IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

HEALTHSOUTH REHABILITATION HOSPITAL
OF NEW MEXICO, LTD., D/B/A HEALTHSOUTH
REHABILITATION HOSPITAL,
Plaintiff,

v.

No. 33,593

TERRY A. BRAWLEY and JOYE BRAWLEY,
Husband and Wife,
Defendants-Third-Party Plaintiffs-Appellants

v.

THE BOARD OF REGENTS OF NEW MEXICO
INSTITUTE OF MINING AND TECHNOLOGY,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT
SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO
THE HONORABLE ALAN MALOTT, PRESIDING

BRIEF IN CHIEF

Oral Argument Is Requested

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TABLE OF CONTENTS

Statement of Compliance

The body of this brief is in Calibri, contains 9,466 words, according to the word-count feature of WordPerfect version X6, and thus complies with the type-volume limitation in Rule 12-213(F)(3), NMRA.

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

STATEMENT OF COMPLIANCE

The body of this brief is in Calibri, contains 9.459 words, according to the word-count feature of WordPerfect version X6, and thus complies with the type-volume limitation in Rule 12-502(D)(3), NMRA.

This Brief in Chief is filed on behalf of Defendants-Third-Party Plaintiffs-Appellants Terry A. Brawley and Joye Brawley (collectively "the Brawleys").

SUMMARY OF PROCEEDINGS

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is a case involving multiple breaches of statutory and contractual duties by Third Party Defendant-Appellee Board of Regents of the New Mexico Institute of Mining & Technology ("NM Tech") arising from its actions and inactions with respect to a medical Health Benefit Plan under which the Brawleys were insureds. Terry Brawley (sometimes referred to simply as "Brawley") suffered serious injuries as a result of an accident which occurred when he was riding his ATV and unexpectedly encountered a deep washout causing him and his vehicle to violently crash. NM Tech breached the terms of the Health Benefit Plan which covered Terry and Joye Brawley as well as various provisions of the New Mexico Insurance Code when it denied payments for medical charges of approximately $562,739.96 after Brawley's ATV accident.[1]

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[1]Plaintiff HealthSouth Rehabilitation Hospital ("HealthSouth") originally sued Brawley for approximately $106,142.07 in unpaid medical charges. NM Tech initially denied coverage for all medical charges of about $562,739.96 under their employee Health Benefit Plan. NM Tech also denied payments to multiple health care providers, including Kindred and UNM hospitals in Albuquerque for the extensive medical care and treatment provided to Terry Brawley. The Brawleys

In denying coverage, NM Tech relied on an "alcohol exclusion" in the policy under which coverage was excluded if the insured was determined to be under the influence of alcohol if proven that the blood alcohol level equaled or exceeded the limit set by the state and that was determined to have a direct relationship to the injuries sustained. The Brawleys denied that the exclusion applied; NM Tech had the burden to establish that the exclusion justified its denial of coverage. NM Tech also contended that it was not "transacting insurance" by accepting premiums and adjusting claims under its Health Benefit Plan and, therefore, was not subject to the New Mexico Insurance Code.

After a bench trial, the Court found that NM Tech was "transacting insurance" by adjusting claims under its Health Benefit Plan within the meaning of the Insurance Code. It found, further, that NM Tech violated the Insurance Code by, among other things, failing to adopt and implement a reasonable plan for the appropriate investigation of claims in general and failing to reasonably investigate the Brawleys' claim in particular. But the Court found that the alcohol exclusion applied and that NM Tech was allowed to invoke that exclusion to deny coverage. The Brawleys appeal from that judgment.

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brought third-party claims against NM Tech. Prior to trial, NM Tech settled with HealthSouth, and HealthSouth was dismissed from the case with prejudice.

B. Summary of Material Facts

1. The Accident

The Brawleys live near Lemitar, New Mexico. On August 1, 2009, Brawley drove his ATV from his home to the Mountain View Bar in Lemitar. At some point, he left the bar. Around midnight, on a straight, flat unlit dirt road between the bar and his home, Brawley was on his ATV when he encountered an unexpected and unforeseeable road "washout" measuring some 15 feet wide by 5 feet deep. Crashing into this washout, Brawley was catapulted over 45 feet where he landed on his head, fracturing his skull and causing life-threatening injuries. In a coma, Brawley was airlifted by lifeguard helicopter to UNM Hospital in Albuquerque, was subsequently treated at four hospitals, and incurred approximately $562,739.96 in medical charges. At trial, NM Tech and Brawley stipulated that the admissible medical charges remaining unpaid were $308,391.89.

Subsequent to the accident, Brawley was charged with aggravated DWI arising from the accident. Those charges were later dismissed on the prosecutor's motion. There was no trial on those charges.

2. The Insurance Coverage

Joye Brawley was an employee of NM Tech and had been employed there for 12 years prior to the accident. She and her husband Terry A. Brawley were covered by NM Tech's Medical Health Benefit Plan contract ("Health Benefit Plan") with a $2 million Specific Excess Loss Policy which applied after NM Tech paid its $135,0000 stop loss deductible. NM Tech and its agent HCH established the Health Benefit Plan and the claims-adjusting procedure with NM Tech retaining the right to final determination to approve or to deny claims. The Health Benefit Plan was a major incentive for Joye to seek employment at NM Tech.

The coverage under the Health Benefit Plan was broad. "This Plan represents the efforts of the Employer to provide its employees and their dependents with the best possible health benefits..." The Health Benefit Plan provided up to $2 million in specific benefits per person for medical services and prescription drugs. It provided full coverage for medical benefits and for prescription drugs for injuries sustained.

One of the "Medical Limitations" in the Health Benefit Plan was the following ("the alcohol exclusion")

> [N]o benefits are payable under this Plain for Expenses incurred for or in connection with ...
>
> (f) Injury or Sickness sustained ... (ii) while under the influence of alcohol .... For purposes of this section, a person shall be presumed to be under the influence of alcohol if his blood alcohol level equals or exceeds the limit for driving under the influence of alcohol as determined by the law of the state in which the Injury occurred. ...
>
> The limitations of this section shall not apply unless there is a direct relationship between the activity described in (1) or (2) and the Sickness or Injuries sustained.

