IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SARAH QUINTERO,

Plaintiff,

v.

Ct. App. No. 28875
No.: CV 2007 01927

STATE OF NEW MEXICO DEPARTMENT OF TRANSPORTATION;
1 through 5, inclusive,

Defendants.

PLAINTIFF/APPELLANT'S BRIEF-IN-CHIEF

Civil Appeal from the First Judicial District, County of Santa Fe
The Honorable James A. Hall, District Court Judge

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Plaintiff/Appellant Sarah Quintero ("Appellant"), by and through her counsel of record **THE BRANCH LAW FIRM** (Turner W. Branch, Frank Balderrama), hereby submits her Brief in Chief on the appeal of the July 24, 2008 Order dismissing Appellant's tort claims against Defendant/Appellee New Mexico Department of Transportation (the "NMDOT") for lack of subject matter jurisdiction. Appellant requests that the Order be reversed and vacated, and that her claims against the NMDOT be remanded to the District Court.

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

The issue raised in this appeal is whether the "going and coming" rule enunciated in New Mexico's Workers' Compensation Act, *NMSA 1978, § 52-1-19*, preempts negligence claims by a State employee who was injured while walking through a parking lot operated and maintained by the NMDOT while catching her commuter bus for travel from Albuquerque to Santa Fe, New Mexico.

This case arises out of injuries Appellant suffered while walking through a "Park 'n' Ride" parking lot in Albuquerque, New Mexico maintained by the NMDOT. She suffered extensive injuries to her leg as a result of the fall, including hospitalization and rehabilitation. At the time of the incident, Appellant was an employee of the New Mexico Department of Public Safety in Santa Fe, New

Mexico, and was on the NMDOT's premises to be picked up by a "Park 'n' Ride" shuttle bus to take her to her job in Santa Fe.

Appellant claims that the NMDOT negligently maintained the premises on which she was injured, and that such negligence on behalf of the NMDOT proximately caused her extensive injuries and damages. *R.P. 002-007.* The NMDOT filed a motion to dismiss Appellant's Complaint on the grounds that the First Judicial District Court lacked subject matter jurisdiction over Appellant's claims. *R.P. 059-069.* Specifically, because at the time of the incident Appellant was a State employee seeks damages from a State entity, her claims are barred by New Mexico Workers' Compensation Act, *NMSA 1978, § 52-1-19*, by virtue of the "going and coming" rule. *Id.* The District Court, the Honorable James A. Hall, granted the NMDOT's motion, finding that Appellant's negligence claims were subject to the exclusivity provisions of *§ 52-1-19. R.P. 084.* This appeal follows.

B. <u>The Course of Proceedings</u>

On August 6, 2007, Appellant filed her Complaint for Personal Injuries against the NMDOT and Defendant All Aboard America! Park and Ride alleging negligence relating to the maintenance of the "Park 'n' Ride" parking lot where Appellant fell and was injured. *R.P. 002-007.* Appellant's then husband, Plaintiff Jim Quintero, also asserted a claim against the defendants for loss of consortium.

Id. Mr. Quintero's claim against the defendants settled at mediation on February 26, 2008.

On May 19, 2008, the NMDOT filed a Motion to Dismiss with prejudice for lack of subject matter jurisdiction, alleging that Appellant's tort claims against it were barred by the exclusivity provisions of the New Mexico Workers Compensation Act. *R.P. 059-069.* On June 9, 2008, Appellant filed a response to the motion, arguing that the NMDOT's motion was untimely and that it had waived the provisions of the Workers Compensation Act by failing to raise it as an affirmative defense. *R.P. 070-078.* Appellant also contended that the parking lot where she suffered her injuries was *not* part of her employer's premises, and thus the "going and coming rule" does not apply to the facts and circumstances of this case. *R.P. 070-078* On June 10, 2008, the NMDOT filed a reply in support of its motion, again asserting that the exclusivity provisions of the Workers Compensation Act were applicable. *R.P. 079-083.*

A hearing on the NMDOT's motion to dismiss was held on June 10, 2008. In an Order dated July 24, 2008, the District Court granted the motion and dismissed Appellant's claims against the NMDOT. *R.P. 084.* Appellant timely filed her Notice of Appeal on July 30, 2008. *R.P. 085-086.*

C. Disposition in the Court Below

Pursuant to an Order dated July 24, 2008, the District Court dismissed Appellant's claims against the NMDOT on the grounds that it lacked subject matter jurisdiction. *R.P. 084.* Appellant appeals from that Order. *R.P. 085-086.*

