ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JESSICA CRESPIN,

Plaintiff-Appellant,

v. NMCA Case No. 35,732

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the Second Judicial District Court, Bernalillo County, NM
Hon. Nan G. Nash, District Judge, District Court No. D-202-CV-2013-04627

ANSWER BRIEF OF DEFENDANT-APPELLEE SAFECO INSURANCE COMPANY OF AMERICA

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I. SUMMARY OF PROCEEDINGS

A. Additional Facts

In this appeal, Appellant Jessica Crespin does not set forth any specific attack on the Court's findings and, as such, all the Court's findings are deemed conclusive. **[3 RP 799-807 FOF 1-84]** Rule 12-318(A)(3), (4) NMRA. Appellee herein, Safeco Insurance Company of America ("Safeco"), provides additional facts that are pertinent to this Court's review of the issue presented, whether Appellant's injuries and damages arose out of the use of an uninsured vehicle.

Appellant participated in the plan for Defendants Fabian Fierro and Travis Bainbridge to pick up Appellant from school on February 20, 2009. **[3 RP 823 FOF 3]** Appellant knew how old Fierro and Bainbridge were and believed that Bainbridge was her boyfriend on February 20, 2009. **[3 RP 823 FOF 6, 7]** Appellant knew Fierro for about three years prior to February 19, 2009 and had had sexual relations with him prior to February 19, 2009. **[3 RP 823 FOF 10, 11]**

On the morning of February 20, 2009, Appellant used various cell phones to text with Fierro and Bainbridge. **[3 RP 823 FOF 12, 13]** On February 20, 2009, Fierro drove himself and Bainbridge to Polk Middle School. **[3 RP 823 FOF 14]** Appellant planned to meet Fierro and

Bainbridge at her school on February 20, 2009; she knew that they were going to pick her up at her school before they arrived at the school. **[3 RP 824 FOF 17, 18, 19]** The Court did not find that Bainbridge and Fierro "convinced" Appellant to get in the car **[BIC, p. 7]**. Rather, Appellant left school and met Bainbridge and Fierro at the vehicle; they talked for about ten minutes; there were people in the vicinity of the vehicle that would have heard Appellant if she called out; Appellant opened the rear door of the vehicle and got inside. **[3 RP 824 FOF 21-27]** Appellant was not coerced, pulled, or otherwise forced into opening the rear door of the vehicle and getting inside, and she was not locked inside the vehicle. **[3 RP 825 FOF 28, 29]** Appellant was not sexually assaulted, physically harmed, physically restrained, or otherwise forced to stay in the vehicle on February 20, 2009. **[3 RP 825 FOF 31, 32, 33]**

The trial court did not find that "[w]ithout the car that they used, Fierro and Bainbridge 'would not have picked up Plaintiff from school ...'" **[BIC, p. 7]** Rather, the trial court found that, "Bainbridge testified, via deposition, that he would not have picked up Plaintiff from school on February 20, 2009 if he had not had use of a car." **[3 RP 827 FOF 63]**

Upon arriving at Fierro's home on February 20, 2009, Appellant exited the vehicle on her own volition and entered the house with Fierro

and Bainbridge. **[3 RP 825 FOF 35]** Fierro lived with his mother, Janet Roybal, on February 20, 2009. **[3 RP 825 FOF 36]** After Appellant entered the house, Fierro introduced his mother to Appellant, at which time Appellant was not crying and did not act scared or distressed. **[3 RP 825 FOF 37, 39]** Appellant witnessed several children present in the house with Ms. Roybal on February 20, 2009. **[3 RP 825 FOF 38]** After the conversation with Ms. Roybal, Appellant went upstairs with Fierro and Bainbridge to talk and listen to music. **[3 RP 825, 826 FOF 40]** The Court did not find that Bainbridge and Fierro "directed" Appellant upstairs. **[BIC, p. 7]**

Prior to the sexual relations (Fierro) and the sexual assault (Bainbridge), Appellant, Fierro, and Bainbridge *listened to music for at least twenty minutes.* **[3 RP 826 FOF 41]** (Emphasis added.)

