COPY

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED
JUN 15 2015

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

v. No. 33,593

TERRY A. BRAWLEY, Individually, and TERRY A.
BRAWLEY as Personal Representative of the
Estate of Joye Brawley, Deceased,
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

REPLY BRIEF

Steven J. Vogel
P.O. Box 1249
3949 Corrales Road, # 120
Corrales, NM 87048
(505) 401-0306

Janice K. Woods
P. O. Box 1415
102 Plaza
Socorro, NM 87801
(505) 401-2840

Attorneys for Defendants-Third-Party Plaintiffs-Appellants
Terry A. Brawley and Joye Brawley

TABLE OF CONTENTS

POINT I: NM Tech Wrongfully Denied the Claim Based On a Blood Test Taken in Violation of New Mexico Law, and the Wrongful Denial Caused Damage to the Brawleys. 1

A. LIABILITY TURNS ON THE ADMISSIBILITY OF THE BLOOD ALCOHOL TEST BECAUSE IT WAS THE SOLE BASIS FOR THE DENIAL OF THE CLAIM. . . . 2

B. THE BRAWLEYS PRESERVED THIS ISSUE FOR APPEAL BY TIMELY AND PROPER OBJECTIONS TO EXHIBIT B. 7

C. THE INFORMED CONSENT ACT APPLIES. 9

POINT II: The Concurrent Causation Doctrine Applies Where, as Here, the Causes are Independent of Each Other and Each Contributes to the Injury. 11

Conclusion. 14

Certificate of Service. 15

TABLE OF AUTHORITIES

NEW MEXICO CASES

Estate of Griego v. Reliance Standard Life Ins. Co.,

2000-NMCA-022, ¶ 17, 128 N.M. 676. 12

Martin v. West American Ins. Co.,
1999-NMCA-158, ¶ 10, 128 N.M. 446. 3

Northwest Bank of N.M.,
2003-NMCA-128, ¶ 10, 134 N.M. 516. 9

Padilla v. State Farm Mut. Auto. Ins. Co.,
2003-NMSC-11, ¶ 12, 133 N.M. 661. 5

State v. Gardner,
1998-NMCA-160, ¶ 21, 126 N.M. 125. 7

State v. Miller,
1997-NMCA-060, ¶ 8, 123 N.M. 507. . . . . 11, 12

State v. Onsurez,
2002-NMCA-082, ¶ 19, 132 N.M. 485. 8

Steere Tank Lines Inc. v. Rogers,
1978-NMSC-049, 91 N.M. 768. 11

Truong v Allstate Ins. Co.,
2010-NMSC-009, 147 N.M. 583, 227. P3d 73. 11

CASES FROM OTHER JURISDICTIONS

Bannister v. State Farm Mut. Auto. Ins. Co.,

692 F.3d 1117 (10th Cir. 2012). 3

Britton v. Farmers Ins. Group,
221 Mont. 67, 86-87, 721 P.2d 303, 316 (1986). 6

Dakota, Minn. & Eastern RR. v. Acuity,
771 N.W.2d 623 (S.D. 2009). 3

Garvey v. State Farm Fire & Cas. Co.,
770 P.2d 704 (Cal. 1989). 12, 13, 14

Lord v. Allstate Ins. Co.,
2014 WL 4686441, n. 4 (D. Ala. 2014). 5

Marks v. Frey-Rude & Assoc.,
166 Wis.2d 1050, 481 N.W.2d 707 (1992). 3

Peiffer v. State Farm Mut. Auto. Ins. Co.
940 P.2d 967, 970 (Colo. App. 1996). 3

State Farm Mut. Auto. Ins. Co. v. Partridge,
10 Cal.3d, 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973). 14

State Farm Mut. Auto. Ins. Co. v. Rayher,
266 P.3d 383, 390 (Colo. 2012). 2

Starr-Gordon v. Massachusetts Mut. Life Ins. Co.,
2006 WL 3218778, 10 (E.D. Cal. 2006). 3

OTHER AUTHORITIES

NMSA 1978, § 66-8-103 (1978). 9, 10, 11

NMSA 1978, § 66-8-109(A) (1993). 10

NMSA 1978, § 66-8-110(A) (2007). 9, 10

NMSA 1978, § 66-8-110 (B) (2007). 10

This Reply Brief is filed on behalf of Defendants-Third-Party Plaintiffs-Appellants Terry A. Brawley, Individually, and Terry A. Brawley as Personal Representative of the Estate of Joye Brawley, deceased.