3. The "Investigation"

NM Tech obtained a one-page document ("Exhibit B") which purported to show the results of a blood alcohol test ("BAT") level on Brawley for August 2, 2009, that exceeded the New Mexico threshold for a presumption of intoxication. That was the beginning and end of NM Tech's investigation into this claim. On that basis of that document, and that document alone, NM Tech denied the Brawleys' claim.

Angela Gonzales was an employee of NM Tech and the person most knowledgeable about the Health Benefit Plan. She admitted the following, and her testimony was uncontroverted:

- the Brawleys' claims were denied solely on the basis of one document, Exhibit B, and that no other documents were discussed or examined prior to the denial of the Brawleys' claims;
- if Brawley had not been under the influence at the time of the accident, the claim would have been covered;
- with respect to Exhibit B, she was not aware of anyone who drew the blood, whether the draw was authorized by a police officer, who was present when the blood was drawn, whether it was done using an approach approved by the scientific laboratory division ("SLD") of the Health and Environment Department, or an SLD-approved sealed blood kit, whether it was analyzed by a SLD certified technician, if any isopropyl was used or even it the blood was taken was from Brawley;
- she could not confirm if the blood draw conformed to New Mexico law and regulations;
- NM Tech never contacted law enforcement personnel or anyone who provided medical services after the incident including the Socorro Fire Department, EMT's medical care providers; and

- NM Tech never reopened the claim after the DWI charges against Brawley were dismissed.

No evidence was offered at trial to prove the that NM Tech made any attempt to ascertain whether the following protocols were followed:

(1) that the blood samples shall be collected in the presence of an arresting officer or other authorized person to authenticate the sample;

(2) that ethyl alcohol shall not be used as a skin antiseptic in the course of blood collection; and

(3) that blood samples be collected using an SLD-approved blood collection kit containing sterile tubes with sodium chloride, or

(4) a chain of custody of the sample from the time it was taken from the body to the place of analysis.

NM Tech never contacted either of the Brawleys prior to denying their claim. **FOF 34; RP 890**.

4. Evidence Presented at Trial

At trial, the Brawleys presented the testimony of two expert witnesses. Derek Swinson, PhD. testified about the cause of the accident, and Professor

Garth Allen testified about NM Tech's failure to properly investigate and evaluate the Brawleys' claim before denial. Their testimony was uncontroverted.

a. Dr. Swinson's Uncontroverted Testimony That the Condition of the Road, and Not the Use of Alcohol, Was the Cause of the Accident

Dr. Swinson, UNM Professor of Physics Emeritus, has reconstructed over 2,000 accidents, including those involving ATVs and motorcycles. He was accepted as an expert witness on accident reconstruction. Based on his mathematical and scientific calculations, he concluded that the ATV accident was inevitable due to the washout which was the cause of the accident. NM Tech presented no contrary evidence.

The washout where the accident occurred was substantial in size, measuring some 15 feet across and 5 feet deep. **FOF 38, RP 890**. Dr. Swinson diagramed the path of the ATV and referred to a map of the area which depicted an initial path along the arroyo ditch bank. He testified that just prior to the accident, the ATV made a sharp turn off the arroyo ditch bank of 77% – which is sharper than a right angle – down a steep drop in elevation of 3-4 feet going down from the road along the arroyo onto a short section of a road traveling to the road where the accident occurred. Dr. Swinson opined that, given the dark

conditions, the sharp 77% turn just prior to the 15 ft. x 5 ft washout area and the washout itself, it is likely that any vehicle traveling along the road would have crashed due the washout. Dr. Swinson opined that if someone had a lot of alcohol in their system they could not have negotiated the 77% turn from the arroyo road down the 3-4 foot drop. Yet Brawley did negotiate that turn. **Oct.7TR 85-86, 95-96; FOF 40, RP 890**.

Dr. Swinson explained that at the accident scene there was a large field of several acres which was flooded for irrigation purposes, with a dirt berm providing a barrier between the field and the roadway. Prior to the accident the berm broke and washed out the road to a depth of 5 feet. He specifically described the ATV crash site where "... the roadway in that area was straight and level." Dr. Swinson opined that if the road had not been washed out Brawley would have gone down this road to his nearby home. **Oct.7TR 86, 87**.

Dr. Swinson testified that the ATV was traveling about 28 mph; the brakes were applied 21 feet before the washout, and it would take a half a second before the ATV arrived at the edge of the washout. When the ATV went over the washout, the ATV's front wheels left the ground, started to drop a little, and when

the ATV struck the far edge of the washout, Brawley was catapulted about 45 feet.

Dr. Swinson stated that "[t]he sole cause of the accident, in my opinion was the washout on the road." **Oct.7TR 87-89, 91, 99; FOF 46, RP 891**.

Dr. Swinson explained that the person operating the ATV would have perceived the washout, reacted and applied the brakes with the difference of one second between daylight and nighttime perception. He opined that the accident was unavoidable due to the washout and would have occurred regardless of alcohol involvement. **Oct.7TR 114**.

Under cross-examination by NM Tech's attorney regarding perception and reaction times, Dr. Swinson explained the inevitability of the accident:

> A sober person might have gotten the brakes on a little earlier; but if you take the time scales for reasonable lengths for perception and reaction, there's still going to be an accident ... If there's only a second different there's still going to be an accident.

Oct.7TR 126.

b. Professor Allen's Uncontroverted Testimony That NM Tech Failed to Reasonably Investigate and Evaluate the Brawleys' Claim

The Brawleys also called Professor Garth Allen as an expert witness. He was duly qualified and accepted by the court as an expert in the standards, customs and practices governing claims adjusting for insurance plans and self-funded plans like NM Tech's. Professor Allen has particular expertise in this re as he is covered under a self-funded health care plan as a university professor, employee at the University of Northern Colorado in Greeley, Colorado. He testified that there is only one set of rules for claims adjusting which requires a fair, prompt and reasonable investigation.