After they listened to music for some time, Fierro and Appellant went into a different room and had sexual relations. **[3 RP 826 FOF 44]** Fierro did not batter Appellant, and he did not use physical restraint to force her to have sexual relations with him. **[3 RP 826 FOF 50]** After the sexual relations, Fierro then fell asleep. **[3 RP 826 FOF 46]**

After Fierro and Appellant had sexual relations, Appellant came into the room where Bainbridge was, and Bainbridge sexually assaulted

Appellant by having sexual relations with her. **[3 RP 826 FOF 47]** Bainbridge did not use physical restraint to force Appellant to have sexual relations with him, and he did not batter Appellant. **[3 RP 826 FOF 49]** The sexual assault by Bainbridge is the intentional tort at issue herein. **[3 RP 832 COL K]**

Appellant thereafter left Fierro's house; she may have left with Bainbridge. **[3 RP 826, 827 FOF 52, 53]** There was no finding that Appellant used the vehicle after she left the house. Ultimately, she went by herself to a Wal-Mart. **[3 RP 827 FOF 56]** While Appellant was at Fierro's house, Ms. Roybal, who was home, never heard Appellant scream or exhibit any kind of distress. **[3 RP 826 FOF 42]**

Appellant reported the sexual acts to her Mother and to law enforcement, and Bainbridge and Fierro were charged with a number of crimes. **[3 RP 827, 828 FOF 57, 58, 64]** Neither Bainbridge nor Fierro pled guilty to kidnapping charges. **[3RP 828 FOF 65, 66]** Fierro testified that he pled guilty, because he did not have the money to pay his attorney. **[3 RP 828 FOF 67]** Bainbridge pled guilty, because he was told that if he pled guilty, he would not have to register as a sex offender. **[3 RP 828 FOF 68]**

The foregoing facts are not challenged by Appellant and, therefore, are deemed conclusive. Rule 12-318(A)(3), (4).

B. Disposition / Conclusions of Law

The Court concluded that, contrary to Appellant's allegations in her Complaint, Appellant was not kidnapped and was not taken by force to the site of the sexual activity and sexual assault. **[3 RP 831 COL G]** The vehicle was used to transport Appellant to the site of the sexual activity and sexual assault. **[3 RP 831 COL G]** The Court concluded that the events after Appellant, Fierro, and Bainbridge arrived at Fierro's home broke any causal link that may have existed between the use of the vehicle and the harm: specifically, all three exited the vehicle on their own; went into the home; Appellant and Fierro spoke with Fierro's mother; the three went upstairs and listened to music for at least 20 minutes; Appellant and Fierro had consensual sex; and then Bainbridge sexually assaulted Appellant. **[3 RP 831-832 COL I; 3 RP 826 FOF 41]** The Court found that the intentional tort, the sexual assault by Bainbridge, occurred after the tortfeasor exited the vehicle and went inside the house. **[3 RP 832 COL K]** The Court concluded that the vehicle was not an active accessory; its only use was to transport Appellant to the site of the intentional tort. **[3 RP 832 COL K, M]** The Court concluded that Appellant suffered emotional injuries as a result of the intentional tort by Bainbridge. **[3 RP 833 COL T, V]**

II. ARGUMENT

New Mexico law permits recovery of uninsured/underinsured motorist ("UM/UIM") benefits for intentional torts only in proper circumstances. *See Britt v. Phoenix Indem. Ins. Co.*, 1995-NMSC-075, ¶ 15, 120 N.M. 813, 907 P.2d 994. The intentional tort at issue herein is Bainbridge's sexual assault on Appellant after they exited the vehicle, went inside the house, conversed with Ms. Roybal, went upstairs, listened to music for at least 20 minutes, and after Fierro and Appellant had sexual relations. **[3 RP 832 COL K]** Fierro did not commit an intentional tort against Appellant.[1] **[3 RP 833 COL R]** Following a test established under Minnesota law, the New Mexico Supreme Court determined that district courts must engage in a three-part analysis to determine whether intentional conduct and its resulting harm arose out of the use of an uninsured vehicle. *Id.* First, there must be a sufficient causal nexus between use of the vehicle and the resulting harm, which requires that "the vehicle be an active accessory in causing the harm." *Id.* ¶ 15. Second, if the uninsured vehicle is an active accessory, the Court must decide "whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered. *Id.* Third, "the court must consider whether the 'use' to which the vehicle was