The Brawleys will stand on their Brief in Chief with respect the the issue of independent intervening cause addressed in Point III of that brief. They will reply to the Answer Brief of NM Tech with respect to Points I and II.

POINT I

NM TECH WRONGFULLY DENIED THE CLAIM BASED ON A BLOOD TEST TAKEN IN VIOLATION OF NEW MEXICO LAW, AND THE WRONGFUL DENIAL CAUSED DAMAGE TO THE BRAWLEYS.

NM Tech breached its contractual, common law and statutory duties to the Brawleys by denying their claim based solely on the report of a blood alcohol test ("BAT"), Ex. B, taken in violation of New Mexico law. The denial caused damage.

NM Tech makes almost no effort to deny that the BAT was taken in violation of New Mexico law, and, of course, it cannot deny that the denial of the claim caused damages to the Brawleys in the stipulated amount of $308,391.89. **10/7/13 TR 9 & Ex. 19-1**. Instead, NM Tech makes primarily three arguments: (1) the Brawleys failed to preserve the BAT argument, (2) there was other evidence

of intoxication aside from the BAT, and (3) the Implied Consent Law does not apply to this case.

The Brawleys will discuss the second issue first, as it impacts the other two.

A. Liability Turns on the Admissibility of the Blood Alcohol Test Because It Was the Sole Basis for the Denial of the Claim

This much is undisputed for purposes of this appeal: Exhibit B was the only document relied upon by NM Tech to deny the claims and they have no idea as to the blood draw, SLD, chain of custody or NM law. **10/7/09 TR 32-3, 61-2, 73-4.**

NM Tech denied the claim through HCH on September 2, 2009. **Ex.15.**

NM Tech denied the Brawley's claim solely on the basis of the BAT and cites Ex. F, **which does not exist in the record. 10/17/13 TR 61 & 62, FOF 35, 43. AB 21.**

NM Tech's conduct in failing to conduct an adequate investigation of this claim was so faulty as to constitute a violation of the New Mexico Insurance Code. **FOF 13, 14, 43, COL 1, 2, 3.**

The denial of their claim caused damage to the Brawleys. **Ex19.**

NM Tech's liability to the Brawleys must be assessed by its conduct at the time it denied their claim. *State Farm Mut. Auto. Ins. Co. v. Rayher*, 266 P.3d 383,

390 (Colo. 2012) ("[a]n insurer's decision to deny benefits to its insured must be evaluated based on the information before the insurer at the time of that decision," *quoting Peiffer v. State Farm Mut. Auto. Ins. Co.* 940 P.2d 967, 970 (Colo. App. 1996); *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"); *Starr-Gordon v. Massachusetts Mut. Life Ins. Co.*, 2006 WL 3218778, 10 (E.D. Cal. 2006) ("[t]he reasonableness of an insurer's decisions and actions must be evaluated based on the information that it had at the time the decisions were made – not based on information acquired afterwards"); *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.") and UJI 13-1702 ("**In deciding whether to pay a claim**, the insurance company must act reasonably under the circumstances to conduct a timely and fair, investigation and evaluation of the claim." We will refer to this as the "time-of-decision" rule. NMSA 59A-16-20 *et.seq.*

NM Tech does not challenge the time-of-decision rule or contend that it is not the law of New Mexico or other jurisdictions. Instead, it dismisses the rule as applicable only to the issue of breach – not causation. **AB 23**. That position, however, ignores the public policy behind the time-of-decision rule. The reason for the rule is that, if there were no such rule, an insurer would be tempted to undertake a shoddy investigation or no investigation at all. Then, if the insured took on the daunting task of suing the insurer, the insurer would then try to find some sort factual basis for denying the claim. As one court explained, without the time-of-decision rule:

> " ...an insurer might by dumb luck avoid any liability for its bad faith refusal to pay the insured's claim without even investigating if, in fact, there was 'out there somewhere' although unknown to the insurer, an "arguable reason" for such a refusal. ... It is not enough for the insurer to dredge up [an arguable reason for denying the claim] *after* the denial, as such a *post hoc* reason would be unrelated to the fairness and good faith of its investigation. **If this were not the case, ...**

> **insurers could willfully deny claims without any investigation and then undertake to identify a reason for the refusal only after the insured goes to the trouble and expense of suing the insurer.**

Lord v. Allstate Ins. Co., 2014 WL 4686441, n. 4 (D. Ala. 2014). (Emphasis added).

