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Torts

Ellen M. Kelly

Andy Thomas

TORTS

ELLEN M. KELLY, ESQ.* and ANDY THOMAS**

INTRODUCTION

During the abbreviated Survey period, New Mexico courts decided cases addressing the duties of law enforcement officers and the duty of disclosure in medical malpractice cases. Other decisions looked at employer liability for intentional acts of employees, liability of landowners to firemen on their property, construction of New Mexico's Release Act, and whether a cause of action exists against an insurance liability carrier for negligent failure to settle a claim against its insured. Procedural questions include the application of the notice and limitations provisions of The Tort Claims Act. The unaddressed issue lurking in several of the survey cases is how liability should be apportioned in situations where both an intentional act by one person and a negligent act by another are proximate causes of an injury.[1]

I. MEDICAL MALPRACTICE

In *Keithley vs. St. Joseph's Hospital,*[2] the court of appeals held that the physician's and hospital's duty to a patient to disclose material information concerning his treatment extends beyond the patient's death.[3] In this particular case, the court found the duty was owed to the patient's wife once her husband died.

Mr. Keithley underwent external beam radiation therapy in 1977. He died in 1978, allegedly due to excessive dosages of radiation. His widow did not sue until 1983, after the three-year statute of limitation had expired.[4] She claimed she could not sue earlier because the doctors and

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*J.D. 1980, University of New Mexico. Presently with Civerolo, Hansen & Wolf, P.A.

**Member, Class of 1986, University of New Mexico, School of Law.

1. *See infra* notes 14-22, 55-61 and accompanying text.

2. 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984), *cert. quashed,* 102 N.M. 565, 698 P.2d 435 (1985).

3. *Id.* at 572, 698 P.2d at 442.

4. *Id.* at 568, 698 P.2d at 438. The Medical Malpractice Act, N.M. STAT. ANN. §§ 41-5-1 to -28 (Repl. Pamp. 1982) establishes a three-year statute of limitations for medical malpractice actions. *Id.* § 41-5-13.

In Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. quashed,* 98 NM. 336, 648 P.2d 794, *cert. denied,* 459 U.S. 1016 (1982), the court rejected the argument that the Act's statute of limitations only applies to "qualified" health care providers. The limitation of actions is not one of the "benefits" available to qualified providers in § 41-5-5 and therefore runs against any provider.

hospital had prevented her by concealment of the allegedly excessive dose and by misrepresenting the effects of the radiation from realizing that she might have had an action.[5]

Physicians and hospitals owe their patients a fiduciary duty "to disclose all material information concerning the patient's treatment."[6] If the doctor or hospital has knowledge of malpractice, the duty can be breached by misrepresentation of the patient's condition, concealment of a problem from the patient, or the mere failure to disclose information about the problem.[7] The running of the statute of limitations may be tolled if the health care provider fraudulently conceals information about a problem resulting from the treatment.[8]

In reversing the summary judgment for defendants, the court of appeals rejected their contention that the fiduciary relationship, and, therefore, the duty to disclose, terminated upon the patient's death. The court reasoned that the position urged by defendants would mean "patients who are merely injured would be in a better position to assert rights against a health-care provider than survivors of the more egregiously injured patients who die from their injuries."[9] Finding the incongruity unacceptable, the court held that the duty to inform survived the patient and was owed to the nearest relative.[10]

The *Keithley* court determined there were factual issues about what the doctors and hospital knew. Without saying so, the court apparently thought that because the evidence could be seen as establishing that the defendants *should* have known of mistakes, it also could act as circumstantial evidence that the defendants *did* know of a problem.[11] This was a particularly

5. *Keithley*, 102 N.M. at 570, 698 P.2d at 440. The doctors had talked to Mrs. Keithley while her husband was receiving the radiation treatments, and she was listed as the next of kin on the hospital's forms. *Id.* at 572, 698 P.2d at 442. There would have been no difficulty in this instance ascertaining who should be contacted about problems connected with her husband's treatment, even after Mr. Keithley died. The court did not address how diligent the doctor or hospital had to be in trying to locate the patient or next of kin if the addresses were not readily available.

6. *Id.* at 569, 698 P.2d at 439.