Professor Allen's testimony established the following:

a. NM Tech hd a fiduciary responsibility and retained the final and ultimate authority on plan eligibility, compensability of claims and was the trustee of the Health Benefit Plan funds and had final authority over the funds. **Oct.7TR 137-138, 142, 144-145**.

b. NM Tech breached its Health Benefit Plan through improper claims adjusting, should not have denied the Brawleys' claims, should have had a mechanism in place to correct the wrongful denial, make it right, get the claims submitted to the excess carrier, fix the problem, and pay the claim. **Oct.7TR 145-146**.

c. The only exclusion used to deny Brawleys' claims was the alcohol exclusion, and NM Tech was required to prove that it applied. Contract exclusions in the industry are construed narrowly. Professor Allen explained that if a person has a few glasses of wine and then has a heart attack, the heart attack is covered regardless of the presence of alcohol. He discussed the fact that NM Tech was required to investigate to determine if a sober person would have had the same accident. He discussed the application of the concurrent causation doctrine to this ATV accident, assuming arguendo that alcohol was a cause of the accident in addition to the washout. **Oct.7TR 147-148**.

d. Professor Allen testified that the only exclusion used to deny the Brawleys' claims was misrepresented as NM Tech never established any direct relationship between the alleged alcohol use and the injuries. NM Tech had the burden to prove the intoxication exclusion's three requirements and to prove that a sober person would not have had the accident due to the washout. NM Tech completely ignored and never investigated the 15 ft. by 5 ft.

washout, an obvious causal factor in the ATV accident which created a dangerous condition in the middle of the road. **Oct.7TR 150-151**.

e. Professor Allen agreed with Professor Swinson's testimony that if the washout was the cause of the accident then the only direct relationship was between the washout and the injuries. **Oct.7TR 152**.

f. Professor Allen testified that NM Tech had a fiduciary duty to implement the Health Benefit Plan in good faith which protected people in time of financial and personal calamity and to support its employees' reasonable expectations and financial confidence in the Health Benefit Plan. **Oct.7TR 153**.

g. Professor Allen testified that NM Tech violated its claims adjusting duties through action and inaction by NM Tech and their agent HCH. It misrepresented the exclusion by treating it as if it said "If you are injured or get sick while intoxicated, we won't pay. That's not what it says. It has to have a direct relationship." It has to prove that Brawley was driving, that he was intoxicated, and that there was a

direct relationship between the intoxication and the accident. **Oct.7TR 154-156**.

h. Professor Allen explained that NM Tech had an obligation to work as hard to find coverage as to deny coverage. NM Tech must give as much consideration to the rights of the Health Benefit Plan beneficiaries as it does to its own rights. **Oct.7TR 155**.

I. Professor Allen was the insurance expert in *American Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ___ N.M. ___, and he testified that where the exclusionary basis for denial results in a criminal charge, and those charges are later dismissed, the claim must be re-evaluated. In this case, as in *Cleveland*, there was a total failure to re-evaluate the claims after the criminal DWI charges were dismissed which failure resulted in breaches of its claims adjusting duties. **Oct.7TR 156-157**.

j. Professor Allen testified that there was nothing in the record to show that anyone from NM Tech or HCH ever contacted law enforcement to determine how the ATV accident occurred before denying the claim. **Oct.7TR 155**.

k. Professor Allen testified that NM Tech's responsibilities for claims adjusting never diminished because of HCH's role. **Oct.7TR 158**.

l. Professor Allen testified that NM Tech failed to adopt and implement reasonable standards for the prompt investigation of the claims; no standard would allow claim denials based upon application of only half of an exclusion; claims standards require that when new information is available such as the DWI dismissal or the washout, failure of proof of who drew the blood, no chain of custody of the blood, no witnesses – at some pont, when you can't prove an exclusion, you must pay the claim. **Oct.7TR 158-160**.

m. Professor Allen opined that NM Tech's denial of the Brawleys' claims was in bad faith as it was based only upon half of an exclusion. Moreover, the medical treatment was medically necessary and reasonable. "It's fundamentally improper and an indicator of bad faith to use your own improprieties to punish the insured." **Oct.7TR 182**.

n. Professor Allen again explained how the concurrent causation doctrine is applied in this case under questioning from NM Tech's

attorney. He discussed the fact that when there are multiple possible causes of an accident, such as the washout and alcohol, NM Tech was required to undertake an analysis and consideration of all causes. If any cause is covered then coverage must be allocated to the beneficiary as coverages are construed broadly and exclusions narrowly. He further testified that if there's a deep hole in the road, you're on an ATV at night and couldn't see the hole, you've got a problem and you're going to crash. The NM State Police report showing the 15 ft. wide x 5 ft. deep washout was made and available beginning August 1, 2009 and NM Tech would have known about the washout and could have obtained that police report at any time thereafter. NM Tech failed to investigate the washout at any time. **Oct.7TR 162-163, 165, 181; Ex. 17**.

o. In response to a question from the court as to the difference between "intoxication" and "under the influence" of alcohol, Professor Allen explained that the former term is a colloquialism and more subject to judgment. **Oct.7TR 185.** But in the insurance industry, the phrase "under the influence," which is the standard

under the NM Tech's Health Benefit Plan, has a "more legal connotation" and refers to the legal limit established by the state, in this case, the State of New Mexico. **Oct.7TR 185-186**.

p. Finally, Professor Allen testified that NM Tech did not perform any investigation of this claim at all:

> Court: In your review of the material that you've reviewed in the case, the depositions, the reports, etc. could you find anywhere where [Health South] or NM Tech actually investigated the issue of the washout at all?"
>
> Professor Allen: No.

Oct.7TR 185-6.

5. The Court's Findings of Fact and Conclusions of Law

The Court did not find that Brawley was under the influence or intoxicated at the time of the accident. Pertinent findings of fact and conclusions of law entered by the Court are as follows:

Findings of Fact:

5. NM Tech provides a Health Benefit Plan for its employees and their dependents that provides coverage for medical benefits subject to the terms of the Plan.

7. Joye Brawley was induced to accept employment at NM Tech, and to remain so employed, at least in some part, by the benefits provided

including, but not limited to, the health benefit plan (hereafter "The Plan.")

9. NM Tech worked with a third party administrator in establishing its Plan, and, as to time pertinent in this case, engaged HCH Administration to process, investigate, adjust, and otherwise determine claims submitted to the Plan.

10. NM Tech retained the right of final determination as to any claim made under the Plan and had the power to accept or reject HCH's recommendations.

13. NM Tech's actions in offering the Plan benefits as an inducement to employment, in maintaining its claims payment Trust fund within New Mexico, and in maintaining a local office and personnel which furthers the Plan's operations and objectives constitutes "transacting business" within the meaning of the Insurance Code, especially Section 59A-1-13 NMSA. *See Kitchell [v. PNM*, 1998-NMSC-51].

15. On the evening of August 1, 2009, Terry A. Brawley was drinking in the Mountain View Bar in Lemitar, New Mexico, and was one of the last persons to leave the bar.

