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,

vs.

No. 33,593

TERRY A. BRAWLEY and JOYE BRAWLEY, husband and wife,

Defendants/Third-Party Plaintiffs/Appellants,

vs.

THE BOARD OF REGENTS OF NEW MEXICO INSTITUTE OF MINING AND TECHNOLOGY,

Third-Party Defendant/Appellee.

Appeal from the Second Judicial District Court, Bernalillo County, New Mexico

The Honorable Alan Malott, Judge

ANSWER BRIEF

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Introduction/Nature of the Case

The scope of this appeal is narrower than it may appear at first glance. The three issues upon which the Brawleys claim that the trial court committed reversible error (BIC at 23-24) all center on the question of whether, on the record before it, the court correctly decided that a healthcare coverage exclusion in NM Tech's Health Benefit Plan applied to claims for payment for services arising out of Terry Brawley's ATV accident. The record, properly presented, shows that the Brawleys did not preserve their current arguments. Even if the arguments are considered, once clarified, the applicable law shows that the Brawleys' arguments lack merit.

Statement of Facts and Proceedings

The Brawleys do not properly summarize the underlying facts. (BIC at 1-21.) Perhaps most obviously, a summary of proceedings which contains "only a sprinkling of citations to a portion of the record," Murphy v. Strata Prod. Co., 2006-NMCA-008, ¶ 5, 138 N.M. 809, does not comply with Rule 12-213(A)(3) NMRA, which requires "citations to the record proper, transcript of proceedings or exhibits supporting each factual representation." As for the representations themselves, the Brawleys largely present the case from their point of view as to why they should have won at trial and, in doing so, omit portions of the record

supportive of the trial court's decision. (Id.) Insofar as the Brawleys may be challenging the sufficiency of the evidence to support that decision, Rule 12-213(A)(3) also requires them to marshal "all of the evidence in support of [any challenged] finding[]." Maloof v. San Juan Cnty. Valuation Protests Bd., 1992-NMCA-127, ¶ 18, 114 N.M. 755; accord Bank of N.Y. v. Romero, 2011-NMCA-110, ¶ 7, 150 N.M. 769 ("The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached."; "[W]e will not reweigh the evidence nor substitute our judgment for that of the fact finder.") (internal quotation marks, citation & alteration omitted), rev'd on other grounds, 2014-NMSC-007, 320 P.3d 1.

Compounding those insufficiencies, much of what the Brawleys say in their summary of proceedings is immaterial to the issues upon which they claim the trial court committed reversible error. Although the trial court found that an appropriately thorough and complete investigation into Terry Brawley's ATV accident had not been done before the denial of coverage, the court concluded that the deficient investigation had not caused the Brawleys to suffer damages because sufficient evidence had been presented which established the applicability of the coverage exclusion under which the claims had been denied. (RP 891, ¶ 43; RP 892, ¶¶ 51-52.) NM Tech's ensuing supplemental statement of facts and proceedings summarizes such evidence.

On the evening of August 1, 2009, Terry Brawley was drinking in the Mountain View Bar. (RP 887, ¶ 15; see also Ramirez Dep. 8:17-25 (while at the bar, he drank shots of Crown Royal).) Hours later when the bar closed, Brawley was one of the last customers to leave. (RP 887, ¶ 15; Torres Dep. 5:20-6:9, 8:3-6, 8:21-9:1, 14:19-22.) Another customer, Jeffrey (or Dusty) Langholf, who had seen Brawley drinking and thought that Brawley might be intoxicated, offered Brawley a ride home. (Torres Dep. 8:21-9:1; Ramirez Dep. 6:11-21; 7:18-24; Ex. F.)[1] Brawley, whose ATV was parked outside the bar, declined the offer. (Ex. F.)

A short time later, Langholf, who lived a couple of doors away from the bar, heard the ATV drive past, heading down an unlit, unpaved ditch road. (Ramirez Dep. 10:13-23; Ex. F.) Concerned that Brawley might not make it home safely, Langholf and a friend of his who joined him decided to get in a vehicle and trail

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[1] The document identified at trial as Exhibit F was part of the incident report prepared by State Police Officer Rolando Ramirez. (Ramirez Dep. 4:6-11; id. 38:22-39:2 (reflecting that the incident report was marked as Exhibit 5 to the Ramirez deposition.) Initially, the trial court ruled that it would not allow Officer Ramirez's incident report into evidence. (10/7/13 Tr. at 130-31.) Subsequently, when it spoke further with the parties about portions of the depositions that were to be submitted as evidence for the court's consideration, the court decided to defer its determination of whether it would consider the incident report until it had an opportunity to review the Ramirez deposition transcript. (10/8/13 Tr. at 148.) In the deposition, Officer Ramirez testified that he was dispatched to investigate the accident shortly after it occurred and that he conducted an investigation that night and interviews the following day. (Ramirez Dep. 6:1-8:19.) He identified Exhibit 5 as his narrative incident report. (Ramirez Dep. 38:22-39:2.) See Rule 11-803(8) NMRA; Anaya v. N.M. State Personnel Bd., 1988-NMCA-077, ¶¶ 17-20, 107 N.M. 622.

Brawley. (Ramirez Dep. 6:11-17, 7:9-17; Ex. F.) While doing so, they encountered the washout and stopped their vehicle. (Ex. F.) Looking across, Langholf saw Brawley's ATV and Brawley sprawled motionless on the ground nearby. (Ex. F.) Langholf immediately called 911. (Ramirez Dep. 15:5-8; Ex. F.)

