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

BRIEF-IN-CHIEF OF PLAINTIFF-APPELLANT JESSICA CRESPIN

ORAL ARGUMENT IS REQUESTED.

ATKINS & WALKER, P.A.
Tyler J. Atkins
Samuel Walker
7301 Indian School Road NE, Suite B
Albuquerque, New Mexico 87110
T/ (505) 508-4640

Attorneys for Plaintiff-Appellant Jessica Crespin

TABLE OF CONTENTS

RULE 12-213(G) NMRA STATEMENT OF COMPLIANCE

I HEREBY CERTIFY that this Brief-in-Chief was prepared using proportionally-spaced, 14-point, Times New Roman typeface in the Microsoft Word word-processing program and that, pursuant to the limitations of Rule 12-213(F)(3) NMRA, its body contains **2,753** words per Microsoft Word's word-count function.

Tyler J. Atkins
Attorney for Plaintiff-Appellant Jessica Crespin

TABLE OF AUTHORITIES

Pages

New Mexico Cases:

Cases from Other Jurisdictions:

New Mexico Statutes:

New Mexico Rules:

SUMMARY OF THE PROCEEDINGS

This appeal arises from a bench trial tried before the Honorable Nan G. Nash in the Second Judicial District Court in May 2016. The crux of Plaintiff-Appellant Jessica Crespin's case was her challenge of Defendant-Appellee Safeco Insurance Company of America's denial of her claim for uninsured motorist coverage benefits under an auto insurance policy purchased by her parents. Following the presentation of Plaintiff-Appellant's case-in-chief, the District Court heard Safeco's Rule 1-041(B) NMRA motion for an involuntary dismissal of Plaintiff-Appellant's claims against it. The District Court granted Safeco's motion and later issued its findings of fact and conclusions of law expounding upon its reasons for doing so. **[RP 822-834]** The District Court then entered its judgment. **[RP 820]** Plaintiff-Appellant appeals from the portion of that judgment concluding that the Safeco "Policy of Insurance does not provide uninsured motorist coverage for the incident at issue." **[RP 820]**

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether an insurance company must provide uninsured motorist coverage to an insured when an uninsured motor vehicle is used as an integral tool in completing a conspiracy to commit a sexual assault against her.

PRESERVATION

The legal question presented in this appeal turns on the application of the evidence presented at trial to the law initially set forth in *Britt v. Phoenix Indemnity Insurance Co.*, 1995-NMSC-075, 120 N.M. 813, 907 P.2d 994, and later interpreted in other cases. These cases were argued at length at both the hearing on Safeco's motion for summary judgment **[RP 345]** and at trial. **[RP 822-834]**

FACTUAL BACKGROUND

The District Court entered very detailed findings of fact following the presentation of evidence in Plaintiff-Appellant's case-in-chief. Those findings of fact include the following that are relevant to this Court's review:

On the evening of February 19, 2009, Travis Bainbridge (then 19 years old) and Fabian Fierro (then 18 years old) communicated by cell phone with Plaintiff-Appellant (then 14 years old). **[RP 822 at ¶ 1, 823 at ¶¶ 2-3]** At the time, Plaintiff-Appellant was a student at Polk Middle School in Albuquerque. **[RP 822 at ¶ 1]** Between themselves, Bainbridge and Fierro, who both knew that Plaintiff-Appellant was minor, made plans to drive to Polk Middle School the next day, pick Plaintiff-Appellant up in a car, and transport her in that car to a place at which they would have sexual relations with her. **[RP 823 at ¶¶ 3-5]** Neither Bainbridge nor Fierro explained to Plaintiff-Appellant that this was their plan. **[RP 823 at ¶ 4]**

On February 20, 2009, Bainbridge and Fierro followed through on their plan. **[RP 823 at ¶ 14]** They met with Plaintiff-Appellant outside Polk Middle School and convinced her to get in the car, which was owned by Fierro's mother and was uninsured. **[RP 823 at ¶¶ 14-15, 824 at ¶ 23]** Neither Bainbridge nor Fierro told Plaintiff-Appellant about their plan to transport her to a place at which they would have sexual relations with her. **[RP 825 at ¶ 34]** Without the car that they used, Fierro and Bainbridge "would not have picked up Plaintiff[-Appellant] from school...." **[RP 827 at ¶ 63]** Fierro drove Plaintiff-Appellant directly to his house without making any stops along the way. **[RP 825 at ¶ 30]** Fierro, Bainbridge, and Plaintiff-Appellant exited the car and went into Fierro's house. **[RP 825 at ¶ 35]** At that point in time, Plaintiff-Appellant did not know that Bainbridge and Fierro "intended to have sexual relations with her or commit a sexual assault upon her...." **[RP 826 at ¶ 43]**