18. Terry Brawley was found at or around midnight August 1-2, 2009, near his ATV on an unlighted ditch road between the Mountain View Bar and his home. Mr. Brawley suffered serious injury from, apparently, being thrown from the ATV.

23. A blood test performed some time after the crash, and after Mr. Brawley had been hospitalized, indicated he had a blood alcohol level nearly double the New Mexico threshold for a presumption of intoxication. This was confirmed by the testimony of Dr. A. Treyball.

26. Subsequent to the incident, Officer Ramirez formally charged Terry A. Brawley with aggravated DWI arising from the incident of August 1-2, 2009.

27. The criminal charges against Plaintiff Terry Brawley were later dismissed by the prosecutor's own Motion. There was no trial.

30. Terry and Joye Brawley's claims for payment of Terry's medical expenses stemming from the August 1-2, 2009, ATV crash were denied pursuant to the Section C-13 exclusion mentioned above.

34. No one from HCH or NM Tech contacted Mr. Brawley or Ms. Brawley prior to the denial of Mr. Brawley's claims.

35. No one from either HCH or NM Tech contacted the investigating officer or the emergency medical personnel on scene at the time of the ATV crash prior to the denial of Mr. Brawley's claims.

36. No one from HCH or NM Tech went to the scene of the crash prior to the denial of Mr. Brawley's claims.

39. Plaintiff's expert, Derek Swinson, PhD., was duly qualified as an expert in accident reconstruction during trial.

40. Dr. Swinson testified that, given the dark conditions, a sharp curve in the road just prior to the wash out area, and the wash out itself, it is likely that any vehicle traveling along the ditch road would have crashed due to the "wash out." Dr. Swinson specifically testified that road conditions and not alcohol use was the cause of the crash in which Mr. Brawley was injured.

42. As of the date Mr. Brawley's claims were denied neither HCH nor NM Tech had developed guidelines for the investigation of claims made under the Plan.

43. In this case, reasonable inquiry into the facts and circumstances could have included communication with the Brawleys; communication with Mr. Brawley's medical care providers; communication with the bartender and/or patrons of the Mountain View Bar; investigation of the crash scene and the "wash out";

analysis of the facts and circumstances of the blood test taken, and relied upon to deny the claim, to assure its reasonable reliability, and follow up on the DWI citation issued to Mr. Brawley. None of these things was done.

46. Dr. Swinson testified that the ATV collision would have occurred as it did whether the driver was drunk or sober since it was solely the "wash out" and not driver error that caused the collision.

47. Given the opportunity to observe Dr. Swinson's testimony, and considering same in context of all the facts and circumstances and all the testimony in the case, the Court rejects Dr. Swinson's conclusion that Mr. Brawley's alcohol use play **no causative role at all** in the ATV crash of August 1-2, 2009.

49. The parties have uniformly and consistently represented to the Court, and to each other, that the "direct relationship" is functionally the same as causation.

50. Mr. Brawley's alcohol use on the night of August 1-2, 2009, was **a cause** of the ATV crash in which he was injured, and which generated the medical bills at the root of this litigation.

51. Mr. Brawley's medical expenses were properly denied by NM Tech and HCH administrators under Section C-13's exclusionary language cited above.

52. Terry Brawley and Joye Brawley did not suffer any actual damages as a result of NM Tech's and HCH's lack of an appropriate thorough and complete investigation into the incident of August 1-2, 2009, prior to the denial of medical benefits at issue.

53. A verdict in favor of Third Party Defendant Board of Regents of NM Tech is appropriate.

Conclusions of Law

1. Third Party Defendant Board of Regents of NM Tech, through the Plan, were [sic] engaged in "transacting insurance" at all times pertinent hereto.

2. Third Party Defendant Board of Regents of NM Tech, through the Plan, were [sic] subject to the provisions of The Insurance Code, Section 59A-1-1, NMSA, et seq.

3. Third Party Defendant Board of Regents of NM Tech, through the Plan, violated the Insurance Code by failing to have a licensed adjustor and by failing to adopt and implement a reasonable plan for the appropriate investigation of claims in general and as to the Brawley claims in specific.

4. Notwithstanding Third Party Defendant's violation of the Insurance Code, there was substantial evidence that Mr. Brawley's injuries on August 1-2, 2009, bore a "direct relationship" to his ingestion of alcohol at the Mountain View Bar prior to the ATV crash.

5. Notwithstanding Third Party Defendant's violation of the Insurance Code, the Plan's denial of the Brawleys' claims for medical benefits was supported by sufficient factual information under the terms of the Plan and especially Section C-13 as set forth above.

7. Third Party Defendant Board of Regents of NM Tech is entitled to Judgment in its favor and Third Part Plaintiffs Brawley should take nothing from this action.

RP 892-894. (Emphasis by the Court).

Accordingly, judgment was entered for NM Tech. **RP 895-896**.

ARGUMENT

Introduction

The Court ruled in favor of the Brawleys on all issues except one: causation. Specifically, and to summarize, the Court ruled that:

- NM Tech was engaged in "transacting insurance" and is therefore subject to the requirements of The Insurance Code, NMSA 1978, Sections 59A-1-1, et seq.
- Upon receiving the Brawleys' claim, NM Tech undertook no investigation; it did not investigate the crash scene and washout, it did not contact the Brawleys or emergency medical personnel.
- NM Tech did not undertake a reasonable inquiry into the validity of the blood test taken to assure its reliability and did not follow up on the dismissed DWI citation issued to Mr. Brawley.
- But the failure to properly investigate didn't matter because there was evidence that Terry Brawley alcohol use was "**a cause**" of his injuries.

The uncontroverted evidence from NM Tech's Human Resources Director, Angie Gonzales, was that the Brawleys' claim was denied based on a single sheet

of paper (Exhibit B) which purported to indicate that Terry Brawley was under the influence of alcohol at the time of the injury.

This judgment must be reversed for any of three reasons. First, Exhibit B was inadmissible, could not support the denial of the claim, and should not have been admitted into evidence. NM Tech failed to lay a proper foundation by showing that the requirements of the Implied Consent Act had been complied with. Since it was the only basis for NM Tech to apply the exclusion which required that they prove his blood alcohol equaled or exceeded the levels set by New Mexico law, NM Tech had no factual basis for denying these claims.