D. Summary of the Facts

Before sunrise on October 19, 2006, Appellant parked her vehicle at the NMDOT's "Park 'n' Ride" lot at Del Rey Avenue NE near Pan American East Parkway NE in Albuquerque, New Mexico. While she was walking in the parking lot to board the bus for travel to Santa Fe, New Mexico, Appellant fell into an unmarked construction hole and suffered a compound fracture to her left leg. The hole Appellant fell into was not clearly marked, barricaded, cordoned off, or properly lit. She then laid on the ground in total darkness and was unattended until she was able to call for emergency medical assistance. Appellant was later taken to Presbyterian Hospital, where she was treated for her injuries. *R.P. 002-007.*

Appellant lived in Albuquerque and was employed by the New Mexico Department of Public Safety (the "NMDPS") in Santa Fe. At the time of the accident, she normally used a private shuttle bus at Albuquerque's Balloon Fiesta

Park to commute to work. However, in October 2006, her pick-up point was temporarily moved to a parking lot operated by NMDOT. *R.P. 077.*[1]

Appellant's duties at the NMDPS included clerical work, fingerprinting public citizens, and filing documents. The NMDPS did not direct her to park at the NMDOT "Park 'N' Ride" lot and did not compensate her for commuting expenses to and from Albuquerque and Santa Fe. As a result of her fall at the parking lot and the resulting injuries, Appellant was unable to work for approximately eight (8) months. When she returned to work, Appellant was unable to perform her duties at her prior level and had to take additional time off for physical rehabilitation. On July 11, 2007, the NMDPS terminated Appellant's employment due to the injuries she sustained on October 19, 2006, which they deemed a non-work related injury to her knee. Appellant did not file a claim for Worker's Compensation, and did not enter into any settlement with the Worker's Compensation Appeals Board.

II. ARGUMENT

A. This Court Should Review *De Novo* the District Court's Order Dismissing Appellant's Negligence Claims Against the NMDOT

The District Court erred in granting the NMDOT's motion to dismiss. In reviewing the Court's July 24, 2008 Order *(R.P. 084)*, the Court of Appeals is to

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[1] Deposition of Sarah Quintero, 12:15-20.

accept as true all facts properly pleaded. As the Court held in *Rio Grande Kennel Club v. City of Albuquerque, 2008 NMCA 93, ¶ 10*, a motion to dismiss tests the legal sufficiency of the complaint, and in reviewing an order granting a motion to dismiss, the Court is to accept as true all facts properly pleaded and review the granting of such a motion *de novo*. *See also Padilla v. Wall-Colmony Corp., 2006 NMCA 137, ¶ 7, cert. denied, 140 N.M. 674, 146 P.3d. 809 (N.M. 2006).*

Although labeled a motion to dismiss, the NMDOT's motion was actually one for summary judgment because it attached and referenced portions of Appellant's deposition testimony which allegedly supported its arguments. *Rule 1-012(C), NMRA,* stated:

> If, on a motion for judgment on the pleadings, *matters outside the pleadings are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056.

(Emphasis added.) See GCM, Inc. v. Kentucky Century Life Ins. Co., 1997 NMSC 52, ¶ 11 ("Because exhibits and affidavits, matters outside the pleadings, were presented to the court and not excluded for purposes of the motion, the proper standard of review is under Rule 1-056 for summary judgment.").

As the Court held in *Martinez v. Metzgar, 97 N.M. 173, 639 P.2d 1228, 1229 (1981) (citing Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 568 P.2d*

589 (1977)), summary judgment is a "harsh remedy" and is infrequently granted. The party opposing summary judgment is to be given the benefit all reasonable doubts. *See Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).* When reasonable minds can differ, summary judgment is inappropriate. *See Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970).* Similar to its review of an order granting a motion to dismiss, this Court is to review an order granting summary judgment *de novo*. *Sam v. Sam, 2006 NMSC 022; DiMatteo v. County of Dona Ana, 109 N.M. 374, 378, 785 P.2d 285, 289 (Ct. App. 1998).*

In the case below, the Complaint did not allege any facts supporting the NMDOT's claim that the "going and coming" rule applied and that the negligence claims were subject to the exclusivity provisions of the Workers' Compensation Act, nor did the evidence submitted in support of and in opposition to the motion remotely suggested that Appellant was injured during the course and scope of her employment thereby triggering application of the Workers' Compensation Act. The Complaint clearly stated and the evidence showed that Appellant was injured while walking through a negligently maintained parking lot operated by a State agency *while catching a commuter bus to take her to her place of employment.*

Accordingly, the District Court's dismissal of Appellant's claims against the NMDOT should be reversed as a matter of law.