7. *Id.*

8. *Id.* at 569, 698 P.2d at 439; Garcia v. Presbyterian Hospital Center, 92 N.M. 652, 655, 593 P.2d 487, 490 (Ct. App. 1974); Hardin v. Farris, 87 N.M. 143, 146, 530 P.2d 407, 410 (Ct. App. 1974). Two additional rules came out of these earlier cases: (1) mere silence constitutes concealment in a fiduciary relationship and (2) concealment does not create a separate cause of action in malpractice cases. *Hardin*, 87 N.M. at 146, 530 P.2d at 410. The "mere silence" rule appears to be reaffirmed in *Keithley*, 102 N.M. at 571, 698 P.2d at 441.

9. *Keithley*, 102 N.M. at 572, 698 P.2d at 442.

10. *Id.* Another decision during the Survey period, Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1984), *cert. quashed*, 102 N.M. 293, 694 P.2d 1358 (1985), held a wrongful death action under the Medical Malpractice Act can be brought only by the personal representative of the deceased's estate. For a discussion of the case, see Burke and Keleher, *Civil Procedure*, Survey of New Mexico Law, 15 N.M.L. REV. 157, 172-3 (1985).

11. *Keithley*, 102 N.M. at 570-71, 698 P.2d at 440-41. This evidence consisted in part of Mrs.

interesting approach since the court also noted that tolling of the statute would not occur if the evidence demonstrated only that doctors or hospitals *should* have known of problems during a patient's treatment.[12]

Finally, the court of appeals found there was a material issue of fact about what Mrs. Keithley knew or should have known about the alleged acts of malpractice within the three-year limitations period. For the statute of limitations to be tolled by fraudulent concealment, Mrs. Keithley had to establish she did not have the means to discover the fraud using "reasonable diligence."[13] Once she knew or should have known of facts involving possible malpractice, the statute started to run again.[14]

II. TORT CLAIMS ACT

A. Substantive Developments

In another first for New Mexico jurisprudence, the supreme court in *Schear v. Board of County Commissioners*[15] imposed liability on police officers for failure to respond to calls for assistance. In *Schear,* the complaint alleged that plaintiff was raped and tortured by an armed assailant who broke into her house.[16] A companion of the woman, who had been forced out by the attacker, called the Bernalillo County Sheriff's Office for help. The only response by the sheriff's office was to try calling the house one time. The rapist prevented the plaintiff from answering the phone.[17]

The plaintiff sued the sheriff and county for gross negligence under the Tort Claims Act.[18] The trial court dismissed the complaint for failing to state a claim upon which relief could be granted. The court of appeals upheld the trial court on the theory that although a police officer owes a duty to the general public, he does not have a duty to each individual who calls for help.[19] The supreme court reversed.

Keithley's affidavit that she wrote to the hospital requesting a final bill and saying that she believed her husband had received too many radiation treatments. The hospital's only response was to say no additional charges were due. Deposition testimony showed that doctors regularly reviewed patient records and could calculate amounts of radiation delivered. Mrs. Keithley's experts stated that errors were "immediately obvious" to anyone with experience in the field.

12. *Id.* at 571, 698 P.2d at 441.

13. Carrow v. Streeter, 410 N.E.2d 1369, 1375 (Ind. App. 1980), *quoted in Keithley,* 102 N.M. at 570, 698 P.2d at 440.

14. *Keithley,* 102 N.M. at 572, 698 P.2d at 442.

15. 101 N.M. 671, 687 P.2d 728 (1984).

16. *Id.* at 672, 687 P.2d 729; the facts of the case are set forth in Schear v. Board of County Commissioners, 23 N.M. St. B. Bull. 192 (Ct. App., 1984).

17. 23 N.M. St. B. Bull. at 193.

18. *Id. See* N.M. STAT. ANN. §§ 41-4-1 to -29 (Repl. Pamp. 1982).

19. 23 N.M. St. B. Bull. at 193.