Inside the house, Fierro and Bainbridge directed Plaintiff-Appellant upstairs. **[RP 826 at ¶ 40]** They did not tell Plaintiff-Appellant that they planned to have sexual relations with her when they got upstairs. **[RP 826 at ¶ 40]** After "some time" passed, Fierro had sexual intercourse with Plaintiff-Appellant. **[RP 826 at ¶ 44]** After Fierro was finished, Bainbridge had sexual intercourse with Plaintiff-Appellant. **[RP 826 at ¶ 47]** "Bainbridge knew that having sexual relations with Plaintiff[-Appellant] was wrong because he knew that she was a minor. He had

expressed these feelings to Fierro prior to the incident." **[RP 826 at ¶ 51]** After both Fierro and Bainbridge had sexual intercourse with Plaintiff-Appellant, she left Fierro's home and sought help. **[RP 827 at ¶¶ 51, 56-57]**

Bainbridge and Fierro were later arrested and charged with several crimes related to their interactions with Plaintiff-Appellant. **[RP 828 at ¶ 64]** Fierro and Bainbridge both ultimately pled guilty to a number of crimes, including "Conspiracy to Commit Criminal Sexual Penetration in the Second Degree" and "Conspiracy to Commit False Imprisonment." **[RP 828 at ¶¶ 65-66]**

The District Court applied its findings of fact and reached its conclusions of law. **[RP 831-833]** The District Court concluded that the applicable test to apply to determine whether Safeco was required to extend uninsured motorist coverage to Plaintiff-Appellant was set forth in *Britt*, 1995-NMSC-075. Applying the *Britt* factors, the District Court concluded that Safeco was not required to extend uninsured motorist coverage to Plaintiff-Appellant. The District Court's analysis is discussed in detail in the sections that follow.

STANDARD OF REVIEW

"Because Rule 1-041(B) leaves the fact finding to the trial judge," the evidence presented should be viewed in "the light most favorable to support" the trial court's granting of such a motion to dismiss. *Padilla v. RRA, Inc.*, 1997-NMCA-104, ¶ 17, 124 N.M. 111, 946 P.2d 1122 (internal quotation marks and

citation omitted). "Findings of fact made by the district court will not be disturbed if they are supported by substantial evidence. 'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. However, when an appellate issue presents a mixed question of law and fact, as this case does, the appellate court "review[s] de novo the trial court's application of the law to the facts in arriving at its legal conclusions." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 (examining whether insureds' daughter who was injured in a car crash was entitled to uninsured motorist benefits under her parents' insurance contract).

Plaintiff-Appellant's appeal presents the Court with a mixed question of fact and law. While the District Court's findings of fact merit deference, the application of those finding of fact to the applicable substantive law are reviewed de novo, against the backdrop that New Mexico's appellate courts have "consistently held that the uninsured motorist statute and contracts arising thereunder should be construed liberally in favor of coverage in order to implement the remedial purposes behind that statute." *Britt*, 1995-NMSC-075, ¶ 11; *see also* NMSA 1978, § 66-5-301 (1983).

ARGUMENT

I. PLAINTIFF-APPELLANT'S INJURIES AND DAMAGES AROSE OUT OF THE USE OF AN UNINSURED VEHICLE.

Safeco appears to agree with the District Court that *Britt* is the controlling New Mexico precedent in determining whether Plaintiff-Appellant's injuries and damages arose out of the use of an uninsured vehicle. *See generally* 1995-NMSC-075. In *Britt*, Daniel Britt was a passenger in an automobile that was rear-ended in traffic. *Id.* ¶ 2. Mr. Britt exited the vehicle after the crash to assess the damage done to his friend's vehicle and to get the other driver's insurance information. *Id.* Outside the vehicle, "a physical altercation" ensued, Mr. Britt was stabbed in the leg, and the assailants then fled the scene of the crime. *Id.* Mr. Britt later made a claim for uninsured motorist coverage to recover for the damages that he endured because of the criminal attack. *Id.*

In considering whether uninsured motorist coverage was available to Mr. Britt, the New Mexico Supreme Court first focused on the question of whether what had happened was an "accident." The Court held that "if the event causing the injury is unintended and unexpected from the injured party's viewpoint, the injury is deemed to have occurred as a result of an accident." *Id.* ¶ 8. Applying that holding to the facts of the case, the Court concluded that "[b]ecause from Britt's viewpoint the stabbing injuries he sustained were an unexpected and unintended result of the

automobile accident, the trial court correctly concluded that Britt's injuries arose out of an accident...." *Id.*

The *Britt* Court's focus then turned to whether Mr. Britt was legally entitled to recover for damages that arose out of the use of an uninsured motor vehicle. *Id.* ¶ 9. In addressing this question, the Court crafted a three-part test to apply to situations like Mr. Britt's: (1) "whether there is a sufficient causal nexus between the use of the uninsured vehicle and the resulting harm," (2) "whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered," and (3) "whether the 'use' to which the vehicle was put was a normal use of that vehicle." *Id.* ¶ 15.