[1] Fierro was not more than 4 years older than Plaintiff. **[5-3-16 2 Tr. 40:18-21]**

put was a normal use of that vehicle." *Id.* As an example, "transportation would be a normal use, where use of a parked car for a gun rest would not be." *Id.* (citing *Continental W. Ins. Co. v. Klug*, 415 N.W.2d 876, 878 (Minn. 1987)). All three prongs must be satisfied to show the alleged harm arose from the ownership, maintenance or use of an uninsured vehicle. *See id.* ¶ 15 (indicating a court should only consider the second and third prongs if the active accessory requirement is satisfied); *Hartford Ins. Co. of the Midwest v. Estate of Tollardo*, 409 F. Supp. 2d 1301, 1308 (D.N.M. 2005) (Browning, J.).

A. The vehicle was not an "active accessory" in causing the emotional injuries incurred by Bainbridge's intentional tort.

Under New Mexico law, a vehicle is an active accessory when the vehicle provides the assailant with certain advantages, such as allowing the assailant to quickly approach his victim, conceal his identity and weapon, and speed away from the scene of the crime, or use the vehicle to position himself near the victim or restrict the victim's movement. In *Barncastle v. Am. Nat'l Prop. & Cas. Co.*, 2000-NMCA-95, 129 N.M. 672, 11 P.3d 1234, the court concluded a passenger used a vehicle as an active accessory in a crime when he or she got out of the vehicle, walked over to the victim's car, shot the victim and returned to the car which sped away. *Id.* ¶ 9. The

vehicle, which was kept running at all times, was an active accessory, because the driver used the vehicle to get into a position where the assailant could shoot the victim and the vehicle was used to escape the scene at a high rate of speed. *Id.* These facts sufficiently demonstrated that "the vehicle was an integral element of the . . . shooting." *Id.*

Barncastle relied upon *State Farm Mut. Auto Ins. Co. v. Blystra*, 86 F.3d 1007 (10th Cir. 1996), a federal case that applied New Mexico law. There, a passenger or driver of a pick-up truck drove by the victim, a pedestrian, and shot him. In holding that the vehicle was an active accessory, the court stated, "[w]hen an automobile is used by an assailant to undertake a drive-by shooting, the automobile is almost by definition an 'active accessory' to the assault." *Blystra, 86 F.3d* at 1012. The *Blystra* court reasoned that the assailant received several advantages through use of the car, including the ability to rapidly approach the victim without drawing suspicion, conceal his identity, and leave the scene quickly to avoid apprehension. *Id.* The *Barncastle* court, as in *Blystra,* noted that *"this was not a case of an intentional tort being committed simply after the tortfeasor exited the vehicle." Barncastle,* 2000-NMCA-95, ¶ 10 (quoting the letter decision in *Blystra*) (emphasis added).

In contrast to these cases, the New Mexico Court of Appeals in *Farmers Ins. Co. v. Sedillo*, 2000-NMCA-94, ¶¶ 9-10, 129 N.M. 674, 11 P.3d 1236, found that the vehicle was not an active accessory, even when the vehicle clearly instigated the physical harm that damaged the insured. The insured was at a tailgate party in a parking lot when an unknown driver of a pickup truck sped through the lot and came particularly close to the insured's daughter. *Id.* ¶ 2. The insured yelled at the driver to slow down. *Id.* The driver responded with profanity and parked in a space about 40 yards from where the insured was located. *Id.* The insured approached the unknown driver and punched him, after which a serious physical fight broke out wherein the insured suffered substantial personal injuries. *Id.* ¶ 3. While the truck instigated the physical violence, under these facts, the uninsured driver's use of the truck was too attenuated from the harm to render the truck an active accessory in the attack on the insured. *Id.* ¶¶ 9-10.