Statutes dating back to 1921 set out the duties of police officers in New Mexico.[20] The courts traditionally held officers owed their duty only to the general public. Thus, no private cause of action arose from an officer's failure to perform them. The only way the police could be liable for a *Schear*-type claim was if the officer voluntarily assumed a duty toward the injured party.[21]

The supreme court in *Schear* found the public/private duty distinction a "ghost of sovereign immunity . . . inconsistent with *Hicks v. State* and Section 41-4-2(B) of the Tort Claims Act."[22] Although it held the complaint stated a valid cause of action, the court explicitly explained it was not imposing strict liability against officers for failing to respond. To recover the plaintiff still would have to show the inaction was a proximate cause of her damages.[23]

A city's animal control center succeeded where the *Schear* defendants failed in claiming sovereign immunity. In *Redding v. City of Truth or Consequences,*[24] the plaintiff sued under the "medical facilities" section of the Act[25] for the negligent release of a vicious cat which bit the plaintiff.[26] The court of appeals reversed the trial court's denial of defendant's motion for summary judgment. An animal control center, even though operated for public health purposes, is not a medical facility for which immunity is waived under the Act.[27] The court assumed defendant owed a duty to plaintiff, but no applicable waiver of immunity could be shown by plaintiff and, thus, no liability arose.[28] *Redding* bears out Pro-

20. The original version of N.M. STAT. ANN. §29-1-1 (Repl. Pamp. 1984), which expresses those duties, was enacted in 1981 N.M. Laws, ch. 170, §1.

21. *See* Doe v. Hendricks, 92 N.M. 499, 590 P.2d 647 (Ct. App. 1979), which illustrates the effect of the distinction between private and public duties. There a police officer failed to respond to a call reporting an assault on a 12-year-old boy in an abandoned house. The court of appeals found no liability because the officer's duty was to the public only and fell within the 1973 Peace Officers Liability Act. That Act provided sovereign immunity from personal liability for police officers in the conduct of their duties and was expressly repealed by the Tort Claims Act. 1976 N.M. Laws, ch. 58, §27.

22. 101 N.M. at 677, 687 P.2d at 734; Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975), abolished sovereign immunity to tort liability; N.M. Stat. Ann. §41-4-2(B) applies the ordinary care standard of tort liability for governmental entities.

23. 101 N.M. at 676, 687 P.2d at 733.

24. 102 N.M. 226, 693 P.2d 594 (Ct. App. 1984).

25. N.M. Stat. Ann. §41-4-9 (Repl. Pamp. 1982). N.M. Stat. Ann. §41-4-9 reads, in pertinent part:

> The immunity granted pursuant to Subsection A of Section 41-4-4 N.M.S.A. 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities.

26. 102 N.M. at 227, 693 P.2d at 595.

27. *Id.* at 228, 693 P.2d at 596.

28. *Id. Redding* makes no mention of public duty. Judge Bivins, who wrote the *Redding* opinion, also wrote the earlier court of appeals opinion in *Schear* which followed the public duty reasoning of *Hendricks* and was reversed by the supreme court.

fessor Ruth Kovnat's 1976 prediction that "litigation [will be] prolonged by argument about whether an activity is included within the [Act's] categories."[29]

B. Procedural Developments

A statute of limitations case, *The Regents of the University of New Mexico v. Armijo*,[30] arose from the death of a two-day-old infant. The mother filed an action for medical malpractice and wrongful death three-and-a-half years later, both on her own behalf and as personal representative of the estate of her deceased child. She claimed malpractice by the doctor and the University of New Mexico Hospital, misrepresentation by the Regents as to the quality of the medical care available at the hospital, and fraudulent concealment of the facts surrounding the death of her child.[31]

The trial court granted a summary judgment for the defendants on the grounds the statute of limitations had run.[32] The court of appeals reversed the trial court in part, holding that while the statute of limitations had run on the mother's suit,[33] it had not run on the child's. The supreme court held summary judgment for the defendants was proper on the claim of the child's estate as well.[34]

The primary issue in the case involved the application of the section of the Tort Claims Act which generally requires suits against governmental entities to be filed within two years of the occurrence resulting in the loss.[35] The Act excepts minors under the age of seven from this requirement.[36] The court of appeals concluded the suit filed on behalf of the child's estate was valid under this exception, even though it was filed more than two years after the occurrence. It reasoned the Tort Claims Act did not differentiate between a claim based on a child's death and a child's injury. Thus, the exception allowed suit by the estate for the death claim.[37]

The supreme court reversed in a 3–2 opinion. The court noted statutes

29. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L. REV. 249, 268 (1976), *quoted in* Scales, *Torts, Survey of New Mexico Law*, 12 N.M.L. REV. 481, 497 (1982).

30. 103 N.M. 174, 704 P.2d 428 (1985).

31. *Id.* at 175, 704 P.2d at 429.

