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

REPLY BRIEF OF PLAINTIFF-APPELLANT JESSICA CRESPIN

ORAL ARGUMENT HAS BEEN REQUESTED.

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RULE 12-213(G) NMRA STATEMENT OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief 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 **3,244** words per Microsoft Word's word-count function.

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TABLE OF AUTHORITIES

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New Mexico State Cases:

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INTRODUCTION

It appears that Plaintiff-Appellant and Safeco agree on several topics that should help to streamline the Court's analysis in this appeal:

1. No findings of fact entered by the District Court are contested. **[AB 1]**
2. This Court's application of the District Court's findings of facts to the applicable law should be performed under a *de novo* review framework, applying the *Britt* test.[1]
3. The only prongs of the *Britt* test that are at issue are the "active accessory" prong and the "intervening cause" prong. **[AB 7, 15]**
4. New Mexico's UM/UIM statute should be liberally construed to favor coverage. *See Britt v. Phoenix Indemnity Insurance Co.*, 1995-NMSC-075, ¶ 11, 120 N.M. 813, 907 P.2d 994.

ARGUMENT

From this the beginning of this case to the present, Safeco has focused its defense on the argument that there was no underlying tort because Plaintiff-Appellant, a 14-year-old girl in the seventh grade, consented to sexual intercourse with two men: one who was 18 years old and another who was 19 years old. Safeco now argues that the District Court's findings of fact "are not challenged by Appellant

[1] Safeco does not appear to contest Plaintiff-Appellant's statement of the applicable standard of review anywhere in its Answer Brief. **[BIC 8-9]**

and, therefore, are deemed conclusive." **[AB 4]** Among those "conclusive" facts are:

- The 19-year-old man (Travis Bainbridge) "sexually assaulted" Plaintiff-Appellant. **[RP 849 at ¶ 47]**
- Both Mr. Bainbridge and the 18-year-old man (Fabian Fierro) pled guilty to "Conspiracy to Commit Criminal Sexual Penetration in the Second Degree" and "Conspiracy to Commit False Imprisonment." **[RP 851 at ¶¶ 65-66]**

Despite these uncontested findings, Safeco continues to argue that Plaintiff-Appellant "participated in the plan" of her own sexual assault, thus obviating any UM coverage under her parents' Safeco policy. **[*See* AB 1]**

What happened over the course of February 19 and 20, 2009 was an ongoing conspiracy whose successful completion depended on the use of a vehicle. Under well-established New Mexico law, proving a conspiracy requires a showing of the following elements:

1. Two or more people "by words or acts agreed to commit" a crime;
2. Those people "intended to commit" that crime; and
3. One or both of those people "committed" or "attempted to commit" the crime.

UJI 14-2811 NMRA ("Liability as a co-conspirator"). Mr. Fierro and Mr. Bainbridge, who both knew that Plaintiff-Appellant was a minor, made plans to drive to Plaintiff-Appellant's middle school, pick her up in a car, and transport her to a

place where they would have sexual relations with her. **[RP 823 at ¶¶ 3-5]** The co-conspirators' intended crime of "sexual assault" was committed after they transported Plaintiff-Appellant to Mr. Fierro's house using an uninsured vehicle. **[RP 849 at ¶¶ 15, 30, 47]** Both co-conspirators pled guilty to conspiring to commit their intended crime of sexual assault. **[RP 851 at ¶¶ 65-66]** The question for the Court in this appeal is whether the co-conspirators' unbroken conspiracy whose completion required the use of an uninsured vehicle demands that Safeco extend UM coverage to its insured, Plaintiff-Appellant.

I. THE UNINSURED VEHICLE WAS AN "ACTIVE ACCESSORY" BECAUSE IT WAS A "CONTRIBUTING FACTOR" IN ALLOWING THE CO-CONSPIRATORS TO COMMIT THE CRIME THEY PLANNED

A vehicle is an "active accessory" to a criminal act when "there is a sufficient nexus between the uninsured driver's fault and the [crime victim's] injuries." *Britt*, 1995-NMSC-075, ¶¶ 14-15. Safeco correctly notes that under New Mexico case law, a vehicle is an "active accessory" when it "provides the assailant with certain advantages"; however, Safeco incorrectly asks the Court to ignore New Mexico courts' analysis of this prong of the *Britt* test and instead adopt the non-binding rationale of decades-old case law from Minnesota. **[AB 7, 14]** Safeco's argument hinges on the Court's acceptance or rejection of Safeco's thesis statement that "the [uninsured] vehicle did not provide Bainbridge with any advantage" in committing sexual assault upon Plaintiff-Appellant. **[AB 14]**