Similarly, the United States District Court for the District of New Mexico, in *Hartford Ins. Co. of the Midwest v. Estate of Tollardo*, 409 F. Supp. 2d at 1308-10, applying New Mexico law, held that the assailant's vehicle was not an active accessory in causing the victims' harm where he was headed home at the time he spotted the victims and his vehicle did not

assist him in shooting and killing them. There, the assailant drove around in his uninsured truck for two to three hours looking for the victims. *Id.* at 1303. Eventually he gave up and decided to return home. On his way home, he happened to see the victims' car at a gas station. *Id.* He attempted to turn into the gas station parking lot, but was driving too quickly and his truck jumped over a curb and slammed into a pole located across the parking lot from the victims' car. *Id.* at 1303-1304. He got out of his truck, ran toward the other car and shot and killed three people inside the car. *Id.* at 1304.

In ruling against the insured, the court found it significant that, at the operative time, the assailant had stopped using his truck to search for the victims, essentially giving up on his quest for revenge, and was instead using his vehicle to return home. *Hartford v. Tollardo,* 409 F.Supp.2d at 1309. When he initiated his assault on the victims, he was not using his vehicle in furtherance of any plot against the victims. *Id.*

In rejecting the insured's arguments that the assailant's truck was an active accessory, Judge Browning noted that the case lacked certain features New Mexico courts have relied upon to conclude a vehicle is an active accessory. *Hartford v. Tollardo,* 409 F.Supp.2d at 1310-11. Since the assailant slammed his truck into a pole, he was hindered in his ability to

use his truck to cause harm. *Id.* at 1309-10. He was outside of his truck and on foot at the time of the attack. *Id.* at 1310-11. He could not exploit the element of surprise by quickly approaching the victims' car in his truck, without suspicion, while also concealing his weapon. *Id.* For all these reasons, the court held that, under New Mexico law, the assailant's truck was not an active accessory. *Id.* at 1312.

While there are no New Mexico cases addressing the availability of UM/UIM benefits in a case factually similar to this one, where the vehicle is merely used to transport the victim to the site of the alleged attack, New Mexico appellate courts would not afford UM/UIM benefits under such circumstances. In *Britt v. Phoenix Indem. Ins. Co.*, 1995-NMSC-075 , the New Mexico Supreme Court ruled that in order for there to be UM/UIM coverage, there had to be some connection, other than proximity in time and place, between the act of the occupant and that of the uninsured motorist. In doing so, the *Britt* Court relied heavily upon Minnesota law addressing UM/UIM coverage and whether intentional conduct and resulting harm arises from an uninsured vehicle. As noted above, the *Britt* Court adopted the Minnesota three-part test verbatim for making such a determination, and, therefore, New Mexico appellate courts would likely find Minnesota law persuasive. *See Hartford v. Tollardo*, 409 F. Supp. 2d at

1310 (finding Minnesota law persuasive in a New Mexico UM/UIM case analysis).

Minnesota courts "have ruled out the mere use of a vehicle for transportation to the scene of a crime as satisfying the active accessory requirement." *Id.* The court in *Edwards v. State Farm Mut. Auto Ins. Co.*, 399 N.W.2d 95 (Minn. Ct. App. 1986) found that the vehicle was used only to transport the victim to the scene of the crime even where the assailant forced the victim in to the car, drove sixty miles away, and then sexually assaulted and murdered her in the car. The court considered that the assailant could have accomplished the same end without the use of the car. *Id.* The court further considered that the law requires a connection between use of the vehicle and the injuries sustained. *Id.* at 98. This connection exists when the injuries arise from a risk associated with motoring. The victim's injuries did not arise from a risk associated with motoring, but rather a risk associated with living in our society. *Id.*