Given the strong and necessary public policy behind the time-of-decision rule, it must apply to both breach and causation. As a matter of public policy, an insurer must not be allowed to avoid liability for its bad faith conduct denying a claim after failing to investigate a claim based on information it acquires after the denial. It would incongruous to hold that an insurer may not rely on information acquired after denial to avoid a finding of breach, but that it may rely on such information to contend that there was no damage caused by its breach. In the latter case it is still improperly avoiding liability by relying on after-denial information – which is a result contrary to the time-of-decision rule and the strong public policy behind it. It is against public policy to allow "the insurer to accomplish indirectly what it is precluded from doing directly." *Padilla v. State Farm Mut. Auto. Ins. Co.,* 2003-NMSC-11, ¶ 12, 133 N.M. 661. **FOF 11, 13, 14, 35, 36, 42, 43 COL 1, 2, 3.**

NM Tech's liability in this case rests on its knowledge and conduct on September 2, 2009, when it denied these claims. The issue is not, and never was, whether, at the trial 4 years later, October of 2013, there was enough evidence

presented for the court to find that Terry Brawley was under the influence "if his blood alcohol level equals or exceeds" the NM limit when the accident happened.

The admissibility issue goes to the conduct of NM Tech. Because Exhibit B was inadmissible, NM Tech acted unreasonably and in bad faith in denying the Brawleys' claim based on it.

> **It is not within the bounds of the duty of good faith between an insurer and the insured for the insurer to rely on** rumor, hearsay, polygraph results or other **inadmissible evidence to deny a loss** under a fire insurance policy and so force the insured to court action to collect the proceeds of his claim. While an insurer may utilize inadmissible facts or evidence to develop admissible evidence, **it does not act reasonably if it declines payment of an insured's claim merely upon inadmissible evidence or testimony. (Emphasis added)**

Britton v. Farmers Ins. Group, 221 Mont. 67, 86-87, 721 P.2d 303, 316 (1986).

In its holding to the effect that there was evidence of "alcohol use", the court cited the BAT and the testimony of Dr. Treybal. **FOF 23.** The testimony of Dr. Treybal, in addition to adding nothing but what the faulty report, Ex B, itself said, is irrelevant because it was never the basis for the denial of the claim and under the time-of-decision rule cannot support the judgment. Dr. Treybal never treated Terry Brawley until 2012.

Because the BAT was inadmissible, judgment should have been entered for the Brawleys. Yet another reason that the "other evidence" of intoxication does not

support the denial of this claim by NM Tech is that it cannot cure the flaw in the only scientific evidence, Ex B, upon which the denial decision was based.

> The State argues that the error of admitting the test results was harmless because there was overwhelming evidence that Defendant was driving while intoxicated. The State points to her erratic driving, her appearance, including the smell of alcohol, bloodshot eyes, and slurred speech, and her failing several field sobriety tests. However we agree with the analysis in *[State v.] McCaslin*, 894 S.W.2d [310] at 312 [Tenn.Crim.App. 1994] that where the only scientific evidence presented at trial was admitted in error, the court cannot say that the effect is harmless.

State v. Gardner, 1998-NMCA-160, ¶ 21, 126 N.M. 125.

B. THE BRAWLEYS PRESERVED THIS ISSUE FOR APPEAL BY TIMELY AND PROPER OBJECTIONS TO EXHIBIT B.

NM Tech begins its "failure to preserve" argument with this somewhat surprising statement: "In their opening brief the Brawleys acknowledge that they did not object to the admissibility of Exhibit B until NM Tech offered it into evidence." **AB 12**. What better time to object? *State v. Onsurez*, 2002-NMCA-082, ¶ 19, 132 N.M. 485 ("To preserve the issue for appeal, Defendant was required to alert the district court to his objection at the time the results of his breath test were offered and entered into evidence.").

Next, NM Tech argues that suggestions of intoxication leaked into the record by means other than Exhibit B without objection. **AB 12-23**. That argument,

however, overlooks the time-of-decision rule. The issue was not whether there was evidence before the fact-finder at trial as to whether Terry Brawley was under the influence at the time of the accident. The issue was what did NM Tech know at the time of denial in 9/2009, and whether NM Tech failed to make a proper investigation of this claim in 2009 before denying it. Since it denied it solely on the basis of Exhibit B, these leaks into the record at trial, long after the denial, are irrelevant. NM Tech's witness Gonzales established this fact. **10/7/09 TR 61-2.**

Next NM Tech argues that the objections made by the Brawleys when Exhibit B was offered into evidence were not specific enough. The Brawleys stand on the record which speaks for itself and contradicts the contentions of NM Tech. For example, the Brawleys specifically objected to Exhibit B on the grounds that "[t]here is no medical doctor here that withdrew the blood. There's no nurse that withdrew the blood." **10/7/13 Tr. at 66-67.** This obviously went to a lack of foundation for the document.