"The *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." *State Farm Ins. Co. v. Bell*, 39 F. Supp. 3d 1352, 1358 (D.N.M. 2014). New Mexico's courts have found an uninsured vehicle to be an "active accessory" when:

- A dog sitting in an otherwise unoccupied vehicle bit a little girl through the open window. *Id.* at 1357-58.
- A passenger got out of a vehicle at a stop light, walked over to another stopped car, and shot the driver of the other stopped car. *Barncastle v. Am. Nat'l Prop. & Cas. Co.*, 2000-NMCA-095, ¶ 9.
- A passenger of a vehicle shot at another vehicle in a drive-by shooting. *State Farm Mut. Auto. Ins. Co. v. Blystra*, 86 F.3d 1007, 1012 (10th Cir. 1996).
- A passenger got out of a vehicle after a car accident and was subsequently stabbed. *Britt*, 1995-NMSC-075, ¶¶ 2, 16.

While Safeco is correct that "there are no New Mexico cases addressing the availability of UM/UIM benefits in a case factually similar to this one" (*i.e.*, the use of a vehicle to contribute to the completion of a conspiracy to commit a sexual assault), the logic of the New Mexico cases analyzing the *Britt* test is applicable.

The question for the Court to resolve in this appeal on the "active accessory" issue is whether the co-conspirators' use of the uninsured vehicle "contribut[ed] to the injury" suffered by Plaintiff-Appellant. *See Bell*, 39 F. Supp. 3d at 1358. Safeco does not, because it cannot, dispute the District Court's findings that the co-conspirators:

- Made plans to pick Plaintiff-Appellant up from her middle school using a vehicle. **[RP 823 at ¶ 3]**
- Planned to have sexual relations with Plaintiff-Appellant, though they never explained that to her. **[RP 823 at ¶ 4]**
- Drove an uninsured vehicle to Plaintiff-Appellant's middle school. **[RP 823 at ¶ 14]**
- Drove Plaintiff-Appellant to Mr. Fierro's house without making any stops along the way. **[RP 825 at ¶ 30]**
- Sexually assaulted Plaintiff-Appellant at Mr. Fierro's house. **[RP 826 at ¶ 47]**
- Hid evidence of the sexual assault "under the seat of the subject vehicle." **[RP 827 at ¶ 54]**

A crucial, uncontested finding of fact related to whether the uninsured vehicle was an "active accessory" in contributing to Plaintiff-Appellant's injuries is Mr. Bainbridge's testimony:

> **63. 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.**

[RP 827 at ¶ 63]

Safeco urges the Court to adopt Minnesota law, *see Edwards v. State Farm Mut. Auto. Ins. Co.*, 399 N.W.2d 95 (Minn. Ct. App. 1986), and approve the proposition that a car can never be considered an "active accessory" used to facilitate a sexual assault, even though it contradicts established New Mexico law. **[AB 12]** As Safeco argues, the rationale in adopting that law would be that "[t]he victim's injuries did not arise from a risk associated with motoring, but rather a risk associated with living in our society." **[AB 12]** This argument ignores the two decades of evolution of the *Britt* line of cases in New Mexico, which allow for recovery for things such as aggravated assaults occurring outside vehicles (*Britt* and *Barncastle*), dog bites (*Bell*), and drive-by shootings (*Blystra*). Like sexual assault, all those things are "risk[s] associated with living in our society" and not necessarily "motoring"; yet, New Mexico's courts have interpreted New Mexico's UM/UIM statute to cover them.

Judge Parker's dissent in *Edwards* more accurately captures the spirit of UM/UIM law in New Mexico on the "active accessory" issue. "When determining whether the motor vehicle was an 'active accessory' in bringing about an injury, the court must look at the circumstances from beginning to end." *Edwards*, 99 N.W.2d at 100 (Parker, J., dissenting). In *Edwards*, the criminal used his vehicle to find his victim, transported his victim to the location of the sexual assault, and testified that he took his victim to the location of the sexual assault so he "'could have sex with [her].'" *Id.* "This illustrates that [the criminal] would not have raped and killed his victim had he not first been able to transport her to a secluded area." *Id.* The criminal's "own statements indicate that he would not have committed the crimes without the vehicle." *Id.*

Identically to the criminal in *Edwards*, the co-conspirators in the present case used an uninsured vehicle to find Plaintiff-Appellant at her middle school, transported Plaintiff-Appellant the location of the sexual assault, and took Plaintiff-Appellant to that location so they could have sexual relations with her. Like the criminal in *Edwards*, Mr. Bainbridge testified "that he would not have picked up Plaintiff[-Appellant] from school on February 20, 2009 if he had not had use of a car." **[RP 827 at ¶ 63]** Plaintiff-Appellant's injuries "could not have occurred had [the co-conspirators] not had access to and use of [the] automobile." *Id.* at 101. Under New Mexico's line of *Britt* cases and against the backdrop of the rule that

New Mexico's UM/UIM statute should be liberally construed in favor of coverage, this Court should find that the co-conspirators' use of the uninsured vehicle contributed to Plaintiff-Appellant's injuries sufficiently to find it to be an "active accessory" to the conspiracy and ultimate sexual assault.