Appellant argues that *State Farm Ins. Co. v. Bell,* 39 F.Supp.3d 1352 (D.N.M. 2014) supports her argument that the vehicle was an active accessory. *Bell,* however, is distinguishable. In *Bell,* a dog inside an SUV bit a child who remained outside the SUV, attempted to hug the dog, and may have leaned inside the SUV. The court analyzed various dog bite

cases in regard to the child's parents' claims that they were entitled to UM/UIM coverage as a result of the child's injuries, including *Boatright v. State Farm Mut. Auto. Ins. Co.,* 309-CV-946-J-32MCR, 2010 WL, 2220250 (M.D. Fla. June 2, 2010). In *Boatright,* the owner opened the car door and the dog leaped out, startling the plaintiff, who fell and injured herself. The *Bell* court noted that other courts have found it persuasive when, as in *Boatright,* the trip was over at the time of the incident. In *Bell,* the dog was still in the SUV at the time of the incident. Furthermore, the *Bell* court went on to state that the bite was facilitated by the height of the SUV, placing the dog and the child face-to-face. Additionally, and most importantly, the bite occurred because of the unique setting of the SUV in that the dog was specifically territorial over the vehicle, transforming it from the mere situs of the injury into a contributing factor to the bite. *Bell,* 39 F.Supp.3d at 1357-58.

In contrast to *Bell,* Appellant had left the vehicle at least 20 minutes prior to having consensual sexual relations with Fierro and, therefore, the trip was over. *See Id.* at 1357. Furthermore, the vehicle did not facilitate Bainbridge's sexual encounter with Appellant, and the vehicle was not a contributing factor to the sexual assault. Moreover, since the dog was still in the SUV in *Bell*, *Bell* never addressed the second part of the *Britt* test,

whether an act of independent significance broke the causal link between the vehicle and the alleged harm.

As in *Edwards v. State Farm Mut. Auto Ins. Co.*, 399 N.W.2d at 97-98, the vehicle was only used to transport Appellant to the site of the intentional tort. In contrast to *Barncastle v. Am. Nat'l Prop. & Cas. Co.,* 2000-NMCA-95, ¶ 10, the case before this Court is a case where an intentional tort was committed after the tortfeasor exited the vehicle. *Id.* (citing *State Farm v. Blystra,* 86 F.3d at 1014).

Furthermore, when the assault occurred, Bainbridge was on foot inside the house and, as such, the vehicle did not provide Bainbridge with any advantage, such as the element of surprise or hiding a weapon, so as to make the vehicle an active accessory. *See Barncastle,* 200-NMCA-95, ¶ 9; *Hartford v. Tollardo,* 409 F.Supp.2d at 1310-1311. The vehicle did not assist Bainbridge in his sexual assault. *Hartford v. Tollardo,* 409 F.Supp.2d at 1309. When Bainbridge assaulted Appellant, Bainbridge was not *using* the vehicle to assist any plot against Appellant. *Id.* at 1309. As in *Farmers v. Sedillo,* 2000-NMCA-94, ¶¶ 9-10, the use of the vehicle in this case was too attenuated from the harm to render the vehicle an active accessory to Bainbridge's assault.

B. Numerous acts of independent significance broke any purported causal link between the use of the vehicle and the alleged harm.

Under New Mexico UM/UIM law, when harm arises from conduct that occurs outside of the uninsured vehicle and is unrelated to the vehicle, or risks associated with motoring, the causal link between the use of the vehicle and the alleged harm is broken. In *Farmers Ins. Co. v. Sedillo*, 2000-NMCA-94, ¶ 10, the New Mexico Court of Appeals held there was an act of independent significance breaking the causal chain when the insured's injuries were caused by him walking over to the driver of a parked truck, criticizing the driver's driving in the parking lot, and throwing the first punch in the physical fight that ensued. *Id.* This was true even though the un/underinsured vehicle instigated the attack that caused the insured's substantial injuries by driving his truck near the insured's daughter. *Id.* Under these facts, the *Sedillo* court found that there was no reasonable inference that the causal chain was not broken.