32. *Id.*

33. Armijo v. Regents of the University of New Mexico, 103 N.M. 183, 186-87, 704 P.2d 437, 440-41 (Ct. App. 1984).

34. *Armijo*, 103 N.M. at 174, 704 P.2d at 429. Certiorari was originally granted on both issues. The plaintiff's petition, however, was subsequently quashed. 103 N.M. 147, 704 P.2d 431 (1985).

35. N.M. STAT. ANN. §41-4-15(A) (Repl. Pamp. 1982). It provides, in pertinent part:

> Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file.

36. *Id.*

37. *Armijo*, 103 N.M. at 186, 704 P.2d at 440.

of limitation are to be strictly construed, so minority savings clauses are enacted "to allow time for the full scope of the child's injury to become apparent, to enable the child to become competent to testify, or to allow the child to act for herself after the disability has been removed . . . Clearly, none of these reasons are applicable when the minor dies."[38]

The mother's individual claim had been for pain and suffering and the loss of the companionship of her child. The court of appeals upheld this portion of the summary judgment and ruled she could not tack her cause of action on to that of her child. The mother's fallback position was that fraudulent concealment about the cause of her child's death tolled the running of the statute on her claim.[39]

The court of appeals stated the fraudulent concealment doctrine could operate in a tort claims action to toll the running of the statute of limitations, but said summary judgment had been proper because the mother could not indicate what specific facts were concealed by the hospital. She failed to "raise a factual issue as to false representations on the part of defendants, or as to the silence of defendants concerning material facts" about her child's death. The mother abandoned her individual claim after the court of appeals decision.[40]

City of Las Cruces v. Garcia[41] concerned the notice provisions of the Tort Claims Act, which require written notice to certain officials within 90 days after the occurrence as a pre-condition to the suit.[42] Actual notice of the occurrence to the responsible agency can overcome the written notice requirement.[43] The *Garcia* plaintiff, who received injuries in a traffic accident, sued the City of Las Cruces and the State as the entities responsible for maintaining street intersections.[44] Even though the city traffic department had received the police accident report, the trial court

38. *Id.* at 176, 704 P.2d at 430, *citing* Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

39. *Id.* at 186-87, 704 P.2d at 440-41; any rights originating from a disability are personal and cannot be asserted in another's claim.

40. *Id.* at 188, 704 P.2d at 442. The court of appeals provides an extensive list of factual information available to the plaintiff during the statutory period; *cf. supra*, notes 12-13 and accompanying text.

41. 102 N.M. 25, 690 P.2d 1019 (1984).

42. N.M. STAT. ANN. § 41-4-16 (Repl. Pamp. 1982).

43. *Id.* § 41-4-16(B) (Repl. Pamp. 1982).

44. The case against the state is not specifically addressed in the appellate opinions. *See*, Garcia v. City of Las Cruces, 23 N.M. St. B. Bull. 479 (Ct. App. May 3, 1984). The court of appeals also rejected plaintiff's "incapacity" theory; he had argued his written notice was timely because it was filed within 180 days after the accident, and his incapacity due to his injuries had prevented him from giving it within the original 90 days. Under the Act, incapacity of an injured party can give him an additional 90 days to give his written notice. N.M. STAT. ANN. § 41-4-16(B). The court found that no matter what definition of "incapacity" it looked to—the term is not defined in the Act—plaintiff could not prevail since he had been able to "comprehend the situation and look after his interests . . ." despite his injuries. 23 N.M. St. B. Bull. at 480-81.

granted summary judgment for both the city and the state. The court of appeals, however, reversed the summary judgment for the city and held receipt of the police report by its traffic department constituted actual notice.[45]

The supreme crout granted certiorari for the city's portion of the case and reinstated summary judgment for Las Cruces. The supreme court confirmed earlier rulings that a report can be "actual notice" under the Act only if it "puts the governmental entity allegedly at fault on notice that *there is a claim against it.*"[46] The police report only informed the city of an occurrence, not a claim, and could not be actual notice.