Christopher Padilla, an EMT with the Socorro Fire Department, who responded to the call, noted that Brawley smelled of alcohol. (Padilla Dep. 4:6-9, 4:23-5:23, 9:22-10:24; Ex. 4-3.) Rolando Ramirez, a State Police Officer, who subsequently arrived at the scene, "smelled a strong odor of alcohol emanating from [Brawley]." (Ramirez Dep. 4:6-11, 8:6-9, 28:17-22.) While Ramirez stayed on the scene to investigate the accident, he directed another police officer to go to the hospital where Brawley was being taken to get blood drawn for a blood alcohol test. (Ramirez Dep. 8:10-16, 15:22-16:12, 24:3-5, 30:16-31:5.)

That hospital was Socorro General Hospital. (Padilla Dep. 12:6-8.) During the roughly two hours that Brawley was at the hospital, his blood was drawn. (Ramirez Dep. 13:23-14:11; Ex. 4 to Ramirez Dep.; Ex. 4-3; Ex. 6-4 to 6-5; Ex. 12-4; Ex. F.) Subsequently, due to the severity of his injuries, Brawley was airlifted to UNMH. (Padilla Dep. 13:5-17; Ex. 6-4 to 6-5.) For close to a month, Brawley received care at UNMH. (Ex. 12-4.) Roughly the following five weeks of his care took place at Kindred Hospital. (Id.) After that, Brawley received

roughly five weeks of rehabilitative care at HealthSouth Rehabilitation Hospital ("HealthSouth"). (Id.; Ex. 13-1.)

At the time of the preceding events, Brawley had healthcare coverage under NM Tech's Health Benefit Plan ("Plan") through his wife who was a NM Tech employee. (Ex. A; RP 886, ¶¶ 5-6; RP 823, 826.) NM Tech had an agreement in place with a third-party administrator, HCH Administration ("HCH"), to administer the Plan. (Ex. 2; 10/7/13 Tr. at 54-55.) Under the agreement, HCH processed claims made for payment under the Plan. (Ex. 2; 10/7/13 Tr. at 54-55; RP 886, ¶ 9.) In doing so, HCH, among other things, received, investigated, and determined whether a claim was covered under the terms of the Plan. (Ex. 2; 10/7/13 Tr. at 17, 56-58; RP 886, ¶ 9.) NM Tech retained the right to make a final coverage determination. (Ex. 2; 10/7/13 Tr. at 17-19; RP 886, ¶ 10.)

The terms of the Plan included coverage limitations, or exclusions, set forth in Section C-13, including the following one:

> [N]o benefits are payable under this Plan for Expenses Incurred . . . in connection with:
>
> . . .
>
> (f) Injury . . . 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. In addition, a person may be considered to be under the influence of alcohol . . . if objective evidence suggests such condition, as

> determined pursuant to the reasonable exercise of discretion by the Employer or Contract Administrator.
>
> The limitations of this section shall not apply unless there is a direct relationship between the activity described in . . . (2) and the . . . Injuries sustained[.]

(Ex. A at C-13.)[2]

Based on the alcohol exclusion, all the claims submitted for payment of the services arising out of Brawley's ATV accident were denied. (10/7/13 Tr. at 8.) HealthSouth sued Brawley and his wife to recover what it was owed. (RP 1.) The Brawleys responded by filing an answer and a third-party complaint which named HealthSouth and NM Tech as the third-party defendants. (RP 18; see also RP 343 (first amended third-party complaint); RP 359 (NM Tech's answer to first amended third-party complaint).) After HealthSouth was dismissed from the lawsuit based on a settlement agreement (RP 617; RP 755), a bench trial took place on the Brawleys' claims against NM Tech (10/7/13-10/8/13 Tr.). The Brawleys sought to have the trial court enter a declaratory judgment holding that the denied claims were covered by the Plan and to award them damages for the alleged improper denial of the claims. (RP 343; RP 820.)

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[2] The Brawleys dubbed the exclusion the "alcohol exclusion." (BIC at 4-5.) NM Tech does so as well.

"Under the Influence of Alcohol" Evidence

During the trial, Angela Gonzales, who was HCH's contact person at NM Tech for claims made under the Plan, testified about the circumstances in which she became aware of the denial of the claims for payment arising out of Brawley's ATV accident. (10/7/13 Tr. at 11, 60-61.) Betsy Herold, the HCH employee who processed claims under the Plan, notified Gonzales about the accident and HCH's determination that the alcohol exclusion applied to the claims. (Herold Dep. 4:6-10, 4:25-5:9; 10/7/13 Tr. at 60-61.) Herold did not discuss the investigation that underlay HCH's non-coverage determination, but later HCH provided Gonzales with a copy of a blood alcohol level lab report. (10/7/13 Tr. at 60-61.)

When handed a document identified as Exhibit B, Gonzales identified it as the lab report that she had received from HCH. (Id.) When asked what Herold had said about the document, Gonzales testified that Herold said that the test result was "a document" that HCH had received as a basis for denying the Brawley claim. (Id. at 61-62; see also id. at 62 (Gonzales also testified that Herold did not discuss any other documents that HCH had looked at in making its denial determination).) When asked whether Herold had discussed what the document showed, Gonzales answered,"[t]he alcohol level, exceeding the legal limit." (Id. at 62.) No objection was made to the testimony that laboratory testing showed that Terry Brawley's post-accident blood alcohol level exceeded the legal limit. (Id.)