Second, even if Terry Brawley's alcohol use may have contributed to the accident, the court held that it was merely "a cause" of the accident. The Court found Dr. Swinson's opinion that the washout was a cause of the accident to be credible, but rejected his conclusion taht "...Brawley's alcohol use played no causative role at all in the ATV crash." By using the words "a cause," and emphasizing those words in bold type-face, the court recognized that there was another cause, *i.e.* the washout, in addition to the use of alcohol. Under the concurrent causation doctrine, if there is more than one cause for a loss and one

of those causes results in coverage, then the loss is covered even if another cause would not result in coverage if it were the sole cause.

Third, and again assuming that there was evidence that Terry Brawley's alcohol use was a cause of the accident, the uncontradicted evidence from Dr. Swinson was that the washout was an independent intervening cause.

PRELIMINARY CONSIDERATIONS

FUNDAMENTAL PRINCIPLES OF NEW MEXICO INSURANCE LAW

A. New Mexico Tech's Health Benefit Plan Is a Contract of Adhesion and Is Not Treated as an Ordinary Contract.

NM Tech's Health Benefit Plan is a contract of adhesion, created solely by one party with no input from the other parties. Our Supreme Court in *United Nuclear Corp. v. Allstate Ins. Co.*, 2012-NMSC-032,285 P.3d 644 held that because insurance contracts are contracts of adhesion as a matter of public policy these contracts will be construed in favor of the beneficiaries and against the maker of the contract. In interpreting this contract of adhesion the court must apply the applicable rules of contract construction. *Foundation Reserve Ins. Co. v. McCarthy*, 1966-NMSC-229, 77 N.M. 118, held that ambiguities are construed in favor of insured.

In *Dellaira v. Farmers Insurance Exchange,* 2004-NMCA-132, 136 N.M. 552 the Court held as follows:

> An insurance contract is not always treated as an ordinary contract. *See Cary v United of Omaha Life Ins. Co.*, 68 P 3d 462,466 (Colo. 2003) (en banc) ("Insurance contracts are not ordinary commercial contracts."). The relationship between insurer and insured is a special relationship under New Mexico law. *See Bourgeous v Horizon Healthcare Corp.*, 117 N.M. 434,439, 872 P 2d 852,857 (1994). An insurer owes a duty of good faith and fair dealing to its insured. *Id.* at 438-39, 872 P 2d at856-57. This duty is non-delegable. *Jessen v Nat'l Excess Ins. Co.*, 108 N.M. 625,629, 776 P. 2d 1244, 1248(1989); see *Cary*, 68 P 3d at 466. It follows that an insurer cannot avoid or dissolve this duty by delegating to third parties its essential function of making sure that claims for policy benefits are handled and determined fairly, promptly and honestly. See id.
> In *Cary*...the entity "had a significant financial incentive to delay payment of benefits or coerce (the insured) into a diminished settlement."*Id.* The Court in *Cary* held that the entity owed a duty of good faith and fair dealing to the insured, even where no privity of contract existed between the two , because the entity "had primary control over benefit determinations, assumed some of the insurance risk of loss, undertook many of the obligations and risks of an insurer, had the power, motive, and opportunity to act unscrupulously in the investigation and servicing of insurance claims." Id at 463. We find the rationale of *Cary* persuasive." Id.

Id., ¶¶ 11-12.

B. Contract Coverages Are Construed Broadly and Exclusions Narrowly.

In interpreting this Health Benefit Plan contract it is essential to recognize that Courts in New Mexico require contract coverages to be construed broadly

and exclusions construed narrowly. The New Mexico Supreme Court in *King v. Travelers Ins. Co.* , 1973-NMSC-013, 84 N.M. 550, ruled that exclusionary clauses must be narrowly construed. *Western Heritage Ins. Co. v. Chava Trucking*, 991 F2d. 65 (10th Cir. 1993) held that contract exclusions are narrowly construed and coverages are broadly construed. *Knowles v. United Servs. Auto. Ass'n.*, 1992-NMSC-030, 113 N.M. 703. Exclusionary clauses in insurance contracts are to be narrowly construed with the reasonable expectations of the insured providing the basis for the Court's analysis.

The courts recognize that the essential purpose behind health plans is to protect families from devastating medical bills. *Sanchez v. Herrera*, 1989-NMSC-073, 109 N.M. 155. Courts construe insurance contracts in favor of their purpose-coverage for the insured.; citing 7 Williston, A Treatise on the Law of Contracts, § 900 (3d ed.1963).

POINT I

NM TECH FAILED TO LAY A PROPER FOUNDATION FOR THE ADMISSION OF THE RESULTS OF A BLOOD ALCOHOL TEST, AND WITHOUT IT THERE WAS NO EVIDENCE OF ALCOHOL USE EXCEEDING THE STATE LIMIT.

Preservation. This point was preserved in the objection by the Brawley's counsel to the admission of Exhibit B. **Oct.7TR65-67.**

Standard of Review. Normally, the admission of evidence is reviewed under the abuse of discretion standard. *State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125. "[B]ut when there is no evidence that necessary foundational requirements are met, an abuse of discretion occurs." *Id.*

Merits. When NM Tech offered Exhibit B into evidence, the Brawleys objected on several grounds including that there was no evidence of who drew the blood and no demonstration of compliance with The Implied Consent Act, NMSA 1978, Sections 66-8-105 through -112. **Oct.7TR 65-7**. NM Tech's response to the objection was (a) this is not a criminal proceeding and (b) "I don't think there's a serious question, even in the pleadings, that he was, in fact, intoxicated." *Id.*

The fact that this is not a criminal proceeding is irrelevant. As foundation, it is always necessary to establish that the blood tested is that of the individual in question.

> It is necessary to identify the specimen of blood used in analysis as that belonging to the person whose intoxication is in question **in both criminal and civil cases**.

Apodaca v. Baca, 1963-NMSC-167, ¶ 15, 73 N.M. 104. (Emphasis added).

Absent evidence that the person actively consented to a blood test, the admission of evidence of a blood test in either a civil or criminal proceedings is governed by the Implied Consent Act which provides in part as follows:

> The results of a test performed pursuant to the Implied Consent Act may be introduced into evidence in **any civil or criminal action** arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs.