B. Because Appellant Was on Her Way to Work at the Time She Was Injured, the "Going and Coming" Rule Does Not Apply and the Workers' Compensation Act Does Not Preempt Her Claims

Appellant's Complaint does not allege any facts suggesting that she was injured during the course and scope of her employment with the NMDPS, nor does the evidence prove that she was. It is undisputed that at the time of the incident in October 2006, Appellant resided in Albuquerque and worked for the NMDPS in Santa Fe. *R.P. 076.*[2] It is also undisputed that she was injured while walking through the "Park 'n' Ride" lot operated by the NMDOT as she undertook to reach a private commuter shuttle bus in Albuquerque. *R.P. 003, ¶ 9.*

The NMDOT's reliance on the "going and coming" rule is completely misplaced. The Workers' Compensation Act, *NMSA 1978, § 52-1-1 to -70* is designed to compensate workers for injury arising out of and in the course of employment. The "going and coming rule"--on which the NMDOT based their motion--is codified by the Act:

> [I]njury by accident arising out of and in the course of employment . . . shall not include injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence.

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[2] Deposition of Sarah Quintero, 7:6-10 and 9:4-11.

Section 52-1-19 (internal quotation marks omitted). As the Court stated in *Lessard v. Coronado Paint & Decorating Ctr., Inc., 2007 NMCA 122, ¶ 9, cert. quashed, 143 N.M. 667, 180 P.3d 674 (N.M. 2008),* an employee en route "to, or returning from, his place of employment, using his own vehicle is not within the scope of his employment absent additional circumstances evidencing control by the employer at the time of the negligent act or omission of the employee." *See also Ramirez v. Dawson Prod. Partners, Inc., 2000 NMCA 11, ¶ 7* ("Under [the Act], . . . workers injured while traveling between home and work are generally not eligible for compensation.").

As this Court recently held in *Harkness v. McKay Oil Corp., 2008 NMCA 123,* it is well settled that the going and coming requirement involves two separate inquiries: "whether the injury (1) 'arose out of' and (2) 'in the course of . . . employment. . . . In order to recover benefits, the worker must show that both requirements are satisfied.'" *Id., ¶ 10 (citing Kloer v. Municipality of Las Vegas, 106 N.M. 594, 595, 746 P.2d 1126, 1127 (Ct. App. 1987)).* Further, the term "arising out of" the employment denotes a risk reasonably incident to claimant's work, and requires that the employment be *a contributing proximate cause* of the injury. *Id. (emphasis added); see also Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A., 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct. App. 1981) (holding that*

the causative danger must be peculiar to the work itself and not independent of the employment relationship); McDaniel v. City of Albuquerque, 99 N.M. 54, 55-56, 653 P.2d 885, 886-87 (Ct. App. 1982).[3] The accidental injury must have its origin in a risk connected with the employment and have flowed from the risk as a rational consequence. *Id.; Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 242-43, 771 P.2d 173, 175-76 (1989).*

For example, courts look at whether the injury "takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Chavez v. ABF Freight Sys., 2001 NMCA 39, ¶ 11.* If the worker was not reasonably involved in fulfilling the duties of his employment at the time of his injury, he was not acting within the course of his employment. *Harkness, 2008 NMCA 123, ¶ 10; Gutierrez v. Artesia Pub. Sch., 92 N.M. 112, 114, 583 P.2d 476, 478 (Ct. App. 1978)*; *Mortgage Inv. Co. of El Paso, 108 N.M. at 242-43, 771 P.2d at 175-76.*

The *Harkness* Court also summed up the general rule that "'employment begins *when the employee reaches his place of work and ends after he leaves his*

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[3] In addition, as the Court held in *Velkovitz v. Penasco Indep. Sch. Dist., 96 N.M. 577, 577, 633 P.2d 685, 685 (1981)*, the phrase "in the course of employment, relates to the time, place, and circumstances under which the accident takes place."

place of work.'" 2008 NMCA 123, ¶ 11 (citing Barton v. Las Cositas, 102 N.M. 312, 315, 694 P.2d 1377, 1380 (Ct. App. 1984)). As the Court held in *Barton,*

> Ordinarily, an injury that occurs to an employee while he is away from his work place is not compensable as an injury arising out of and in the course of his employment," as the "employment relationship is suspended" between the times an employee leaves work and returns to it.