When, following that line of questioning, NM Tech moved for the admission of Exhibit B (id. at 65), the Brawleys objected (id. at 65-67). They objected that the document did not fit within the hearsay exception for business records, that no doctor or nurse who had drawn the blood was present, and that they could not tell from the document whether the blood tested had been withdrawn pursuant to the Implied Consent Act. (Id. at 66-67.) In responding, NM Tech explained that Exhibit B was "one of the documents that the . . . administrator relied upon in making a determination that Mr. Brawley was, in fact, intoxicated." (Id. at 67.) In ruling on the objections, the court remarked: "[T]he report is tendered as something that Ms. Gonzales received. The issues of the weight or propriety of the statements made therein are reserved for further litigation. But the admissibility of the document as to what it is . . . is appropriate. And so Defendant's Exhibit B, being the blood test results, or lab test results, is admitted." (Id. at 67-68.)

The court heard additional testimony about Brawley's blood alcohol level from Dr. Alois Treybal, one of Brawley's treating physicians. (10/8/13 Tr. at 6, 13.) On cross, Dr. Treybal was asked about Exhibit 21, a UNMH medical record which summarized the initial care that Brawley had received at UNMH, starting early on the morning of August 2. (Id. at 29, 31-32; Ex. 21; see also Exs. 6-4, 6-5 (reflecting Brawley arrived at UNMH shortly before 3:00 a.m. on August 2).) Dr. Treybal testified that entries on the third page reflected that a blood test had been

done at 5:01 a.m. that morning which showed that Brawley was intoxicated. (Id. at 35-36.) The Brawleys, who already had moved Exhibit 21 into evidence (10/8/13 Tr. at 5, 21-22), did not object to Dr. Treybal's testimony about what the document showed and did not try to counter it on redirect (id. at 35-36).

Also before the court were depositions and exhibits which included information about Brawley's blood alcohol level.[3] The Herold and Burk depositions established that in processing claims for payment arising out of Brawley's ATV accident, HCH had obtained and relied on the blood alcohol report admitted as Exhibit B, Brawley's initial post-accident medical records, and Officer Ramirez's incident report, all of which reflected that Brawley was under the influence of alcohol. (Herold Dep. 30:10-24; Burk Dep. 4:25-5:10, 6:11-18, 20:16-21:9; Ex. B; Ex. 12-4; Ex. B; Ex. F; RP 890, ¶ 41.)

Additionally, there was evidence in the record about the criminal proceedings arising out of Brawley's ATV accident. After completing his investigation and receiving blood alcohol test results for blood drawn while Brawley was at Socorro General Hospital from the state Scientific Laboratory Division, Officer Ramirez filed a criminal complaint charging Brawley with

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[3] During the trial, the parties stipulated to the admissibility of the depositions of the Mountain View Bar bartender, Louis Torres, EMT Padilla, Officer Ramirez, Betsy Herold, and two other HCH deponents, Linda Burk and Debra King. (10/8/13 Tr. at 146-51.) In doing so, the parties agreed that the exhibits to the HCH depositions would not be submitted, some of which already had been admitted as trial exhibits. (Id. at 172-74.)

aggravated driving while under the influence of intoxicating liquor or drugs. (Ramirez Dep. 4:25-8:25, 13:23-14:11; 30:16-31:5; Ex. 4 to Ramirez Dep.; Ex. F.) The charge was nolle prossed based upon the unavailability of a witness from the Scientific Laboratory Division. (Ex. C.)

"Direct Relationship" Evidence

Garth Allen, the Brawleys' claims handling expert (10/7/13 Tr. at 139-40), testified about the "direct relationship" requirement in the alcohol exclusion (id. at 147-48). In doing so, he explained that for the alcohol exclusion to apply it was not enough that Brawley was intoxicated, there also had to be a direct relationship between the intoxication and his injuries. (Id. at 147-48.) "[The] direct relationship connotes causation." (Id. at 148.) In commenting on what made the causation analysis of Brawley's ATV accident more complicated Allen testified, "[t]his case involves what we call in the insurance industry concurrent causation; that is, there's a ditch, a washout. That's a potential cause of this injury or accident. And intoxication is a possible cause. So [you've] got to figure out which one was it, or is it both, concurrent causation[.]" (Id.)

Causation Evidence

Derek Swinson, the Brawleys' accident reconstruction expert (10/7/13 Tr. at 83-84), testified on direct that Officer Ramirez's accident scene diagram reflected that the driver of the ATV had "braked 21 feet before arriving at the edge of the

washout." (Id. at 86-87; Ex. 17-1.) "[T]he physical evidence indicates that whoever was driving this ATV did not become aware of this washout until a few seconds before reaching the edge of the washout." (Id. at 87-88.) On cross, Swinson clarified that he was not assuming that driver of the ATV first saw the washout about 21 feet before the washout. (Id. at 103, 113.) "In order for the brakes to come on, you have to have perception and then a reaction to that perception." (Id. at 113.) Swinson, who knew that Brawley's blood alcohol level "was above the .08 limit" (id.), agreed that intoxication could affect reaction and reflex time. (Id. at 114.)