> 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). Although this statute was not cited at the time of objection, citation to legal authority is not required for preservation. *In re*

Northwest Bank of N.M., 2003-NMCA-128, ¶ 10, 134 N.M. 516 ("Providing the trial court with citation to authority is not a requirement for preservation.").

C. THE INFORMED CONSENT ACT APPLIES

NM Tech argues that the Implied Consent Act does not apply because it applies only to an "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." NMSA 1978, § 66-8-110(A) (2007). **AB 15**. NM Tech argues that this is not such an action because "it does not seek to impose civil liability or criminal punishment on Brawley as a result of his driving the ATV." *Id.* NM Tech misreads the statute.

If NM Tech had paid this claim the, obviously, this lawsuit would not have been filed. But it denied the claim based on the "alcohol exclusion." That exclusion expressly refers to "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 where the injury occurred." **Ex. A at C-13.** That limit is in the Implied Consent Act. NMSA 1978, § 66-8-110 (B) (2007). Further, the Implied Consent Act expressly incorporates the requirements of NMSA 1978, Section 66-8-103 (1978), quoted above, regarding limitations on the persons authorized to draw blood for testing.

NMSA 1978, § 66-8-109(A) (1993). Thus, this is an "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." NMSA 1978, § 66-8-110(A) (2007).

There is no requirement that the action be one seeking to impose civil liability or criminal punishment as a result of a person's operation of a motor vehicle – only that the action "arise 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." *Id.* Since this action came to be because of allegations that Terry Brawley had committed acts while under the influence of intoxicating liquor, it comes under the Implied Consent Act.

Moreover, even aside from any limitation in the Implied Consent Act, the limitation in NMSA 1978 Section 66-8-103 (1978), which is not part of the Implied Consent Act, would apply here. That was the case in *Steere Tank Lines Inc. v. Rogers*, 1978-NMSC-049, 91 N.M. 768, which, like this one, was a dispute over whether insurance benefits (worker's compensation benefits) were payable where there was a dispute about whether the person who drew the blood was authorized under Section 66-8-103. That statute applies here for the same reason. *Truong v Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P3d 73, "The plain

meaning rule, recognizes that when a statue contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."

POINT II

THE CONCURRENT CAUSATION DOCTRINE APPLIES WHERE, AS HERE, THE CAUSES ARE INDEPENDENT OF EACH OTHER AND EACH CONTRIBUTES TO THE INJURY

This issue was preserved for appellate review through the testimony of Professor Allen who rendered his opinion that NM Tech was bound to coverage under the concurrent causation doctrine. **Oct. 7 TR 148, 151, 162-163, 165, 181; Ex. 1.** The cases cited by NM Tech 24 (**AB 24**) do not support its position that the Brawleys failed to preserve this issue. In *State v. Miller*, 1997-NMCA-060, ¶ 8, 123 N.M. 507, the party failed to present the applicable principles or arguments to the trial court. Here, those principles were presented through the testimony of Professor Allen. The doctrine of concurrent causation was squarely before the court. The court did not apply that doctrine, but the issue was thus preserved for appellate review. In *Estate of Griego v. Reliance Standard Life Ins. Co.*, 2000-NMCA-022, ¶ 17, 128 N.M. 676, the Court held that the issue was adequately preserved; it does not even address the circumstances under which an issue is <u>not</u> adequately preserved.

Professor Allen's uncontradicted testimony established coverage under the concurrent causation doctrine and NM Tech's good-faith and fiduciary obligations to its insureds. He explained that it was NM Tech's obligation to timely and thoroughly investigate the washout as a cause of the accident stating "[w]e have another obvious causal factor, this dangerous, dangerous condition in the middle of the road." **10/7/13 TR 148, 149, 151, 155-6, 162, 182, 185-6**. NM Tech was obligated to work as hard to find coverage as to deny claims and to give as much consideration to the rights of the policyholders as to its own rights. *Id.*

On the merits, NM Tech fails to demonstrate why the doctrine of concurrent causation does not apply here and ignores the fact that this is a contract of adhesion. It relies on *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704 (Cal. 1989), for the proposition that concurrent causation does not apply in cases involving first-party coverage. It is not that simple. *Garvey* involved a claim under a first-party property damage insurance policy. Key to the decision was the difference between property insurance and other kinds of insurance which have broader coverage.