Id. Once employment status is suspended by removing the constraints of the work's time and place, the risk of being on the road on the way to and from work is a risk of the worker's private conduct. *Harkness, 2008 NMCA 123, ¶ 11.* The going and coming rule also exists "to make everyday commuting between home and the workplace *the employee's business* rather than the employer's . . . ." *Id., ¶ 14.* The *Harkness* Court held that "nothing about the distance between Appellants' homes and the rig was so burdensome as to confer upon Appellants any status beyond that of mere commuters." *Id., ¶ 17.*

In this case, the New Mexico's Workers' Compensation Act clearly does not preempt Appellant's claims against the NMDOT under these facts. Under no reasonable scenario could her injuries have arisen out of the course and scope of her employment with the NMDPS, which is not a defendant in this case. Appellant was *on her way* to work. Rather than drive herself to Santa Fe, Appellant took advantage of the commuter buses that run between Albuquerque and Santa Fe

which take individuals like Appellant to and from the cities of their employment. *R.P. 077.*[4] Further no facts presented to the District Court demonstrate that her commute to Santa Fe was an inherent service for which Appellant's employer, the NMDPS, compensated Appellant, or that the NMDPS directed Appellant to use the private commuter buses. *See Harkness, 2008 NMCA 123, ¶ 31 (finding that the appellants' "employment was not a contributing proximate cause of the accident since no circumstance necessarily arising from their employment presented them with any greater risk on the way home than that faced by normal commuters").*

In addition, the NMDOT's "Park 'n' Ride" lot at which Appellant was injured has no relation whatsoever to the NMDPS. The parking lot at issue in this case is not part of the NMDPS premises, nor did the NMDOT prove that it was in its motion in the Court below. The lot *is not* intended for the sole use of NMDPS employees, like Appellant. Appellant and other NMDPS are *not required* to park at the lot, nor are they required to use the commuter bus service between Albuquerque and Santa Fe. *See Constantineau v. First Nat'l Bank, 112 N.M. 38, 38, 810 P.2d 1258, 1259 (N.M. App. 1991) (holding that "mere 'use' of a parking lot is insufficient to consider the lot part of the employer's 'premises'.").* As the Court held in *Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 506, 734 P.2d 743,*

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[4] Deposition of Sarah Quintero, 11:17-12:8.

746 (1987), there must be some showing by the moving party that a parking lot was intended for the use of their employees in order to be part of the employer's premises. In this case, there was no such showing.

C. The NMDOT Waived Its Right to Assert Workers' Compensation as an Affirmative Defense

It is well established under New Mexico law that a defendant must assert the Workers' Compensation Act as an affirmative defense or it is waived as a matter of law. In this case, the NMDOT did not raise Workers' Compensation preemption as an affirmative defense in its Answer *(R.P. 027-030)* or assert that Appellant's claims were covered by Workers' Compensation until *after* the discovery and dispositive motion deadline.

In *Taylor v. Van Winkle's IGA Farmer's Mkt., 1996 NMCA 111, writ denied, 122 N.M. 416, 925 P.2d 882 (N.M. 1996)*, an employee's complaint alleged that she went to her employer's store to pick up a paycheck on her day off and that while in the store, she slipped and fell and sustained injuries. The employer failed to plead Workers' Compensation as an affirmative defense and judgment was entered in favor of the employee. In denying the employer's subsequent assertion that the trial court lacked jurisdiction to enter a judgment, the trial court held it had subject matter jurisdiction over the case and the employer had a meritorious defense, and that the employer waived Workers' Compensation preemption because it failed to

assert it as an affirmative defense. On appeal, the employer argued the judgment was void because the exclusivity of employee's remedy under workers' compensation insurance law deprived the trial court of subject matter jurisdiction. *Id.*, ¶ *6.* The New Mexico Court of Appeals affirmed the trial court's order on the sole basis that the employer failed to raise the Workers' Compensation Act as an affirmative defense which resulted in a waiver as a matter of law. *Id.*, ¶ *7.*