The trial court rejected Swinson's opinion that the washout was the only cause of the accident (RP 890, ¶ 40; RP 891, ¶ 46, RP 891-92, ¶ 47), as it properly could. State ex rel. Martinez v. Lewis, 1993-NMCA-063, ¶ 57, 116 N.M. 194 ("The opinions of experts, even when uncontradicted, are not conclusive on facts in issue, and the trial court may reject expert opinion as it chooses.").

Findings and Conclusions

Following the trial, NM Tech and the Brawleys submitted proposed findings of fact and conclusions of law. (RP 850, RP 862.) Pertinent findings of fact made by the trial court that the Brawleys omit (cf. BIC at 17-20) are:

> 22. Christopher Padilla, an EMT with Socorro Fire Department, attended Mr. Brawley at the scene of the crash. Mr. Padilla testified that Mr. Brawley smelled of alcohol.

41. The decision to deny Mr. Brawley's medical claims under Section C-13 was reached after review of the police report and preliminary medical records . . . .

45. Evidence produced at trial did not support the existence of a 'phantom driver' who was transporting Mr. Brawley on the night in question. The Court finds, then, that Mr. Brawley was driving the ATV himself.

(RP 888-91.)

Argument

I. THE ALCOHOL COVERAGE EXCLUSION APPLIES TO THIS CASE.

A. The Brawleys Failed to Preserve Their Admissibility Objections Regarding Exhibit B, Which Was Properly Admitted.

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. (BIC at 27.) The line of questioning about the contents of Exhibit B that preceded their objections provides a basis to conclude that the Brawleys failed to timely object to the admissibility of information about the contents of the exhibit and thereby waived any such objection. Martinez v. Yellow Freight Sys., Inc., 1992-NMSC-015, ¶ 12 n.12, 113 N.M. 366. The questions asked were clearly aimed at eliciting the fact that the lab test report showed that Brawley's blood alcohol level exceeded the legal limit. Supra p. 7. The time to object to the admissibility of the lab

report's content, then, was before such information was elicited, not after the trier of fact already had heard it.

Furthermore, the objections the Brawleys made in challenging the admissibility of Exhibit B did not preserve the arguments that they advance on appeal. (BIC at 26-34.) The Brawleys cite to three pages of the trial transcript in identifying where they preserved the arguments. (Id. at 26.) Review of those pages (10/7/13 Tr. at 65-67) reveals the following about the objections that the Brawleys made at trial, as compared to what the Brawleys argue now.

First off, the Brawleys made a "hearsay" objection and, more specifically, an objection that Exhibit B "doesn't qualify as a business record." (10/7/13 Tr. at 66.) On appeal, the Brawleys have abandoned their hearsay objection by not arguing it in their brief-in-chief. City of Santa Fe v. Komis, 1992-NMSC-051, ¶ 22, 114 N.M. 659.

Next, the Brawleys stated: "This document is indicating some blood results of which there is no basis that can be established. There is no medical doctor here that withdrew the blood. There's no nurse that withdrew the blood." (Id. at 66-67.) If the statements were intended to raise a separate objection that no evidence had been presented as to who had drawn the blood used in the blood alcohol test and that such a showing had to be made to lay a foundation for Exhibit B to be admitted, that was not what was said. (See id.) Nor was any authority cited which

might have alerted the trial court and NM Tech that the Brawleys had such an objection in mind. (See id.) In and of themselves, then, the statements were too general to preserve such an objection. State v. Lucero, 1993-NMSC-064, ¶ 11, 116 N.M. 450 (trial counsel must "state the objection[] so that the trial court may rule intelligently on [it] and so that an appellate court does not have to guess at what was and was not an issue at trial."); see also State v. Joanna V., 2003-NMCA-100, ¶ 7, 134 N.M. 232 (preservation rule also "provides the opposing party a fair opportunity to show why the court should rule in its favor"), aff'd, 2004-NMSC-024, 136 N.M. 40; accord Tobeck v. United Nuclear-Homestake Partners, 1973-NMCA-099, ¶ 9, 85 N.M. 431 (objection that does not call out "the specific reason for the matter's inadmissibility will be treated as if no objection had been made").

In making their third and final objection to Exhibit B on the basis of the Implied Consent Act, in pertinent part, the Brawleys said:

> Your Honor . . . you've heard . . . testimony that the basis for the exclusion is that . . . – Mr. Brawley was driving under the influence, contrary to law. The law in this particular case is the Implied Consent Act. And under the Implied Consent Act, there are numerous provisions that must be followed in the extraction of blood. And so we cannot authenticate this document as to whether or not the blood was withdrawn pursuant to the Implied Consent Act. So for that basis, . . . [we] object.

(Id. at 67.) The Brawleys' attempt to tie authentication of the exhibit to compliance with the Implied Consent Act was misdirected and therefore ineffective. See Rule 11-901(A) NMRA (indicating that authentication involves

proof that an item of evidence "is what the proponent claims it is"); State v. Varela, 1999-NMSC-045, ¶¶ 25-26, 128 N.M. 454 (holding that objection based on one ground does not preserve objection based on another ground).

In saying what they did about the Implied Consent Act, the Brawleys did not articulate the idea that the admissibility of Exhibit B stood or fell upon compliance with the act as they do now. (BIC at 28.) They therefore failed to preserve such an objection. Woolwine v. Furrs, Inc., 1987-NMCA-133, ¶ 20, 106 N.M. 492 ("To preserve an issue for review on appeal, it must appear that the appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."; "Error may not be predicated upon matters not raised in the trial court.").