> Property insurance ... is an agreement, a contract, in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss. Coverage, in turn, is commonly provided by reference to causation, e.g., "loss caused by ..." certain enumerated perils. The term "perils" in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion which bring about the loss. Thus the "cause" of loss in the

> context of property insurance is totally different from that in a liability policy. This distinction is critical to the resolution of losses involving multiple causes.
>
> ... In liability insurance, ... the insurer agrees to cover the insured for a broader spectrum of risks.

Id. at 710. The Court went on to explain that, "[i]n the property insurance context, the insurer and insured can tailor the policy according to the selection of insured and excluded risks and, in the process, determine the corresponding premium to meet the economic needs of the insured." *Id.* at 711. But, because the spectrum of risks or so much broader under a liability policy no such "tailoring" is possible. *Id.*

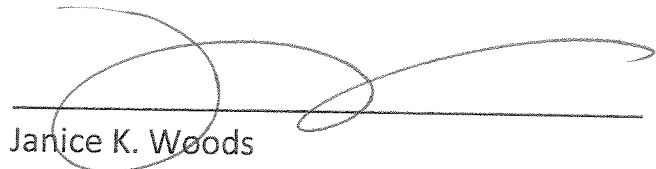
In this respect medical coverage policy, as in the case at bar, is more like liability coverage than property damage coverage. The spectrum of risks under this policy is very broad. So, *Garvey* does not render the rule in *State Farm Mut. Auto. Ins. Co. v. Partridge,* 10 Cal.3d, 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973), inapplicable to this case.

In *Partridge*, the Court held that the doctrine of "efficient cause" is not applicable where, as in that case, "both causes are independent of each other; the filing of the trigger did not 'cause' the careless driving, nor vice versa." *Id.* 514 P.2d at 130, n. 10. Similarly in the case at bar, the washout did not cause the under the influence allegations, nor vice versa. Accordingly, in *Partridge*, the Court applied

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served on the following by first-class mail on June 15, 2015:

Edward R. Ricco
Rodey Law Firm, P.A.
P. O. Box 1888
Albuquerque, NM 87103-1888



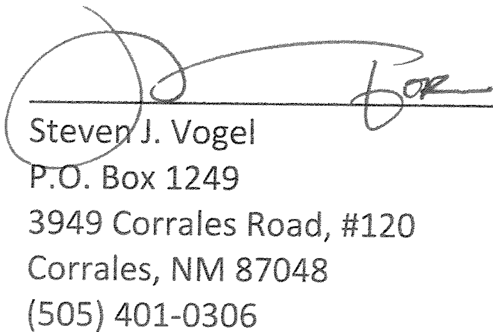
Janice K. Woods

the concurrent causation doctrine and the same result should follow here.

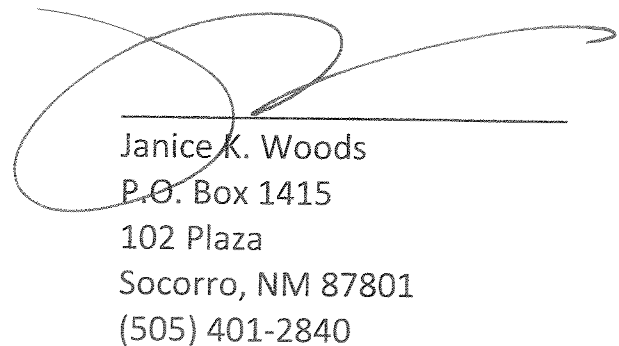
CONCLUSION

Therefore there is coverage for Brawleys' claims under the Health Plan as : 1) NM Tech failed to prove under the influence which equaled or exceeded NM law; 2) Exhibit B was inadmissible, lacked foundation and failed to meet NM statutory requirements; 3) the washout was a concurrent cause of the injuries and damages and therefore there was coverage under the Plan; and 4) the washout was an independent, intervening cause.

Respectfully Submitted,



Steven J. Vogel
P.O. Box 1249
3949 Corrales Road, #120
Corrales, NM 87048
(505) 401-0306



Janice K. Woods
P.O. Box 1415
102 Plaza
Socorro, NM 87801
(505) 401-2840

Attorneys for Defendants-Third-Party Plaintiffs-Appellants
Terry A. Brawley and Joye Brawley