Considering the evidence presented in Plaintiff-Appellant's case-in-chief and applying *Britt*, the District Court concluded that:

> **A. The subject vehicle used by Fierro and Bainbridge on February 20, 2009 was "uninsured" pursuant to the insurance contract at issue.**

> **E. The incident at issue occurred as a result of an accident.**

> **L. Under *Britt*, the Court must finally decide whether the vehicle at issue was put to its normal use. The subject vehicle was put to its normal use. 1995-NMSC-075, ¶ 15.**

[RP 831-832] Neither party appealed any of those conclusions of law, which are not therefore not before the Court.

At issue in this appeal are the District Court's conclusions of law related to the first two prongs of the *Britt* test: (1) whether there was a sufficient nexus between the use of the uninsured vehicle used to transport Plaintiff-Appellant to the site of the attack and her damages, and (2) whether any act of independent significance broke the causal link between the use of the uninsured vehicle and the damages Plaintiff-Appellant suffered.

A. There Was a Sufficient Causal Nexus Between the Use of the Uninsured Vehicle and the Sexual Assault of Plaintiff-Appellant

If there is a "sufficient nexus between the uninsured driver's fault and [the] injuries" of the person making a claim for uninsured motorist benefits, then the damages suffered "ar[i]se out of the use of an uninsured automobile." *Id.* ¶ 14. "Such a causal nexus requires that the vehicle be an 'active accessory' in causing the injury." *Id.*

In *State Farm Insurance Co. v. Bell*, the United States District Court for the District of New Mexico considered the availability of uninsured motorist coverage for an incident during which a young girl "was bitten as she attempted to pet [a dog] while [the] dog" was inside an unattended, parked vehicle. 39 F. Supp. 3d 1352, 1353-54 (D.N.M. Aug. 22, 2014). The Court, applying the *Britt* test, found that the uninsured vehicle was an "active accessory" in causing the incident to occur. *Id.* at 1357-58. Because the vehicle was a "contributing factor" in causing the bite to

occur, as opposed to the "mere situs" of the bite, it was determined to be an "active accessory." *Id.* at 1358. The Court explained that "[t]he *Britt* test does not require absolute certainty that the injury would not have occurred but for the use of the vehicle, it only requires that the vehicle itself contribute to the injury." *Id.*

In *Barncastle v. American National Property & Casualty Co.*, 2000-NMCA-095, ¶ 9, 129 N.M. 672, 11 P.3d 1234, this Court applied the *Britt* test and found that there was coverage for an intentional act committed by an uninsured driver. *Barncastle* involved a shooting from an uninsured vehicle, and the Court found that the vehicle was an "active accessory" in achieving the shooting because: (1) the uninsured driver used the vehicle to assist in committing the crime and (2) the vehicle was used to escape from the scene of the crime, thereby making it an essential factor in completing the crime. *Id.*

In the present case, the question is whether the use of the uninsured vehicle contributed to Plaintiff-Appellant's injuries. Based on Bainbridge's testimony, the use of the uninsured vehicle was the key element in facilitating the crimes that were perpetrated on Plaintiff-Appellant. As the District Court found, without the use of the uninsured vehicle, Bainbridge and Fierro "would not have picked up Plaintiff[-Appellant] from school...." **[RP 827 at ¶ 63]** Bainbridge effectively admitted that without the use of the uninsured vehicle, the harm to Plaintiff-Appellant would not have been possible. It follows that not only did the uninsured vehicle contribute to

cause Plaintiff-Appellant's injuries and damages, but her injuries and damages would not have ever occurred without the use of the uninsured vehicle. The uninsured vehicle was far more than an "active accessory" assisting in the infliction of harm on Plaintiff-Appellant; it was an irreplaceable accessory in inflicting harm on her. Without the use of the uninsured car to transport Plaintiff-Appellant from her middle school to Fierro's house, none of this would have ever happened. The use of the uninsured vehicle was never intended to be innocent; rather, it was the central tool used to complete the crimes for which Bainbridge and Fierro pled guilty.