If the Court nevertheless considers the objection, substantively, the objection does not withstand scrutiny. Language in Section 66-8-110 indicates that the Implied Consent Act does not apply in this case. More specifically, the language states that the act applies 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, § 6-8-110(A) (2007). This is not such an action; it does not seek to impose civil liability or criminal punishment on Brawley as a result of his driving the ATV. The action originally arose out of HealthSouth's attempts to recover payment for healthcare services that it had provided to Brawley which remained unpaid. (RP 1.) The third-party action that

the Brawleys filed in response arose out of their attempts to secure a declaratory judgment that those and other services arising out of the ATV accident were covered by the Plan and to recover damages for the alleged improper denial of the claims. (RP 18; RP 343.) Obviously, if the Implied Consent Act does not control the admissibility of the blood test results, the act does not provide a basis upon which to reverse the trial court's decision to admit Exhibit B.

Even if the Implied Consent Act could be said to be controlling, it is clear that the Brawleys did not preserve their current lack of foundation objections. Cf. supra p. 14. They never expressly made a "lack of foundation" objection. (10/7/13 Tr. at 65-67.) And, although they represented that they had researched the act beforehand (see id. at 65-66), they unquestionably did not raise the litany of statutory and regulatory provisions – including Section 66-8-103 – that they currently claim NM Tech failed to demonstrate were met. (BIC at 28-32.) They did not even rattle off the consolidated, shorthand list of foundational requirements included in their arguments. (Id. at 32.) Having not raised such objections at trial, they did not preserve them and cannot prevail on them on appeal. State v. Jason F., 1998-NMSC-010, ¶ 9, 125 N.M. 111 (objection not preserved where neither the lower court nor opposing party had an opportunity to address the applicable criteria and no factual record existed for review).

The Brawleys also did not preserve the new objection that they try to slip in under the guise of critiquing some of what NM Tech said in response to their objections to Exhibit B – i.e., that no showing had been made that the blood tested belonged to Terry Brawley (BIC at 27). Woolwine, 1987-NMCA-133, ¶ 20 ("Error may not be predicated upon matters not raised in the trial court.").

Where the Brawleys imply that the trial court erred in relying on testimony from Dr. Treybal in finding that a foundation had been laid for the admission of Exhibit B (id. at 32), they misstate the record. Review of trial transcript pages which precede the ones that the Brawleys cite shows that Dr. Treybal was testifying about the UNMH medical record which was marked as Exhibit 21 (10/8/13 Tr. at 31-32), which is consistent with the finding of fact in which the trial court stated that Dr. Treybal's testimony confirmed another test which showed that Brawley's blood alcohol level was nearly double the New Mexico threshold for a presumption of intoxication (RP 888, ¶ 23).

Based upon the record that it had before it, there is no basis to conclude that the trial court erred in admitting Exhibit B. That exhibit suffices to establish that Brawley was under the influence of alcohol at the time of the accident, justifying the trial court's application of the alcohol exclusion in the Plan. Even without regard to Exhibit B, however, the subsequent proceedings yielded additional

substantial evidence, discussed in the following section, which confirmed that Brawley was under the influence of alcohol at the time of his ATV accident.

B. The Brawleys Fail to Adequately Attack the Findings of Fact That Support the Trial Court's Decision and Are Based Upon Substantial Evidence.

In challenging the evidentiary basis for the trial court's decision that the medical claims at issue were appropriately denied under the alcohol exclusion, the Brawleys focus entirely on arguing that the court erred in admitting Exhibit B. (BIC at 26-32.) Added to the arguments is the statement: "Moreover, the evidence is undisputed that NM Tech denied the Brawleys' claim based solely on Exhibit B, not Dr. Treyball's testimony at trial." (Id. at 33.) But in determining the applicability of the alcohol exception when deciding whether any insufficiency in claim processing actually injured the Brawleys, the trial court could properly consider all admissible evidence.

The Brawleys have "not launched an appropriate attack . . . on the . . . finding[s]." Crutchfield v. N.M. Dep't of Taxation and Revenue, 2005-NMCA-022, ¶ 17, 137 N.M. 26. They have not appealed "on the ground that any of the court's findings of fact was unsupported by substantial evidence." Id.; see also Rule 12-213(A)(4) ("The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive."). They "fail[] to assert any substantial evidence standard of review." Crutchfield, 2005-NMCA-022, ¶ 17.

They do not "attack any finding . . . [as] required in Rule 12-231(A)(4)," id.; see also Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc., 2004-NMCA-063, ¶¶ 28-29, 135 N.M. 607, thereby waiving such a challenge, Rule 12-231(A)(4). They do not otherwise argue that the trial court's findings are not supported by substantial evidence, which makes the findings "essentially unchallenged, and . . . therefore binding on appeal," Crutchfield, 2005-NMCA-022, ¶ 17; see also Nosker v. Trinity Land Co., 1988-NMCA-035, ¶ 11, 107 N.M. 333 ("Findings of fact adopted by the trial court and not directly attacked on appeal must be accepted as true by the reviewing court."). Therefore, the Court need not undertake a substantial evidence review.

Even if the Court were to construe the arguments and, in particular, the add-on statement, supra p. 18, as amounting to a sufficiency of the evidence attack – i.e., that Exhibit B was inadmissible and without it there was no evidence from which to find that the coverage exclusion applied (see BIC at 26) – the attack would be an incorrect and incomplete one. At most, the attack could be construed as attacking Finding of Fact 23. That finding states:

> 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.