NMSA 1978, § 66-8-110 (2007). (Emphasis added). The only logical construction of this statute is that the results of a test not performed pursuant to the Implied Consent Act may not be introduced into evidence in any civil or criminal action ..." Otherwise the statute imposes no requirements on the admissibility of this kind of evidence.

Several statutes and regulations govern the testing of blood for alcohol content. First, is the requirement of who is authorized to draw the blood.

> Only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test.

NMSA 1978, § 66-8-103 (1978). In *Steere Tank Lines Inc. v. Rogers*, 1978-NMSC-049, 91 N.M. 768, plaintiff's decedent was involved in a single-car fatal accident, and plaintiff brought suit to recover worker's compensation benefits. The

employer defended on the grounds that the decedent was intoxicated at the time of the accident which, if true, was a bar to the benefits sought. The employer offered the results of a blood-alcohol test to which plaintiff objected on the grounds that the person who withdrew the blood was not among those listed in the above-quoted statute. This Court ruled for plaintiff. On certiorari, the Supreme Court reversed.

The *Rogers* Court observed that the purpose of the statutory requirement is two-fold: "(1) to insure the safety and protection of the person being subjected to the test ... [a]nd (2) to insure reliability of the sample." *Id.,* ¶ 6. In that case, the person who drew the sample was a deputy medical examiner who had received training from the Office of the State Medical Examiner, was licensed or commissioned by that office and was experienced in drawing blood from dead bodies. *Id.*, ¶ 8. Accordingly, the Court held that the purpose of the statute was satisfied and, therefore, the test results were properly admitted.

First, *Rogers* confirms that the statutory requirements for the admission of blood test applies to civil as well as criminal cases. Second, the result in *Rogers* is distinguishable from the facts of this case. In the case at bar there is no evidence whatsoever of who drew the blood which is the subject of Exhibit B and,

therefore, no showing that the person was properly licensed or trained. That failure goes to the "reliability of the sample."

In *Gardner*, this Court reviewed the implied consent statutes including their amendment in 1993. The issue in that case was the admissibility of a blood alcohol test taken in violation of the "20-minute rule" imposed by Department of Health Regulations promulgated and administered under the Implied Consent Act. The Court held as follows:

> [F]ollowing the 1993 amendments to the DWI laws, in order for persons to be deemed to have given their consent to blood or breath alcohol tests, and **in order for those test results to be admitted into evidence, the tests must have been taken in accordance with department of health regulations**.

Id., ¶ 9. (Emphasis added). Since there was no showing in *Gardner* that the 20-minute rule required by Department of Health regulations was complied with, the admission of the test results was held to be erroneous as a matter of law.

The holding in *Gardner*, was approved in *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, ("We conclude *Gardner* holds that non-compliance with a regulation that goes to the accuracy of the test makes the results inadmissible." (*id.*, ¶ 11), *overruled on other grounds*, *State v. Bullcoming*, 2010-NMSC-7, 147 N.M. 487.

Other requirements include the following:

- The blood test "shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug." NMSA 1978, § 66-8-107(B) (1993).
- "Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples." NMAC 7.33.2.15(A)(1).
- "The initial blood samples should be collected within three hours of the arrest." NMAC 7.33.2.15(A)(2).
- "Ethyl alcohol shall not be used as a skin antiseptic in the course of collecting blood samples." NMAC 7.33.2.15(A)(3).
- The samples shall be dispensed or collected using an SLD-approved blood collection kit. NMAC 7.33.2.15(A)(3).
- The blood samples shall be delivered to SLD or a laboratory certified by SLD to conduct tests for alcohol or other drug content. NMAC 7.33.2.15(A)(4).

NM Tech made absolutely no attempt to show that any of these requirements were met. There is no evidence of (1) who took the sample and whether they were within the requirements of Section 66-8-103; (2) whether the test was administered at the direction of a law enforcement officer of any kind;" (3) whether the blood was drawn in the presence of the arresting officer or other responsible person who can authorize the samples, (4) whether the blood sample was collected in the presence of the arresting officer or other responsible person who can authenticate the samples; (5) whether the sample was collected within three hours of the arrest; (6) whether ethyl alcohol was used; (7) whether an SLD-approved blood-collection kit was used; or (8) whether the blood sample was taken to a SLD or a laboratory certified by SLD. All NM Tech offered, and the only support for NM Tech's denial of the Brawleys' claims was a piece of paper with Terry Brawley's name on it and indicating test results. Without a showing that the requirements of the above-referenced statutes and regulations were followed the document should have been denied admission for lack of foundation.

The Court also cited the testimony of Dr. Treyball. **FOF 23, RP 888.** But Dr. Treyball simply testified that the document says what is says. **Oct.8TR 35-36**. His testimony did not fill the gaps in the foundation for the admission of Exhibit B.

Moreover, the evidence is undisputed that NM Tech denied the Brawleys' claim based solely on Exhibit B, not Dr. Treyball's testimony at trial. NM Tech's compliance with its statutory and contractual duties must be measured by its knowledge and conduct at the time it denied the Brawleys' claim and the evidence it relied upon at that time. *Bannister v. State Farm Mut. Auto. Ins. Co.,* 692 F.3d 1117 (10th Cir. 2012) (approving a jury instruction which provided that "you [the jury] may only consider evidence which the insurer had at the time it decided to deny the claim); *Dakota, Minn. & Eastern RR. v. Acuity*, 771 N.W.2d 623 (S.D. 2009) ("The issue [of bad faith] is determined based upon the facts and law available to [the i]nsurer at the time it made the decision to deny coverage"); *Marks v. Frey-Rude & Assoc.*, 166 Wis.2d 1050, 481 N.W.2d 707 (1992) ("Determination of [the absence of a reasonable basis] alone again requires a dual inquiry into (1) the absence of a fairly debatable issue of fact or law at the time of denial of coverage, and (2) the nature or extent of the investigation and evaluation of that investigation by the insurer prior to the denial of coverage"). *See also, Martin v. West American Ins. Co.*, 1999-NMCA-158, ¶ 10, 128 N.M. 446 (noting that the trial court reasoned "that it should consider all the facts available

to the Insurer at the time it denied coverage in evaluating the Insurer's good faith in making a decision concerning coverage.")

Due to a total lack of foundation, the objection to the admission of Exhibit B should have been sustained. Its admission was an error of law or, at the very least, an abuse of discretion due to lack of foundation. *Apodaca*. Without that evidence there is no evidence that Brawley's blood alcohol level equaled or exceeded NM limits, and NM Tech's faulty investigation of this claim caused damages to Terry Brawley and Joye Brawley.