III. OTHER TORT DEVELOPMENTS

A. Negligent Entrustment

McCarson v. Foreman Oil Co.,[47] a negligent entrustment case, was filed following a fatal highway accident. The court of appeals examined the effect of evidence of prior drug and traffic arrests, citations, or plea bargains on a claim of negligent entrustment defined by the trial court's jury instructions.[48]

One *McCarson* defendant was the principal owner of the company and responsible for overseeing his truck drivers. The other defendant, his adult son, was an employee of the company and had unrestricted use of a company truck. The accident occurred in September 1981 after the son had been drinking at a friend's party. Although he left the picnic driving the truck, he claimed a hitchhiker was driving at the time of the accident.[49]

The trial court admitted evidence of the son's general drinking habits, speeding tickets before the accident, and a prior conviction for DWI in September 1980. This evidence included a January 1981 arrest for trafficking in cocaine and an October 1982 plea agreement in which the trafficking charge was reduced to possession.[50]

The court of appeals affirmed judgment for the plaintiff. It held neg-

45. 23 N.M. St. B. Bull. at 482.

46. *Garcia*, 102 N.M. at 27, 690 P.2d at 1021 (emphasis in original).

47. 27 N.M. St. B. Bull. 69 (Ct. App., 1985).

48. The jury instructions on the elements of negligent entrustment were not challenged. *Id.* at 71. Accordingly, the court did not decide the elements of negligent entrustment for New Mexico. *Id.* The RESTATEMENT (SECOND) OF TORTS § 308 (1965) was quoted as the source of the theory of negligent entrustment. 24 N.M. St. B. Bull. at 72. It provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

49. RESTATEMENT (SECOND) OF TORTS, § 308, at 100 (1965). 24 N.M. St. B. Bull. at 70.

50. *Id.* at 70, 73.

ligent entrustment may exist if an entrustor knows, or should know, the driver is likely to use the car in a manner creating a risk of harm to others.[51] Under the doctrine, both the son's fitness as a driver and the father's knowledge of the son's fitness were fact questions.[52] The court of appeals determined that the evidence was admissible because these "prior specific acts" were relevant to the son's fitness and the father's knowledge of it. Defendants argued that the DWI conviction was the only item which concerned the son's ability to operate a vehicle safely.[53]

Even if the father had not been aware of his son's social habits, "a jury was entitled to find that lack of knowledge . . . was an aspect of the father's negligence" in his role as owner of the company and overseer of the company vehicles.[54] Plaintiff did not have to prove the father knew the son was intoxicated at the time of the accident. The plaintiff only had to establish that it was or should have been foreseeable to the father, because of the son's past conduct, that the son was "likely to become drunk or otherwise unfit at anytime."[55]

B. Negligent Hiring and Retention

In *Pittard v. The Four Seasons Motor Inn, Inc.*,[56] the court of appeals determined a hotel owner may be liable for an employee's attack on a person visiting a hotel guest, even if the employee acted outside the scope of his employment at the time. The *Pittard* employee sexually assaulted a boy at the hotel where the boy's grandparents were registered guests.[57] Prior to this incident the hotel fired the employee from his position as a dishwasher because he had been drinking at work. He also had been removed forcibly from the hotel when he showed up drunk to ask for his job back and got into a fight in the kitchen. Nonetheless, shortly before the attack on the boy, he was rehired as a steward.[58] By his own admission, he was drunk and still drinking when the attack occurred.

Plaintiffs won reversal of a directed verdict for the hotel on a theory of negligent hiring and retention.[59] The *Pittard* decision paralleled the

51. *Id.* at 72.
52. *Id.* at 71.
53. *Id.*
54. *Id.* at 73.
55. *Id.*
56. 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984).
57. *Id.* at 726, 688 P.2d at 336.
58. *Id.* at 730, 688 P.2d at 340.
59. In dicta the court indicated that plaintiff also might have prevailed on a second theory—that of the negligence of the proprietor of business premises. The RESTATEMENT (SECOND) OF TORTS § 344 (1965) imposes liability "for physical harm caused by . . . acts of third persons . . . and by failure of the possessor to exercise reasonable care to (a) discover that such acts . . . are likely . . . or (b) to give warning." *Id.* "Third persons" would include employees of the proprietor, but plaintiffs here failed to preserve the issue by not tendering proper jury instructions on this theory. *Pittard*, 101 N.M. at 728, 688 P.2d at 338.

conclusion reached in *McCarson,* that the defendant would not have to foresee the specific event giving rise to the lawsuit to be liable. For the negligent hiring and retention claim to be submitted to the jury, the evidence only had to indicate the hotel should have foreseen "some general harm . . . or consequence"[60] to third persons if it rehired the employee who committed the act. In determining whether the directed verdict was proper, the court looked at all the evidence available to the hotel about the employee's past conduct.[61]