(RP 888, ¶ 23.)

Directed as it is only at Exhibit B, the Brawleys' sufficiency of the evidence attack is based on the notion that only one blood alcohol test occurred after Terry Brawley's ATV accident. But that was not so as the district court recognized in wording Finding of Fact 23 as it did. The first sentence presumably refers to Exhibit B. See Exhibit B. The second sentence refers to the separate blood alcohol test that took place at UNMH about which Dr. Treybal testified. Supra pp. 8-9; (Ex. 21). Dr. Treybal's testimony about Brawley being intoxicated confirmed that it was reasonable to infer that Terry Brawley was under the influence of alcohol at the time of his ATV accident. Robertson v. Carmel Builders Real Estate, 2004-NMCA-056, ¶ 20, 135 N.M. 641 ("When determining whether a finding of fact is supported by substantial evidence, we review the evidence in the light most favorable to upholding the finding and indulge all reasonable inferences in support of the court's decision.").

Moreover, even if the trial court erred in admitting Exhibit B (which NM Tech does not concede), the error would not require reversal of its decision "unless no other admissible evidence substantially supporting the court's findings is present." Stephenson v. Dale Bellamah Land Co., 1969-NMSC-147, ¶ 7, 80 N.M. 732; see also Martinez, 1992-NMSC-015, ¶ 14 ("Substantial evidence is any relevant evidence in the record that a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks & citation omitted)).

Plenty of such evidence could be found in the record. As Finding of Fact 41 in relevant part establishes,"[t]he decision to deny Mr. Brawley's medical claims under Section C-13 was reached after review of the police report and preliminary medical records[.]" (RP 890, ¶ 41.) The court thus recognized that other evidence shows that Brawley was under the influence of alcohol. The police report – i.e., Officer Ramirez's incident report – stated that the blood alcohol lab test that Officer Ramirez received from the Scientific Laboratory Division showed that Brawley had a blood alcohol level of .19. (Ex. F; Ex. 4 to Ramirez Dep.) Exhibit 12-4 referred to medical records from Socorro General Hospital which showed that Brawley's "blood alcohol level was .14 at the time of admission to the emergency room for treatment of injuries sustained in an ATV accident." (Ex. 12-4.) Circumstantial evidence in the record also spoke to Terry Brawley being under the influence of alcohol. E.g., the shots of alcohol that he drank, Langholf's concern and conduct in trailing Brawley, the fact that two emergency responders independently reported that Brawley smelled of alcohol at the accident scene, and the criminal charge brought against Brawley. Supra pp. 3-4, 9-10. Additionally, there was evidence that Langholf was able to stop his vehicle when he encountered the washout whereas Brawley did not. Supra pp. 3-4.

All in all, "[t]here being substantial evidence to support the court's finding[] [as to Terry Brawley being under the influence of alcohol] whether or not

inadmissible evidence was admitted is not material and [does] not constitute reversible error." Stephenson, 1969-NMSC-147, ¶ 7. Additionally, having argued error only in the admission of Exhibit B, in their remaining arguments the Brawleys do not attack the other findings of fact which show that the other requirements for the alcohol coverage exclusion were met. (BIC at 33-34.)

That makes the remaining factual findings (RP 885-92) binding, supra Crutchfield. Notable among them are the following ones:

> 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.
>
> . . .
>
> 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[.]
>
> . . .
>
> 45. Evidence produced at trial did not support the existence of a "phantom driver" who was transporting Mr. Brawley on the night in question. The Court finds, then, that Mr. Brawley was driving the ATV himself.
>
> . . .
>
> 48. The specific 'direct relationship' between alcohol use and injury required for the exclusion is not defined in the [NM Tech Health] Plan.
>
> 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 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[.]

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[ly] thorough and complete investigation into the incident of August 1-2, 2009[.]

(RP 887-92.)

Those facts dispose of the Brawleys' remaining arguments. The case law that they cite goes to the issue of breach (BIC at 33-34), which is immaterial in light of the trial court's determination that any deficiencies in the investigation leading up to the coverage denial did not cause the Brawleys to suffer damages. (RP 892, ¶ 52.)

The Brawleys' Point I (BIC at 26) is therefore wrong on both counts. The trial court properly admitted Exhibit B which itself provided substantial evidence for finding that Brawley was under the influence of alcohol at the time of his ATV accident. Even if the court erred in admitting Exhibit B, there was other substantial evidence to support the court's finding on the issue.

II. THE CONCURRENT CAUSATION DOCTRINE DOES NOT APPLY TO THIS CASE INVOLVING FIRST-PARTY MEDICAL BENEFITS.

A. The Brawleys Did Not Preserve Any Issue for Review Regarding the Applicability of the Concurrent Causation Doctrine.

The Brawleys contend that they preserved the argument that they should prevail through application of the concurrent causation doctrine "by . . . presentation of the testimony of Professor Allen," their claims processing expert. (BIC at 34.) But, although the expert mentioned concurrent causation in passing while setting forth his views of the case (see 10/7/13 Tr. at 148), the Brawleys never argued during the trial, nor in their post-trial requested findings of fact (RP 862-74) or their requested conclusions of law (RP 875-77), that the concurrent causation doctrine should apply and that the doctrine required the court to hold that the alcohol exclusion did not preclude Plan coverage. Presenting a testimonial basis for a legal argument, without then making the argument, is not sufficient to preserve an issue for review. See, e.g., State v. Miller, 1997-NMCA-060, ¶ 8, 123 N.M. 507 ("We agree with the State that it 'elicited facts' supporting its theories. We have not uncovered anything in the record, however, . . . showing that the State presented any of these legal principles or arguments to the trial court."); see also Estate of Griego v. Reliance Standard Life Ins. Co., 2000-NMCA- 022, ¶ 17, 128 N.M. 676 (holding that issue was adequately preserved when "Plaintiffs . . . brought the issue to the trial court's attention and prompted the trial court to rule

on it" (emphasis added)). The Court need not address this unpreserved issue. Woolwine, 1987-NMCA-133, ¶ 20.