II. THE USE OF THE UNINSURED VEHICLE WAS ONE PART OF THE CO-CONSPIRATORS' UNBROKEN PLAN TO COMMIT SEXUAL ASSAULT

Under *Britt*, "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). Whether the causal chain is broken depends heavily on the mindset of the criminal. *See Britt*, 1995-NMSC-075, ¶ 16. If the driver uses a 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 [causal] nexus...." *Id.* (emphasis added).

Mr. Fierro used the uninsured vehicle in complicity with Mr. Bainbridge to commit sexual assault upon Plaintiff-Appellant. The uninsured vehicle was used, based on the testimony of Mr. Bainbridge, to facilitate the conspiracy to commit sexual assault upon Plaintiff-Appellant. The conspiracy began on February 19, 2009 when Mr. Fierro and Mr. Bainbridge first made the plan to transport Plaintiff-Appellant to a place where they could have sexual relations with her and did not end

until they were finished having sexual relations with her on February 20, 2009. This was an active conspiracy of which the use of the uninsured vehicle was an essential piece.

Safeco correctly states that "*Britt* held that if the collision was accidental and the intent to attack attached after the collision, then the attack broke the causal connection...." **[AB 16]** That is not what happened in the present case; rather, the intent to attack originated on February 19, continued through the use of the vehicle to transport Plaintiff-Appellant to the place of her attack, and was finally realized at Mr. Fierro's house. There was nothing impulsive about what happened. It was a calculated plan that depended on the use of a vehicle to facilitate it. Safeco seeks to convince the Court to view what happened piece by piece in a vacuum instead of taking a step back and looking at the whole picture of the active conspiracy.

In support of its argument on this prong of the *Britt* test, Safeco relies on a single New Mexico case, *Farmers Ins. Co. v. Sedillo*, 2000-NMCA-094, 129 N.M. 674, 11 P.3d 1236.[2] **[AB 15]** In *Sedillo*, this Court considered a case in which an uninsured driver sped through a parking lot, causing a Farmers insured to yell at him to slow down. *Id.* ¶ 2. The uninsured driver then "responded with profanity and pulled into a parking space about 40 yards away." *Id.* The Farmers insured then walked over to the uninsured driver's vehicle, the uninsured driver and his

[2] Safeco also cites *Britt* in passing.

passengers all exited the vehicle, words were exchanged, the Farmers insured threw the first punch, and a violent fight ensued. *Id.* ¶ 3. In finding that there was an "act of independent significance" that broke the causal chain of the use of the uninsured vehicle, this Court reasoned that the Farmers insured "walked over to [the uninsured driver] after he had parked his truck, continued criticizing [the uninsured driver's] driving in the parking lot, and threw the first punch." *Id.* ¶ 10. There was no plan to use the uninsured vehicle to facilitate any attack on the Farmers insured; instead, the attack was the result of hot heads—the vehicle was not used in furtherance of completing any thought-out conspiracy to cause harm to the Farmers insured.

As it did in its "active accessory" argument, Safeco urges the Court to adopt Minnesota law and approve the proposition that "violent acts…consitut[e] events of independent significance breaking the causal chain between the use of the vehicle and the victim's injuries." **[AB 15]** In *Edwards*, the Minnesota Court of Appeals found that a rape and murder that occurred inside an uninsured vehicle "broke the causal link between the 'use' of the vehicle and the injuries inflicted." 399 N.W.2d at 98-99. In *Holm v. Mutual Services Casualty Insurance Co.*, 261 N.W.2d 598, 603 (Minn. 1977), the Supreme Court of Minnesota held, in part, that because "no part or instrumentality of the vehicle ever came into contact with the victim," his injuries did not "arise out of the use" of the vehicle. In *Continental Western Insurance Co. v. Klug*, 415 N.W.2d 876, 878 (Minn. 1987), the Supreme Court of Minnesota found

no act of independent significance broke the causal chain when the driver of an uninsured car, while driving, shot at his victim; however, that court was careful to point out that had the shooter "used his vehicle to drive ahead of [the victim], left his vehicle, and shot [the victim] from the side of the road, we might have found an intervening act."