The court also pointed out that as a steward, one of the employee's duties was to help with the preparation of banquets, which involved contact with patrons and access to alcohol. Since earlier incidents of the employee's intoxication and violence had occurred at the hotel, the court concluded the sexual assault case should have been submitted to the jury.[62]

C. Fireman's Rule

In *Moreno v. Marrs,*[63] another case of first impression in New Mexico, the court of appeals held a property owner has a duty to warn firemen of hidden perils on his land. The "fireman's rule" duty arises from a combination of four elements: where a hazard is (1) hidden and (2) not known or observable by the firemen, and the landowner (3) knows of the hazard and (4) has an opportunity to warn of the danger.[64] If all the elements are present, the landowner may be liable if he fails to warn. The landowner also has a duty not to misrepresent a known hazard.[65]

In *Moreno,* volunteer firemen were injured by toxic chemical fumes while fighting a fire at defendant's warehouse. Defendant argued he was not liable because plaintiffs had assumed the risk of firefighting. The court confirmed there can be no recovery by a fireman for injuries received in the knowing confrontation of a hazard.[66] Since there was conflicting testimony about plaintiff's knowledge of hazards and about defendant's warning, summary judgment for defendant was reversed by the court of appeals. The court also rejected the argument that defendant should be liable because the presence of the chemicals constituted a nuisance and

60. *Pittard,* 101 N.M. at 730, 688 P.2d at 340.

61. *Id.* The court rejected the application of strict liabillity against employers sued for the acts of employees in a negligent hiring or retention case. *Id.* at 728-29, 688 P.2d at 338-39. The *Pittard* plaintiffs also argued innkeepers should be held to a higher standard than ordinary care, by analogy to the traditional requirement that common carriers or innkeepers assure the comfort and safety of their guests. The court pointed out "New Mexico . . . applies in all cases an 'ordinary care' standard." *Id.* at 729, 688 P.2d at 339, *quoting* N.M. U.J.I. Civ. 6.5 (Repl. Pamp. 1980).

62. *Id.* at 731, 688 P.2d at 341.

63. 102 N.M. 373, 695 P.2d 1322 (Ct. App. 1984).

64. *Id.* at 378, 695 P.2d at 1327 (quoting Clark v. Corby, 249 N.W.2d 567, 570 (Wis., 1977)).

65. *Moreno,* 102 N.M. at 378, 695 P.2d at 1327, (quoting Lipson v. Superior Court of Orange County 644 P.2d 822, 828-29, 182 Cal. Rptr. 629, 635-36 (1982)).

66. *Id.*

limited any theory of liabilty to the duty to warn or not to misrepresent the conditions on the property.[67]

D. Release Act

In *Gonzales v. Atnip*,[68] the court of appeals held that the Release Act did not invalidate an oral settlement of a personal injury suit when the settlement was reached after the filing of the lawsuit by attorneys who had specific authority from their clients to do so. The Release Act allows disavowal of "any" settlement agreement made while the claimant is under medical care, if the agreement is not obtained according to the Act's requirements of notice and acknowledgment.[69] The *Gonzales* plaintiff wanted a settlement set aside because he had not realized he still needed medical care and had "just made a mistake" in agreeing to it.[70] He urged an unconditional reading of the act so "any settlement agreement" would refer to "all" settlement agreements.[71]

The dispute stemmed from a 1982 lawsuit plaintiff filed for injuries received in a 1981 traffic accident. The attorneys settled the case in 1984. That agreement was reached by the attorneys only after Gonzales had approved the terms.[72] Gonzales made no allegations of unfair practices by the other party, he simply changed his mind about the settlement. Plaintiff attempted to avoid the agreement, and defendants moved for enforcement.[73]

The court of appeals assumed the plaintiff was still receiving medical care at the time of the settlement and the treatment was reasonably required and provided in good faith.[74] The court still found the agreement enforceable even though the statutory provisions for obtaining the release had not been followed. It delineated three reasons for the decision. First,

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67. *Id.* at 379-80, 695 P.2d at 1328-29.