B. In First-Party Cases Involving a Loss with Multiple Causes, the Concurrent Causation Doctrine Does Not Apply.

NM Tech's health benefit plan provides first-party benefits to the plan beneficiaries. (RP 886, ¶ 5 (finding that the plan provides employees and dependents with coverage for medical benefits); Ex. A.) Cf. Black's Law Dictionary 922-23, 925 (10th ed. 2014) (distinguishing first-party insurance, which "applies to an insured or the insured's own property, such as . . . health insurance," from third-party or liability insurance, which "cover[s] a loss resulting from the insured's liability to a third party").

The Brawleys argue that the concurrent causation rule should apply to afford them benefits under the NM Tech plan, given the trial court's finding that both the road washout and Terry Brawley's intoxication were causes of the accident that injured him. (BIC Point II.) But the Brawleys fail to note a crucial distinction revealed by the subsequent history of their leading case, State Farm Mutual Automobile Insurance Co. v. Partridge, 514 P.2d 123 (Cal. 1973), and discussed in another of the cases they cite, Warrilow v. Norrell, 791 S.W.2d 515, 527-28 (Tex. App. 1989).

In Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704 (Cal. 1989), the same court that issued Partridge distinguished it in holding that applying a

concurrent cause analysis to a situation involving first-party coverage "ignores . . . the important distinction between . . . coverage under a first-party . . . policy and . . . coverage under a third-party liability insurance policy." Id. at 705. Partridge, as the Brawleys' brief in chief explains, involved third-party coverage for the insured's tort liability where the insured's covered negligence and another, excluded cause combined to bring about the harm. (BIC at 36-37.) Indeed, all the cases relied upon by the Brawleys in invoking the concurrent causation doctrine fit that pattern. (BIC at 38-40.)

Garvey, on the other hand, involved first-party coverage. The plaintiffs there purchased a property insurance policy that covered damage from various causes but excluded damage resulting from earth movement, including settling. The plaintiffs' home was damaged when an improperly constructed addition separated from the main structure. Although there was evidence that settling caused the addition to separate from the home, the trial court held that coverage existed under the Partridge concurrent causation rule because one cause of the harm – a contractor's negligent construction of the addition – was covered, even if the other cause was not.

The California Supreme Court held that Partridge does not supply the governing rule when first-party coverage is at issue. Partridge "never considered" a first-party coverage scenario. 770 P.2d at 709. An insurer under a third-party

liability policy provides coverage for the insured's own negligence; consequently, policy coverage in the third-party context "draws on traditional tort concepts of fault, proximate cause and duty." Id. at 710. In contrast, "the coverage analysis in the [first-party] property insurance context . . . draws on the relationship between perils that are either covered or excluded[.]" Id. "The task becomes one of identifying the most important cause of the loss and attributing the loss to that cause." Id. (internal quotation marks & citation omitted) (emphasis omitted).

In earlier cases, the California court had described such a cause as the "'efficient cause,'" id. at 707 (quoting Sabella v. Wisler, 377 P.2d 889, 895 (Cal. 1963) (internal quotation marks & citation omitted)), or the "'prime or moving cause,'" id. at 708 (quoting Brooks v. Metropolitan Life Ins. Co. 163 P.2d 689, 691 (Cal. 1945)). It is the cause "'that sets others in motion . . . , though the other causes may follow it, and operate more immediately in producing the disaster.'" Id. at 707 (quoting Sabella, 377 P.2d at 895 (internal quotation marks & citation omitted)). Because the district court had erroneously applied the Partridge concurrent causation rule, the court in Garvey remanded the case for a determination of coverage "under an efficient proximate cause analysis." Id. at 714.

That result is reflected also in the treatise on which the Brawleys rely. (BIC at 36.) See 7 S. Plitt et al., Couch on Insurance § 101:56, at 101-106 (3rd ed.

2013) ("Third-party insurance typically provides coverage under the 'concurrent causation' rule . . . . In contrast, recovery under first-party insurance coverage is generally permitted if a cause falling within the coverage provided under the policy can be considered the 'efficient cause' of the loss." (footnotes omitted)). And the result is recognized by New Mexico law. See Couey v. Nat'l Benefit Life Ins. Co., 1967-NMSC-044, ¶ 5, 77 N.M. 512 (adopting rule that, in determining coverage under policy providing hospitalization benefits, "the proximate efficient cause of hospitalization" is determinative, despite existence of other factors contributing to insured's hospital stay); accord Armijo v. World Ins. Co., 1967-NMSC-158, 78 N.M. 204 (applying Couey's proximate efficient cause analysis to policy providing death benefits).