The *Britt* line of cases has, over the past two decades, expanded coverage well beyond what is available under Minnesota law. While simply getting out of an uninsured vehicle in Minnesota appears to be enough to break the causal chain, the same is simply not true in New Mexico. *See, e.g.*, *Britt*, 1995-NMSC-075, ¶ 16 (holding that exiting a vehicle before an assault does not break the causal chain if the use of the car was used "in order to facilitate the attack"); *Barncastle*, 2000-NMCA-095, ¶ 10 ("[G]iven the right facts, the causal chain might not be broken even though the assailant commits his assault after exiting the stopped vehicle." (internal quotation marks and citation omitted)); *Bell*, 39 F. Supp. 3d at 1357 (explaining that a dog bite was "facilitated" by the physical dimensions of an uninsured vehicle that was unoccupied by any human being). While Safeco is correct that the co-conspirators and Plaintiff-Appellant exited the uninsured vehicle and that time passed between then and the occurrence of the sexual assault, its causal link argument that "the intentional tort of sexual assault by itself was sufficient to break any purported causal link between the vehicle and the harm" is fundamentally

flawed. **[AB 18]** While such an argument may hold water under Minnesota law, the same cannot be said when scrutinized through the lens of New Mexico law. To rule in Safeco's favor on this issue under New Mexico law would require a finding that (1) Mr. Fierro did not act "in complicity" with Mr. Bainbridge in completing the plan to sexually assault Plaintiff-Appellant and (2) the uninsured vehicle was not used "in order to facilitate" the sexual assault on Plaintiff-Appellant. *See Britt*, 1995-NMSC-075, ¶ 16. Such findings would directly contradict the District Court's uncontested findings of fact.

III. SAFECO'S PUBLIC POLICY ARGUMENTS IGNORE NEW MEXICO'S STATED PUBLIC POLICY IN FAVOR OF UM/UIM COVERAGE

New Mexico's public policy dictates 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. This is the standard that was applied in *Britt*, as well as all the subsequent cases that expanded the reach of *Britt*.

Safeco quite literally makes a "floodgates" argument in an effort to convince the Court to endorse its decision to refuse to extend coverage to its insured. In so doing, it argues that if the Court were to allow coverage, "the floodgates would open to countless claims unrelated to the use of a vehicle." **[AB 19]** That argument rests on the faulty, self-serving premise that Plaintiff-Appellants' claim for coverage is

"unrelated to the use of a vehicle."[3] Safeco again directs its focus on the "six or seven separate activities that occurred after exiting the vehicle" and avoids addressing the continuing, active conspiracy that was in motion when the uninsured vehicle was used and of which the use of the uninsured vehicle was an integral piece.

Rather than "inundate" New Mexico's courts with "even more UM/UIM claims," this appeal gives the Court the opportunity to clearly delineate for attorneys for insureds and attorneys for insurers what types of sexual assault cases should be covered under binding New Mexico law. **[AB 20]** The result would presumably be less litigation, not more. New Mexico's courts were not flooded with UM/UIM cases after *Britt* was decided. They were not flooded when *Blystra* required coverage for drive-by shootings. They were not flooded when *Barncastle* required coverage under certain circumstances when a passenger exits a vehicle to shoot someone else. They were not flooded when *Bell* required some dog bites to be covered. Ruling in Plaintiff-Appellant's favor would not cause the sky to fall; rather,

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[3] This argument also rests on allusions to evidence that is not in the record in this case; namely, that New Mexico is "in a time of rising crime rates"; that ruling in Plaintiff-Appellant's favor "would have severe financial implications on insurers and, ultimately, the citizen of New Mexico"; and that ruling in Plaintiff-Appellant's favor "would severely affect the ultimate availability of UM/UIM coverage, including the cost of such coverage." **[AB 20]** Safeco did not direct the District Court, and does not direct this Court, to any actual evidence to support any of those fact-dependent contentions.

it would further the remedial purpose behind the UM/UIM statute that the New Mexico Legislature deemed part of the fabric of New Mexico's public policy.

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, uninsured motorist coverage should be extended to Plaintiff-Appellant under this set of circumstances.

REQUEST FOR ORAL ARGUMENT

For the reasons set forth in her Brief in Chief, Plaintiff-Appellant respectfully reiterates her request for an oral argument on the issues raised in her appeal. *See* Rule 12-214(B)(1) NMRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was emailed to the all counsel of record on this 1st day of June, 2017:

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