In *Edwards v. State Farm Mut. Auto Ins. Co.*, 399 N.W.2d at 97-98, the Minnesota Court of Appeals held that the assailant's violent acts of raping and murdering the victim in an uninsured motor vehicle constituted events of independent significance breaking the causal chain between the use of the vehicle and the victim's injuries. It did not matter that the crime

occurred in the uninsured vehicle, because the assailant did not require a vehicle to inflict harm on the victim. Further, even though the assailant forced the victim into a car and drove her sixty miles away from where he abducted her, there was no element of the offenses perpetrated on the victim that required use of an automobile or that concerned risks associated with motoring. *Id.* at 96-97, 99. The victim's injuries arose from the unfortunate risk of living in our modern society, and not a risk associated with motoring. *Id.* at 98. The vehicle was used merely to transport the victim to the site of the violent attack, which was an intervening cause that broke the causal chain between the vehicle and the victim's injuries. *Id.* at 98-99. *See also Britt,* 1995-NMSC-075, ¶ 15, citing with approval *Kish v. Central Nat'l Ins. Group of Omaha,* 424 N.E.2d 288, 294 (Ohio 1981) (holding that intentional act of murder was intervening cause); *United Serv. Auto Ass'n v. Ledger,* 234 Cal. Rptr. 570, 572 (Cal. Ct. App. 1987) (interpreting liability policy and holding that stabbing was intervening cause). Indeed, *Britt* held that if the collision was accidental and the intent to attack attached after the collision, then the attack broke the causal connection, even though the assailants got back in the vehicle and it drove off. *Britt,* 1995-NMSC-075, ¶ 16.

In *Holm v. Mutual Service Cas. Ins. Co.,* 261 N.W.2d 598, 603 (Minn. 1977) (discussed in *Klug*), the court found an act of independent significance where a police officer, after pursuing a motorcycle, left his vehicle to make an arrest and committed a battery upon the motorcyclist. The court stated that the officer had completely left the vehicle before he administered the tortious battery. The police car had served only to transport him to the scene of the incident. *The battery could as easily have occurred had the officer come upon the stationary motorcycle while on foot.*

In contrast, in *Klug*, 415 N.W.2d at 878, relied upon by the New Mexico Supreme Court in *Britt*, the Supreme Court of Minnesota found the causal connection was not broken when the assailant's driving of the uninsured vehicle and the shooting of the insured were inextricably related. There, the assailant pulled up next to the insured, while both were traveling on a highway, and shot the insured. *Id.* at 877. He then followed the insured in his vehicle as the insured changed lanes, and rammed the back of the insured's vehicle. *Id.* Under the facts in *Klug*, the causal chain between the insured's harm and the use of the un/underinsured vehicle was not broken.

In the instant case, the trial court found that Appellant exited the vehicle, walked into the house, conversed with Ms. Roybal, went upstairs

with Fierro and Bainbridge, listed to music with Fierro and Bainbridge for at least 20 minutes, and then had consensual sexual relations alone with Fierro. After the consensual sexual relations with Fierro, Appellant then walked into the room where she and Bainbridge had sexual relations. Depending on how the Court would count these events, six or seven separate acts broke any purported causal chain between the vehicle and Appellant's sexual assault by Bainbridge and more than 20 minutes passed after the parties exited the vehicle. *See Britt,* 1995-NMSC-075, ¶ 15; *Kish v. Central Nat'l Ins. Group of Omaha,* 424 N.E.2d at 294; *United Serv. Auto Ass'n v. Ledger,* 234 Cal. Rptr. at 572. Indeed, the intentional tort of sexual assault by itself was sufficient to break any purported causal link between the vehicle and the harm.

Although Bainbridge testified, via deposition, "that he would not have picked up Plaintiff from school on February 20, 2009 if he had not had use of a car," **[3 RP 827 FOF 63]** his testimony and opinion is not a binding legal conclusion. Rather, as stated by the *Edwards* court, Bainbridge did not require a vehicle to inflict harm upon Appellant, and no element of the assault concerned risks associated with motoring. *Edwards,* 399 N.W.2d at 96-97, 99. The assault could as easily have occurred had Bainbridge, Fierro, and Appellant met at one of the skate parks and walked to Fierro's

house. *See Holm v. Mutual Service Cas. Ins. Co.,* 261 N.W.2d at 603. *See also* **[5-2-16 1 Tr. 62:10-22]** [Appellant's cousin Lisa Archuleta told Detective Hartsock that she looked for Appellant at boyfriend's (Fierro) house, Bainbridge's house, and skate park on February 20, 2009.]