Thus, when the Brawleys assert that, although their authorities all concern liability insurance policies, "the rationale of the concurrent causation doctrine applies just as well here" (BIC at 40), they are simply incorrect. In applying the concurrent causation doctrine, a distinction between first-party and third-party coverage "is necessary and appropriate." Warrilow, 791 S.W.2d at 528. Based upon that distinction, the concurrent causation doctrine does not apply to the present case.

C. Because the Issue Was Not Preserved and the Record Consequently Is Undeveloped, the Judgment Should Be Affirmed Under the Theory the Brawleys Pursued at Trial.

Applying the proper analysis, one might conclude that Terry Brawley's intoxicated condition when he left the bar, which impaired his ability to appreciate and respond to road hazards, was the efficient cause of the accident that occurred when he encountered the washed out area of the roadway. But the trial court made no finding addressing efficient cause (RP 885-92), and it probably is more correct to say that in its current state the record is inadequate to determine, as between intoxication and washout, which was the "efficient" or "moving" cause of the accident. That deficiency in the record is due entirely to the Brawleys' failure to raise the concurrent causation issue at trial. See supra Point II(A).

The Brawleys' efforts at trial were devoted to establishing through their accident reconstructionist's testimony that the washout was the sole cause of the accident. (See, e.g., Tr. 10/7/13 at 99 (Swinson: "The sole cause of the accident, in my opinion, was the washout on the road[.]"); RP 867, ¶ 21 (requested finding: "The cause of the ATV accident was a . . . washout[.]").) The evidence and argument simply were not calibrated to address factors material to determining efficient cause. The district court refused to credit the Brawley's expert testimony and rejected the proposed finding. (RP 890-92, ¶¶ 40, 46, 47, 54.) See Lewis, 1993-NMCA-063, ¶ 57 (factfinder may reject even allegedly uncontradicted expert

testimony); Empire West Cos. v. Albuquerque Testing Labs., Inc., 1990-NMSC-096, ¶ 17, 110 N.M. 790 (refusal to accept requested finding is viewed as finding against party with burden of proof). Because the court did not err in refusing to adopt the theory under which the case was tried by the Brawleys, the court's judgment should be affirmed.

Moreover, because the district court made no finding that the washout was the efficient cause of the accident, the Brawleys failed to meet their burden of proof even under the concurrent causation theory that they advance on appeal.

III. THE INDEPENDENT INTERVENING CAUSE DOCTRINE HAS NO APPLICABILITY TO THIS CASE.

A. The Brawleys Failed to Preserve Any Issue Regarding Independent Intervening Cause.

As with the concurrent causation issue, the Brawleys contend that they preserved the argument that the washout was an independent intervening cause of the accident by presenting the testimony of their experts "who testified that the washout was the cause of the accident." (BIC at 41.) While the cited testimony itself is patently inadequate to raise the issue, the more salient point is that nowhere in the record – in testimony, argument, or requested findings or conclusions – is there any reference by the Brawleys to the independent intervening cause doctrine as applicable to this case. See supra pp. 24-25. The issue was not raised and

preserved in the district court and therefore should not be considered on appeal. Woolwine, 1987-NMCA-133, ¶ 20.

B. The Road Washout Cannot Be Considered an Independent Intervening Cause of the Accident.

Even if the Brawleys had raised the issue of independent intervening cause at trial, they cannot prevail by relying on an independent intervening cause theory. First, they offer no authority supporting their attempted application of independent intervening cause to establish coverage in a first-party insurance or health plan benefit case. Lee v. Lee (In re Adoption of Doe), 1984-NMSC-024, ¶ 2, 100 N.M. 764 ("We assume where arguments in briefs are unsupported by cited authority, counsel . . . was unable to find any supporting authority . . . . Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.") (citation omitted). The absence of authority is not surprising because, as previously discussed, supra Point II(B), tort-based concepts such as independent intervening cause are not properly applied to questions of loss causation involving first-party coverage.

The road washout cannot be characterized as an independent intervening cause in any event. The trial court expressly rejected the Brawleys' expert's opinion that Terry Brawley's intoxication played no causative role in the accident, and it found that Brawley's alcohol use was a cause of the accident. (RP 891-92, ¶ 47; RP 892, ¶ 50.) The court's finding regarding causation is not challenged.

The court did not find that the washout would have caused Brawley to crash even if he had been sober. The trial court thus implicitly found that Brawley's intoxication and the washed-out condition of the roadway combined to cause the accident. See Herrera v. Roman Catholic Church, 1991-NMCA-089, ¶ 14, 112 N.M. 717 ("[F]indings of the trial court will be construed so as to uphold a judgment rather than to reverse it.").

Under the court's unchallenged findings, then, the washed-out roadway was not a cause of the accident that arose independently of Brawley's intoxication, turned aside the normal course of events, and produced an unforeseeable outcome. See Silva v. Lovelace Health Sys., Inc., 2014-NMCA-086, ¶ 17, 331 P.3d 958, cert. quashed, 2014-NMCERT-009, 337 P.3d 96; UJI 13-306 NMRA. Rather, it was entirely foreseeable that in his impaired condition Terry Brawley would be unable to manage any road hazards he might encounter on his drive home from the bar. Brawley's accident was so foreseeable a consequence of his intoxication that Langholf and his friend, with exactly that concern in mind, undertook to follow him after he departed the bar; they were the first to come upon the accident scene. Supra pp. 24-25. Thus, despite the Brawleys' contentions, the independent intervening cause doctrine has no bearing on this case.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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