68. 102 N.M. 194, 692 P.2d 1343 (Ct. App. 1984), *cert. denied*, 102 N.M. 225, 693 P.2d 591 (1985).

69. N.M. STAT. ANN. §§ 41-1-1 to -2 (Repl. Pamp. 1982). N.M. STAT. ANN. §§ 41-1-1(B) and -2 provide in pertinent part:

> Any settlement agreement . . . made by any person who is under the care of a person licensed to practice the healing arts or is confined in a hospital . . . which is not obtained in accordance with the provisions of Section 2 . . . may be disavowed by the injured person.
>
> The provisions of this act . . . shall not apply, if at least five days prior to obtaining the settlement, release or statement, the injured party has signified in writing [and] acknowledged . . . his willingness that a settlement, release or statement be given.

70. 102 N.M. at 197, 692 P.2d at 1346.

71. *Id.* at 198, 692 P.2d at 1347.

72. *Id.* at 196, 692 P.2d at 1345.

73. *Id.* at 195, 692 P.2d at 1344.

74. *Id.* at 197, 692 P.2d at 1346.

the court reasoned that the Act's purpose is to prevent unfair settlements.[75] There was no evidence here the settlement was unfair. The case had been in progress for 18 months; extensive discovery had been done. Second, the court determined that the New Mexico constitutional guarantee of judicial control over court procedures would be jeopardized if the Release Act applied to every settlement.[76] Here depositions and a trial setting were vacated as a result of the settlement. Trial courts could not control docketing and case disposition without the power to determine the validity of agreements. Finally, the court found that limitations had already been placed on the applicability of the Act in *Bolles v. Smith*.[77] Where judgment or dismissal has followed settlement, the Act cannot be used to set aside the settlement. The court read *Bolles* to mean that an enforceable agreement which does not thwart the Act's purposes cannot be disavowed.[78]

E. Negligent Failure to Settle

In a case certified from the 10th U.S. Circuit Court of Appeals, the New Mexico Supreme Court held allegations of an insurance carrier's negligent failure to settle a claim against its insured failed to state a cause of action.[79] In *Ambassador Insurance Co. v. St. Paul Fire and Marine Insurance Co.*,[80] the excess carrier sued the primary carrier for negligently failing to accept a settlement offer within the limits of the primary medical malpractice policy.

The court relied, in part, on dicta from another supreme court decision to find sound policy reasons for not recognizing plaintiff's cause of action.[81] Insurers and their policyholders have only a contractual relationship, so both are obligated only to perform the terms of the contract and to deal with each other in good faith.[82] Accordingly, in deciding whether

75. *Id.* at 198-99, 692 P.2d at 1347-48.

76. *Id.* at 198, 692 P.2d 1347.

77. 92 N.M. 524, 591 P.2d 278 (1979). The court pointed out that these limitations arose largely from the lack of clear legislative intent in the Act and urged clarification. *Gonzales*, 102 N.M. at 200, 692 P.2d at 1349.

78. *Gonzales*, 102 N.M. at 200, 692 P.2d at 1349.

79. Ambassador Insurance Co. v. St. Paul Fire & Marine Insurance Co., 102 N.M. 28, 690 P.2d 1022 (1984). The case was certified pursuant to N.M. STAT. ANN. § 34-2-8 (1978).

80. 102 N.M. 28, 690 P.2d 1022 (1984).

81. The court quoted from American Employer's Insurance Co. v. Crawford, 87 N.M. 375, 380, 533 P.2d 1203, 1208 (1975):

> Clearly, the company violated no contractual obligation to Crawford, and *we fail to understand the source or nature of any duty recognized in the law of tort which the company owed or breached.* (Emphasis added in *Ambassador*, 102 N.M. at 29, 690 P.2d at 1023.)

82. *Ambassador*, 102 N.M. at 30, 690 P.2d at 1024. The only duty contractually imposed on the insurer is the duty to defend the suit. *Id.* Thus, it is the insurer's decision whether to settle. New Mexico, however, recognizes the implied covenant of fair dealing which creates a duty of good

to settle a case or take it to trial, insurers must balance their own interests against those of the insured and protect both evenhandedly.[83] An insurer should not be penalized for good faith efforts to reduce its liability and that of the insured by trying a case. The risks inherent in any trial can defeat either party's case, and neither side should be required to settle because of the possibility of losing in the courtroom.[84]

The court stated that negligence in defending a case for an insured can be strong evidence of bad faith on the part of the company, but negligence without bad faith does not state a cause of action.[85] Failure to prepare for the case properly can constitute negligence, but only as an element of proof in a bad faith claim.