C. Public policy weighs strongly against a finding that Appellant's injuries arose out of the use of an uninsured motor vehicle.

If this Court were to find that the transport of Appellant to a situs other than a vehicle, where an intentional tort occurred over 20 minutes after leaving the vehicle, where six or seven separate activities occurred after exiting the vehicle and before the intentional tort occurred, allowed for recovery of UM /UIM benefits, the floodgates would open to countless claims unrelated to the use of a vehicle. How many different activities would have to occur before any purported causal connection is broken? How many hours would have to pass after exiting the vehicle before any causal connection is broken? All an insured would have to claim to recover UM/UIM benefits is that the tortfeasor intended the harm from the moment he or she first set forth in a vehicle. Indeed, in the instant case, Fierro signed an Affidavit less than two weeks before the trial with the understanding that in exchange for Plaintiff dismissing him from this case, Fierro would sign the Affidavit stating that he and Bainbridge intended to

have sex with Plaintiff before they picked her up in the uninsured vehicle, and they did not communicate that to her. **[5-3-16 2 Tr. 4:19-10:5]**[2] UM/UIM benefits are intended to protect an insured from uninsured or underinsured drivers – not from all types of torts committed without any significant connection to a vehicle and the risks associated with motoring. Exposing insurance companies to such limitless, indeterminate risks, particularly in a time of rising crime rates in New Mexico, would have severe financial implications on insurers and, ultimately, the citizens of New Mexico. Such an extension of UM/UIM benefits in these remote, unpredictable situations would likely also inundate our currently overburdened courts with even more UM/UIM claims. The resulting impact would severely affect ultimate availability of UM/UIM coverage, including the cost of such coverage. It would also thwart the purpose behind New Mexico's current statutory and case law regarding UM/UIM coverage, which is to expand insurance coverage and protect individual members of the public against the hazard of culpable uninsured motorists. *Britt*, 1995-NMSC-075, ¶ 11.

[2] As a result of Fierro signing the Affidavit that reflected the facts that the plaintiff sought to prove, the trial court agreed that Fierro was an adverse witness as to Safeco. **[5-3-16 2 Tr. 12:10-20]**

D. Appellant waived her right to contest the damage award by not addressing it in her BIC.

In her Docketing Statement, Appellant claimed that the trial court erred in setting the damage award against Bainbridge at $10,000. Appellant failed to address this issue in her BIC and, therefore, has waived the argument. *State v. Ortiz,* 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

III. CONCLUSION

As set forth above, the vehicle at issue was not an active accessory in completing the alleged conspiracy for Bainbridge to commit a sexual assault against Appellant. Appellant entered the vehicle by her own volition. The vehicle was used to merely transport Appellant to the situs of the assault, which occurred well after exiting the vehicle and entering Fierro's house. The vehicle did not provide any advantage to either Fierro or Bainbridge, such as the element of surprise or hiding a weapon. During the assault, Bainbridge was not using the vehicle to assist in any plot against Appellant. As such, the use of the vehicle was too attenuated from the harm to render the vehicle an active accessory.

Furthermore, even if the vehicle was an active accessory, which is denied, six or seven acts of independent significance broke any causal connection to the vehicle, including the sexual assault itself, which occurred

at least 20 minutes after exiting the vehicle and entering the house. Public policy does not support a finding that the facts of this case allow for a recovery by Appellant of UM/UIM coverage.

For the reasons set forth above, Safeco respectfully requests that this Court affirm the trial court and hold that (1) the vehicle was not an active accessory; and (2) even if the vehicle were an active accessory, which is denied, that any purported causal connection between the vehicle and the alleged harm was broken by the numerous acts of independent significance that occurred, beginning with the occupants exiting the vehicle through the final intervening act, Bainbridge's sexual assault, and for any further relief this Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via electronic mail on this 25th day of April 2017 to the following:

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