POINT II

UNDER THE CONCURRENT CAUSATION DOCTRINE COVERAGE EXISTS IF A COVERED PERIL IS "A CAUSE" OF THE ACCIDENT EVEN THOUGH THERE MAY BE ONE OR MORE OTHER CONCURRENT CAUSES.

Preservation. This issue was preserved for appellate review by the Brawleys' presentation of the testimony of Professor Allen on concurrent causation.

Oct.7TR 162-163, 165, 181; Ex. 17

Standard of Review. The application of the concurrent causation doctrine to facts such as those presented here, assuming there was evidence that the level of Brawley's blood exceeded the limit set by the state and that his alcohol use was a cause of the accident along with the washout, presents a legal issue, and legal

issues are reviewed de novo. *Lucero v. Sutten*, 2015-NMCA-010, ___ N.M. ___, ¶ 6.

Merits. As Professor Allen explained, even assuming that Terry Brawley was under the influence of alcohol on the night of the accident and assuming, as the court found, that alcohol use was "a cause" of the accident, this claim is nonetheless covered under the Health Benefit Plan because the alcohol use was, at best, a concurrent cause of the accident along with the washout. Dr. Swinson's uncontroverted testimony was that the washout was the sole cause of the accident and that any alcohol use was not a cause. The court rejected Dr. Swinson's testimony that "Mr. Brawley's alcohol use played **no causative role at all**" in the accident and found that Mr. Brawley's alcohol use was "**a cause**"" of the ATV crash. **FOF 46, 47, 50, RP 891-892** (Emphasis by the Court). Clearly the Court **did not find** that the alcohol use was the sole cause of the accident nor did the court find that the washout was not also **a cause** of the accident. Moreover, the Court never found that Brawley was under the influence where his blood alcohol " ... equals or exceeds the limit for driving under the influence of alcohol as determined by the law of the State." Under these findings, the Court found that there were concurrent causes for the accident, but erroneously ruled that

since one of the causes was a risk excluded by the Health Benefit Plan, there was no coverage for this accident.

That ruling is contrary to the concurrent causation doctrine which holds that "coverage should be permitted whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk which is covered under the terms of the policy. Steven Pitt, Daniel Maldonado & Joshua D. Rogers, Couch on Insurance § 101.55 (3d ed. 2013).

New Mexico has not had occasion to consider the concurrent causation doctrine, so it is an issue of first impression in this state.

The leading case is *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d, 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973). In that case, Partridge, the named insured, was a hunting enthusiast who filed the trigger mechanism of his .357 magnum to give it a "hair trigger." One day, Partridge and two companions when hunting jackrabbits in Partridge's vehicle. Partridge was driving, and the gun was either in his lap or on top of the steering wheel pointed at Vanida, one of the passengers. In chasing a jackrabbit, Partridge drove the vehicle off the road into rough terrain and hit a bump, whereupon the gun discharged with the bullet striking Vanida resulting in her paralysis. Vanida sued Partridge.

Partridge had two insurance policies: a homeowner's policy and an auto policy. There was no question about the auto policy; it covered this accident. The only question was coverage under the homeowner's policy. Defendant State Farm (which was the insurer under both policies) contended that there was no coverage under the homeowner's policy because it contained an exclusion for injuries "arising out of the use" of a motor vehicle. Factually, it was determined that the accident and resulting injuries arose from the **concurrence of two causes**: (a) the negligent filing of the trigger mechanism and (b) the negligent driving. The homeowner's policy covered the first risk but excluded coverage for the second risk.

As the foundation for the opinion, the Court invoked principles universally accepted under insurance law and, as demonstrated above, accepted in New Mexico in particular.

> Whereas **coverage clauses** are interpreted broadly so as to afford the greatest possible protection to the insured, **exclusionary clauses** are interpreted narrowly against the insurer. These differing canons of construction, both derived from the fundamental principle that all **ambiguities in an insurance policy are construed against the insurer-draftsman**, mean that in ambiguous situations an insurer might be found liable under both insurance policies.

Id., 514 P.2d at 128. (Emphasis added; citations omitted).

Applying these general principles to the case at hand, the California Supreme Court held that there is coverage whenever a covered risk combines with an excluded risk to produce the ultimate injury.

> Here the 'use' of Partridge's car was not the sole cause of Vanida's injuries but was only one of two joint causes of the accident. Thus, even if we assume that the connection of the car with the accident is the type of non-ambiguous causal relationship which would normally bring the exclusionary clause into play, the crucial question presented is whether a liability insurance policy provides coverage for an accident caused jointly by an **insured risk** (the negligent filing of the trigger mechanism) and by an **excluded risk** (the negligent driving). Defendants correctly contend that **when two such risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy**.
>
> Here ... an insured risk (the modification of the gun) combined with an excluded risk (the negligent use of the car) to produce the ultimate injury. Although there may be some question whether either of the two causes in the instant case can be properly characterized as The 'prime,' 'moving' or 'efficient' cause of the accident we believe that coverage under a liability insurance policy is equally available to an insured whenever[10 Cal.3d 105] an insured risk constitutes simply A concurrent proximate cause of the injuries. 11 That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.

Id., 514 P.2d at 12-131. (Emphasis added).

The concurrent causation doctrine from *Partridge* has been adopted by many jurisdictions.