It should be noted in this context that 1984 changes in the Insurance Code[86] create a private right of action for unfair or deceptive practices against insurance companies. The statute allows the claim to be brought by "any person covered by this article [Article 16] who has suffered damages."[87] The change is important because two earlier cases[88] found third parties—for instance persons not parties to the contract for insurance suing the insured—had no private cause of action for these types of claims. These earlier cases may be overruled by the new code provision.

F. New Mexico's (Short-Lived) Seatbelt Defense

In *Thomas v. Henson,*[89] the court of appeals adopted the "seatbelt defense" as a means of apportioning plaintiff's damages in automobile accident cases. Plaintiff was injured in an accident and defendant was found 100% at fault by the jury. The trail court refused to admit defendants' proffered evidence of plaintiffs' failure to use seatbelts.[90]

The court of appeals upheld judgment for the plaintiff, but prospectively

faith. *Id.* (citing State Farm General Insurance Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974); State Farm Fire and Casualty Co. v. Price, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984); Chavez v. Chenoweth, 89 N.M. 423, 533 P.2d 703 (Ct. App. 1976); Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct. App.), *cert. denied,* 84 N.M. 219, 501 P.2d 663 (1972)).

83. *Ambassador,* 102 N.M. at 32, 690 P.2d at 1025 (quoting Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 33, 298 P.2d 1002, 1017 (1956), quoting Hilker v. Western Automobile Insurance Co., 204 Wis. 1, 14, 235 N.W. 413, 415 (1931)).

84. *Ambassador,* 102 N.M. at 30, 690 P.2d at 1024.

85. *Id.* at 31, 690 P.2d at 1025.

86. N.M. STAT. ANN. §§ 59A-16-1 to -30 (Repl. Pamp. 1984).

87. *Id.* § 59A-16-30.

88. *See* Patterson v. Globe American Casualty Co., 101 N.M. 541, 685 P.2d 396 (Ct. App. 1984) (no provision in Unfair Insurance Practices Act for private action against insurer by non-party to contract); State Farm Fire & Casualty Co. v. Price, 101 N.M. 438, 684 P.2d 524 (Ct. App. 1984) (no private action against insurer under Unfair Insurance Practices Act for party to personal injury suit against insured).

89. 102 N.M. 417, 696 P.2d 1010 (Ct. App. 1984).

90. *Id.* at 419, 696 P.2d at 1012.

adopted a seatbelt defense for New Mexico.[91] It held that even where a plaintiff's negligence does not contribute to the accident, plaintiff's damages may be limited if his injuries are increased because he was not protecting himself by wearing a seatbelt.[92] The court reviewed voluminous case law and commentary in reaching its decision, finding at least four different versions of the defense in other jurisdictions.[93] The court determined that New Mexico's seatbelt defense would be based on the "duty to exercise ordinary care for one's own safety."[94]

The decision was reversed after the survey period.[95] The supreme court, normally so concerned about any infringement by the Legislature to preempt the judicial authority, decided it was the Legislature's privilege to determine if the seatbelt defense should exist in New Mexico.[96] The 1985 Legislature enacted the Safety Belt Use Act[97] which required use of belts beginning January 1, 1986. The Act specifies, however, "[f]ailure to be secured . . . by a safety belt as required . . . shall not in any instance constitute fault or negligence and shall not limit or apportion damages."[98]

91. *Id.* at 427, 696 P.2d at 1020.
92. *Id.* at 420, 696 P.2d at 1013.
93. *Id.* at 420-25, 696 P.2d at 1013-18.
94. *Id.* at 424, 696 P.2d at 1017 (quoting N.M. U.J.I. CIV. 16.4 (Repl. Pamp. 1980); the concept of apportioning damages on a theory of antecedent failure to mitigate was also incorporated from the RESTATEMENT (SECOND) OF TORTS § 425 (1965)).
95. Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985).
96. *Id.* at 327, 695 P.2d at 477, *see supra* n. 75 and accompanying text.
97. N.M. STAT. ANN. §§ 66-7-370 to -73 (Cum. Supp. 1985).
98. *Id.* § 66-7-373.