B. No Act of Independent Significance Broke the Causal Link Between the Use of the Uninsured Vehicle as Part of Conspiratorial Plan to Sexually Assault Plaintiff-Appellant

"If a court finds that there is a sufficient causal nexus, then it should next consider whether an act of independent significance broke the causal link between the use of the vehicle and the harm suffered." *Britt*, 1995-NMSC-075, ¶ 15. "[T]he *Britt* court recognized that, given the right facts, the causal chain might not be broken even though the assailant commits his assault after exiting the stopped vehicle." *Barncastle*, 2000-NMCA-095, ¶ 12 (internal quotation marks and citation omitted). In *Britt*, the Supreme Court focused on the use of the uninsured vehicle as a tool to "facilitate the attack" as the crucial showing required to allow for a legal determination that the causal chain was never broken:

> If, as Britt asserted, the unidentified driver intentionally rammed Glass's vehicle in complicity with the assailants or in order to facilitate the attack, then the assailants' actions probably did not constitute an 'independent intervening cause' sufficient to cut off the nexus between the driver's actions and Britt's injuries. If, on the other hand, the collision was accidental and the assailants developed the intent to attack Britt after the collision, perhaps due to hot tempers resulting from the collision, then their actions broke the causal link between the use of the vehicle and Britt's injury.

1995-NMSC-075, ¶ 16.

In the present case, the uninsured car was used to facilitate the ability of Fierro and Bainbridge to complete the crimes to which they pled guilty. Again, Bainbridge plainly testified that without the use of the uninsured car, he and Fierro never would have picked Plaintiff-Appellant up at her middle school and, thus, would never have been able to complete the conspiracy they planned on February 19, 2009 without the use of the uninsured car. **[RP 827 at ¶ 63]** It was planned between Fierro and Bainbridge on February 19 that they would pick up Plaintiff-Appellant from her middle school the next day so that they both could sexual intercourse with her—all unbeknownst to Plaintiff-Appellant. **[RP 823 at ¶¶ 3-5]** Both Bainbridge and Fierro ultimately pled guilty to this conspiracy. **[RP 828 at ¶¶ 65-66]**

Fierro and Bainbridge wanted to have sexual relations with Plaintiff-Appellant. They used the uninsured car to facilitate that plan. They used the uninsured car to transport Plaintiff-Appellant to a place where they could realize their plan. They did this, and there was no break in their plan, from the time when

they made the agreement to do so on February 19 to the time they completed their plan at Fierro's house on February 20. There was no intervening break in the causal link between the time they first formulated their plan to use the car to achieve their goals and the moment they took turns having sexual intercourse with Plaintiff-Appellant. The District Court therefore erred, as a matter of law, when it concluded that there was not a sufficient causal nexus between the use of the uninsured vehicle and the harm caused to Plaintiff-Appellant.

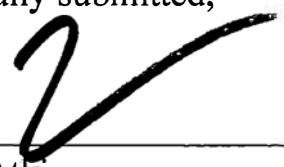
CONCLUSION

Applying the reasoning of the *Britt* case against the backdrop of the well-established mandate that all insurance contracts must be liberally construed in favor of providing coverage to an insured, coverage should be extended to Plaintiff-Appellant under this set of circumstances.

REQUEST FOR ORAL ARGUMENT

The issue raised in this appeal does not appear to have ever been addressed in New Mexico's body of case law. Binding precedent concerning this issue would provide invaluable guidance to both insureds and insurers. Because of the oftentimes unclear interplay between *Britt* and its progeny, Plaintiff-Appellant believes that oral argument would be of great assistance to the Court in rendering its opinion. *See* Rule 12-214(B)(1) NMRA.

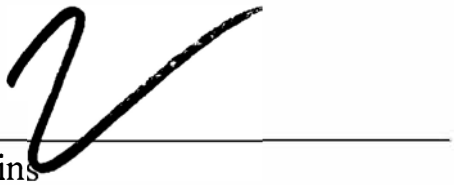
Respectfully submitted,



Tyler J. Atkins
Samuel Walker
Atkins & Walker, P.A.
7301 Indian School NE, Suite B
Albuquerque, NM 87110
(505) 508-4640
Attorneys for Plaintiff-Appellant Jessica Crespin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief-in-Chief was emailed to the all counsel of record on this 17th day of March, 2017:



Tyler J. Atkins
Attorney for Plaintiff-Appellant Jessica Crespin