- *Scottsdale Ins. Co. v. Van Nguyen*, 158 Ariz. 476, 763 P.2d 540 (App. 1988) (where injury occurred through combination of a covered risk (negligence in preparation and movement of a structure) with an excluded risk (negligence in the operation of a motor vehicle), loss was covered by the policy despite the exclusion);

- *United States Fidelity & Guar. Co. v. State Farm Mut. Auto. Ins. Co.,* 107 Ill.App.3d 190, 437 N.E.2d 663 (1982) (where injury occurred through a combination of a covered risk (negligence in the operation of a day care facility) with an excluded risk (negligence in the operation of a motor vehicle), loss was covered by the policy despite the exclusion);

- *Kalell v. Mutual Fire & Auto. Ins. Co.,* 471 N.W.2d 865 (Iowa 1991) (where injury occurred through a combination of a covered risk (negligent removal of a dead tree limb) with an excluded risk (negligent operation of a motor vehicle), loss was covered by the policy despite the exclusion);

- *Waseca v. Mutual Ins. Co.,* 331 N.W.2d 917 (Minn. 1983) (where damage occurred through a combination of a covered risk (placing of live embers in an uncovered barrel) with an excluded risk (negligent operation of a motor vehicle), loss was covered by the policy despite the exclusion);

- *Salem v. Oliver*, 128 N.J. 1, 607 A.2d 138 (1992) (where injuries occurred through a combination of a covered risk (supplying a minor with alcoholic beverages) and an excluded risk (negligent operation of a motor vehicle), loss was covered by the policy despite the exclusion);

- *Houser v. Gilbert*, 389 N.W.2d 626 (N.D. 1986), (where death occurred through a combination of a covered risk (failure to remove mud from the highway once deposited or to warn of danger) and an excluded risk (use of truck to deposit dirt and mud on the highway), loss was covered by the policy despite the exclusion);

- *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883 (Tenn.1991) (where loss occurred through a combination of a covered risk (negligence in failing to warn and kicking pan of flammable substance) and an excluded risk (using a welding torch on a vehicle), loss was covered by the policy despite the exclusion);

- *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App. 1990) (where loss occurred through a combination of a covered risk (negligent failure to have gun repaired and negligent failure to keep an empty chamber under the hammer) and an excluded risk (changing a tire on a vehicle and loading a vehicle), loss was covered by the policy despite the exclusion);

- *Lawver v. Boling*, 71 Wis.2d 408, 238 N.W.2d 514 (1976) (where loss occurred through a combination of a covered risk (negligence in the choice of materials for and manner of construction of the rigging) or an excluded risk (negligence in the operation of the truck) or both, loss was covered by the policy despite the exclusion.

Although these case happened to arise in the context of liability coverage under motor vehicle insurance policies, the rationale of the concurrent causation doctrine applies just as well here. Indeed, in *Partridge* which is a primary source for that doctrine, the Court relied on its earlier decision in *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 163 P.2d 689 (1945). *Partridge*, 514 P.2d at 817-18. In *Brooks*, the insured was covered by an accident policy containing an exclusion for losses caused wholly or partly by "disease or mental infirmity." The insured was afflicted with debilitating cancer. He died in a fire, and the insurer sought to avoid

liability on the grounds that a healthy individual would not have perished in the fire. Referring to its decision in *Brooks*, the *Partridge* court said "While acknowledging that the insured's condition did contribute to his death, our court rejected the insurer's contention that coverage was unavailable simply **because one of two joint causes of the death was an excluded risk**." *Partridge*, 514 P.2d at 818. (Emphasis added). That reasoning lead to the concurrent causation doctrine announced in *Partridge*, and applies here as well.

POINT III

THE COURT ERRED IN DENYING COVERAGE BECAUSE THE EVIDENCE WAS UNDISPUTED THAT THE WASHOUT WAS THE INDEPENDENT INTERVENING CAUSE OF THE ACCIDENT.

Preservation. The Brawleys preserved this issue through the presentation of the testimony of Dr. Swinson and Professor Allen who testified that the washout was the cause of the accident. **Oct.7TR86-89, 91, 99, 114, 147-148, 150-152.**

Standard of Review. While the determination of whether something is an independent intervening cause is a question of fact, *Govich v. North American Systems, Inc.*, 1991-NMSC-061, ¶ 24, 112 N.M. 226, where the evidence is undisputed the applicability, vel non, of the doctrine of independent intervening cause is a question of law and reviewed de novo. *Lucero,* ¶ 6, citing *Johnson v.*

Yates Petroleum Corp., 1999-NMCA-066, ¶ 3, 127 N.M. 355 (as "stating that when the relevant facts are undisputed, the legal interpretation of those facts is reviewed de novo on appeal").

Merits.

> Independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.

UJI 13-306, NMRA.

Even assuming arguendo that there was evidence to support a finding that Terry Brawley had used alcohol on the night in question and assuming that there is factual support for the court's finding that alcohol use was "a cause" of the accident, the doctrine of independent intervening cause applies. When it applies, the independent intervening cause "break[s] the natural sequence of the first negligence and stands as the efficient cause of the injury and damages." *Thompson v. Anderman*, 1955-NMSC-045, ¶ 25, 59 N.M. 400.

The concept of independent intervening cause was "dramatically" limited (UJI 13-306, NMRA, Committee Commentary), in *Torres v. El Paso Electric Co.*, 1999-NMSC-029, 127 N.M. 729. But the limitation in *Torres* does not extend to intentional tortious acts or criminal acts or **forces of nature**." *Id.*, ¶ 15, n. 2.

Referring to its Opinion in *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, 130 N.M. 532, this Court said:

> In that case, we explained that the rationale behind the doctrine, which is that under circumstances where "**a force of nature**, an intentional tort, or a criminal act" follows the defendant's negligent act, the potential scope of the defendant's liability must be limited by the remoteness or unforeseeability of the intervening force. The instruction on independent intervening cause "is based on a policy determination that [the defendant's] liability should cease at the point where an independent cause [i.e.., **a force of nature** or an intentional or criminal act] intercepts and interrupts the normal progression of causation, because it produces an injury that ... was not foreseeable as a result of an earlier act or omission.

Silva v. Lovelace Health System, Inc., 2014-NMCA-086, ¶ 17, ___ N.M. ___. (Emphasis added).

Under the undisputed and uncontroverted facts of this case, the washout was an unforeseeable force of nature that intercepted and interrupted the normal progression of causation. As Dr. Swinson explained, at the accident scene there was a large field of several acres which was flooded for irrigation purposes with a dirt berm providing a barrier between the field and roadway where the accident happened. Prior to the accident, the berm broke, water poured off the field and washed out the road to a depth of five feet. He specifically described the ATV crash site where ".. the roadway in that area was straight and level." Under

these facts, the washout was unexpected and unforeseeable force of nature and was the independent intervening cause of this accident.

CONCLUSION

For these reasons, the judgment of the district court should be reversed and this cause should be remanded with directions to enter judgment for Terry A. Brawley and Joye Brawley.

STATEMENT REGARDING ORAL ARGUMENT

Appellants requests oral argument because this case presents significant legal issues, including the adoption of the concurrent causation doctrine which is an issue of first impression in New Mexico.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served on the following by first-class mail on February 19, 2015:

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