The NMDOT's argument that the Appellant's negligence claims are limited to those compensable under the Workers' Compensation Act is an affirmative defense because it is a matter in avoidance. *Berry v. Meadows, 103 N.M. 761, 768, 713 P.2d 1017, 1024 (Ct. App. 1986) ("An affirmative defense is that state of facts provable by defendant which may bar plaintiff's right to recover."); Bendorf v. Volkswagenwerk Aktiengeselischaft, 88 N.M. 355, 358, 540 P.2d 835, 838 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).* Because the NMDOT failed to assert the Workers' Compensation Act as an affirmative defense in its Answer, it was waived. *United Nuclear Corp. v. General Atomic Co., 93 N.M. 105, 120, 597 P.2d 290, 305, cert. denied, 444 U.S. 911 (1979).*

Other jurisdictions have similarly found that Workers' Compensation preemption is an affirmative defense that must be timely asserted is well supported by other jurisdictions. The analysis of the Supreme Court of Illinois, expressed in

Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (Ill. 1984), is on point. In *Doyle,* the defendant employer maintained that its statutory immunity under the Illinois Workers' Compensation Act also immunized it from a contribution claim under Illinois's joint tortfeasor statute. Because the Workers' Compensation Act preempted other state law tort claims, the employer maintained that it had no potential liability in tort. *Id. at 5, 461 N.E.2d at 384.* The *Doyle* Court rejected the argument, concluding that the defendant was *potentially* liable in tort at the time of the incident even though any common law tort action ultimately would have been preempted by the workers' compensation regime. *Id. at 12, 461 N.E.2d at 388.* It reasoned that, although preemption is a defense to any tort action brought by an employee for a work-related incident, it is merely an affirmative defense, not an outright bar to liability. *Id. at 8-9, 461 N.E. 2d at 386-87.* In its view, an employer could make the strategic decision to defend against an employee's tort claim on its merits rather than invoke the protections of the workers' compensation scheme, perhaps in the hopes that the jury would find the evidence of negligence lacking. In such a case, the employer's legal exposure would be based on liability in tort. *Id.*

Other jurisdictions have reached similar conclusions. In *Radil v. Sanborn W. Camps, Inc., 384 F.3d 1220 (10th Cir. 2004)*, the Tenth Circuit Court of Appeals again found a waiver of the Workers' Compensation Act. Applying

Colorado law, the Court found that the defendant bears the burden of proving as a waivable, affirmative defense that workers' compensation is a plaintiff's exclusive remedy. *See also Popovich v. Irlando, 811 P.2d 379, 385 (Colo. 1991) (holding that a defendant bears the burden of establishing affirmative defenses); Bigby v. Big 3 Supply Co., 937 P.2d 794, 799 (Colo. Ct. App. 1996) (holding that "the exclusivity of workers' compensation is an affirmative statutory defense which must be timely raised, or it is waived").* Similar rulings have been reached in California, Kentucky, and Montana. *See Green v. City of Oceanside, 194 Cal. App. 3d 212, 239 Cal. Rptr. 470 (1987) (ruling that the defendant city waived the defenses of the exhaustion doctrine and the exclusive remedy rule of worker's compensation by failing to plead them as affirmative defenses.); Northeast Health Mgmt., Inc. v. Cotton, 56 S.W.3d 440 (Ky. Ct. App. 2001) (the defendant hospital effectively waived any defense that this case was governed by the Workers' Compensation Act which must be pled and failure to do so constitutes a waiver of the defense); Brown v. Ehlert, 255 Mont. 140, 841 P.2d 510 (Mont. 1992) (Workers' Compensation Act was waived for failure to raise as an affirmative defense).*

Here, the NMDOT failed to assert the Workers' Compensation Act as an affirmative defense in it Answer to Appellant's Complaint filed in District Court. After discovery was complete, the dispositive motion deadline expired, and Mr.

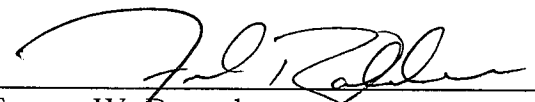
Quintero's loss of consortium claim was settled at mediation, the NMDOT raised the issue for the first time in its Motion to Dismiss. However, as stated above, Worker's Compensation preemption must be pleaded as an affirmative defense or it is waived as a matter or law. *See Taylor, 1996 NMCA 111.* Accordingly, the District Court erred in granting the NMDOT's motion and dismissing Appellant's negligence claims.

III. CONCLUSION

WHEREFORE, by reason of the premise described herein, Plaintiff/Appellant Sarah Quintero respectfully requests that this Court reverse the District Court's July 24, 2008 Order granting Defendant/Appellee New Mexico Department of Transportation's motion to dismiss, remand the case to the District Court, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

THE BRANCH LAW FIRM



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This 26th day of March, 2009

Frank Balderrama

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