employers, in the commercial setting, conducted their affairs in reliance upon their insurance carrier or business attorney's representations that they were not required to maintain insurance coverage for their laborers. Obviously, if a new rule is announced to the contrary, such employers cannot purchase retroactive coverage to insure against accidents occurring before the imposition of the new rule. Rather they will be burdened with significant financial hardship to defend against farm/ranch claims without the benefit of insurance coverage. To punish those employers, for

conduct that was previously legal, would be a clear offense to justice. On the other hand, to apply the new rule purely prospectively, would place those employers on notice of what is expected from them, and give them the time and opportunity to purchase workers' compensation insurance coverage for their laborers.

Prospective application is crucial to ensuring the solvency of a state fund established for the very specific purpose of providing benefits to workers whose employers were legally obligated, but failed, to do so.

Not only would retroactive application of a new rule, declaring the farm/ranch exclusion unconstitutional, place a financial burden on farm/ranch employers, such application would also place a financial burden upon the solvency of the Fund. The UEF's assets to pay for a job injured worker's claim, when the employer is uninsured, is derived from a statutory assessment of thirty-cents per employee, paid each quarter by all employers subject to the Act, with the exception of farm/ranch employers. *See* NMSA 1978, as amended, § 52-1-9.1(B).

In a nut shell, to be eligible for benefits from the UEF, a worker's employer must have been required by the Act to have insurance coverage in place for his/her worker, but for whatever reason, did not comply. § 52-1-9.1(B) Id. In such

case, upon a failure or refusal by employer to pay worker's benefits, the UEF, as a payor of last resort, becomes statutorily obligated to pay worker's benefits. *See* NMSA 1978, as amended, Sections 52-1-9.1 (C), (G)(1), and (I).

Application of a retroactive new rule imposing farm/ranch liability claims upon the UEF, where the worker's employer, in compliance with existing law, did not have insurance coverage in place, or for the same reason, fails or refuses to pay worker's benefits, would reduce the solvency of the Fund, not only for benefits that would be payable to a flood of farm/ranch workers whose claims would fall within the provisions of the new retroactive rule, but would also significantly affect the Fund's assets available to pay for non-farm/ranch claims.

Granted, the UEF has a statutory right or reimbursement from an uninsured employer subject to the Act. However, given that a farm and ranch employer was not required, under current law, to have insurance coverage in place for its farm/ranch laborers, the UEF would be precluded from asserting any reimbursement right. The UEF's right of statutory reimbursement from an employer hinges upon an employer's "legal" liability to his/her workers. Without such legal liability, there cannot be any right to reimbursement from employer granted to the UEF. The end result being, not only an inequity imposed upon the UEF, but also inequity upon those non-farm/ranch employers whose

aforementioned statutory contributions paid into the Fund, will be utilized to pay for farm/ranch worker's benefits which were not intended by the legislature to be paid under existing law.

For the foregoing reasons, the UEF would submit that there are sufficient combinations of the weighty *Chevron Oil* Factors as announced in *Beavers, Id.* and *Padilla, Id.* for this Court to avoid retroactive application of a new rule, declaring the farm/ranch laborer exclusion unconstitutional, and applying the new rule purely prospectively, with application only to cases arising in the future after the new rule is announced by the Court.

While it may appear unfair to apply the new rule prospectively and thereby deny Appellant-Rodriguez from his day in court if this case were remanded by retroactive application of the new rule, it would work an even greater injustice to deny the multitude of farm/ranch employers and the UEF from a defense upon which they significantly had a legal right to rely upon. Otherwise, should this Court believe that it would be unfair not to apply the new rule's application to Appellant, the UEF would in such case respectfully request that the Court limit application of the new rule to "selective prospectively," *i.e.* application of the new rule only to Appellant-Rodriguez's case at bar and only to cases arising in the future after the new rule is announced by the Court.

CONCLUSION

Based upon the foregoing reasons, Appellee-UEF respectfully requests:

1. The Court declare that neither the District Court's Declaratory Judgment *in Griego*, nor the Court of Appeal's Memorandum Ruling, in relation to the *Griego* Judgment, are binding upon the State of New Mexico Uninsured Employers' Fund.
2. The Court decide whether the farm and ranch laborer exclusion under the Act is constitutional or unconstitutional, and if unconstitutional, its application be applied purely prospectively.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this Answer Brief of Appellee State of New Mexico Uninsured Employers' Fund was served on each of the following parties noted below on this 1st day of May 2014.

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STATEMENT OF COMPLIANCE WITH RULE 12-502(E)

This Answer Brief complies with the type-volume limitation imposed by NMRA 2010, Rule 12-505(E). The word count feature of the word processing system (Microsoft Word, Version 2003) used to prepare the Petition indicates a word count of 5,720 for the body of the Answer Brief, excluding the cover page, signature clock, certificate of service and this certificate of compliance.

Richard J. Crollett, Esq.