STATE OF NEW MEXICO TRANSPORTATION COMPENDIUM OF LAW

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Revised 2017

A. Elements of Proof for the Derivative Negligent Claim of Negligent Entrustment, Hiring/Retention and Supervision

In New Mexico, there are four distinct theories by which an employer might be held to have derivative or dependent liability for the conduct of an employee.[1] The definition of derivative or dependent liability is that the employer can be held liable for the fault of the employee in causing to a third party.

1. Respondeat Superior

   a. What are the elements necessary to establish liability under a theory of Respondeat Superior?

An employer is responsible for injury to a third party when its employee commits negligence while acting within the course and scope of his or employment. *Ocana v. Am. Furniture Co.,* 2004-NMSC-018, ¶ 29, 135 N.M. 539, 91 P.3d 58; *Los Ranchitos v. Tierra Grande, Inc.*, 1993-NMCA-107, ¶ 13, 116 N.M. 222, 226, 861 P.2d 263, 267 (citing *McCauley v. Ray*, 1968-NMSC-194, ¶ 28, 80 N.M. 171, 180, 453 P.2d 192.) UJI 13-407 NMRA provides that:

> An act of an employee is within the scope of employment if:
>
> > 1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and
> >
> > 2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

New Mexico has not addressed the doctrine of placard liability or "logo liability." *Cf., Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983) (recognizing the doctrine of placard liability/logo liability in the Tenth Circuit); *see also Dietrich v. Albertsons Inc.*, 1995 U.S. App. LEXIS 14690 (10th Cir. 1995) (explaining the limitations of the Court's holding in *Rodriguez*). However, New Mexico does acknowledge that under the Interstate Commerce Commission ("ICC") regulations, the carrier/lessee has full and complete responsibility during the term of the lease. *Matkins v. Zero Refrigerated Lines, Inc.*, 1979-NMCA-095, ¶ 25, 93 N.M. 511, 517, 602 P.2d 195, 201; *but see Ross v. Wall St. Sys*., 400 F.3d 478, 480 (6th Cir. 2005) ("the underlying ICCC regulations [supporting the doctrine of logo liability] have changed, and this rule is no longer in effect."). It follows that the driver/lessor would become, for liability purposes, the employee of the carrier. *Id.*

[1] Where trucking and transportation cases are not available to illustrate a particular point of law, this article will cite to applicable New Mexico cases within the employment context.

The plaintiff retains the burden of establishing that the employee was within the course and scope of his employment at the time of the accident. *See Los Ranchitos*, 1993-NMCA-107, ¶ 16, 116 N.M. at 227, 861 P.2d at 268 (discussing burden of proof in summary judgment proceedings); UJI 13-407 NMRA; *Cf. JA Sikversmith, Inc. v. Marchiondo*, 1965-NMSC-061, ¶ 10, 75 N.M. 290, 294, 404 P.2d 122, 124 ("[I]t is well settled that the party alleging the affirmative has the burden of proof."). Whether an employee's actions come within the scope of employment is generally a question of fact to be determined on a case by case basis. *Los Ranchitos*, 1993-NMCA-107, ¶ 13, 116 N.M. at 226, 861 P.2d at 267; *see also Horanburg v. Felter*, 2004-NMCA-121, ¶¶ 12-13, 136 N.M. 435, 99 P.3d 685 (distinguishing the legal term of art "within the course and scope of employment" from an action which is merely "employment related" or "connected to … employment"). "But when no facts are in dispute and the undisputed facts lend themselves to only one conclusion, the [scope of employment] issue may properly be decided as a matter of law." *Medina v. Fuller*, 1999–NMCA–011, ¶ 22, 126 N.M. 460, 971 P.2d 851.

b. Representative New Mexico cases

In New Mexico, the general rule precludes imposing vicarious liability on an employer where an employee is going to or from work in his or her own automobile. *Lessard v. Coronado Paint & Decorating Ctr., Inc*., 2007-NMCA-122, ¶ 13, 142 N.M. 583, 589, 168 P.3d 155, 161 (citing *Nabors v. Harwood Homes, Inc*., 1967-NMSC-024, ¶ 6, 77 N.M. 406, 408, 423 P.2d 602, 603 (employee in route to or retiring from 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); *Richardson v. Glass*, 1992-NMSC-046, ¶ 8, 114 N.M. 119, 122, 835 P.2d 835, 838 (employee was not in the scope of employment at time of automobile accident during lunch period, and thus employer was not liable, where employee was on his own time driving his own vehicle, accident occurred at location where employee would not have been in the course of employment, and employer did not exercise any control over employee while he drove to shop after lunch break); *Zamora v. Foster*, 1972-NMCA-118, ¶ 12, 84 N.M. 177, 500 P.2d 1001 (rejecting contention that employee's transportation to and from work is reasonably necessary to the efficiency of employer's operation)); *but see Medina v. Fuller*, 1999-NMCA-011, ¶ 21, 126 N.M. 460, 466, 971 P.2d 851, 856 (deputy sheriff was within scope of duties at time of automobile accident, even though she was on her way from work when accident occurred, where she was driving a patrol car, radio was on and deputy was ready to immediately respond to calls). Accordingly, the courts have found that "three circumstances . . . must exist in order to impose vicarious liability on an employer for an employee's negligent actions in driving a personal vehicle to and from work: (1) the employer must expressly or impliedly consent to use of the vehicle; (2) the employer must have the right to control the employee in his operation of the vehicle, or the employee's use of the vehicle must be so important to the business of the employer that such control could be inferred; and (3) the employee must be engaged at the time in furthering the employer's business." *Lessard*, 2007-NMCA-122, at ¶ 14.

Benham v. All Seasons Child Care, Inc., 1984-NMCA-080, 101 N.M. 636, 686 P.2d 978, *cert. denied,* 101 N.M. 686, 687 P.2d 743, stands for the proposition that permission to use an automobile can be limited in scope. In *Benham,* an employee was involved in an accident while on a personal mission with her employer's van, which she was authorized to use. *Id*., at ¶ 1, 637. "[P]roof or admission of ownership creates a presumption that the driver of a vehicle causing damages is the servant of the owner and using the vehicle in the master's business[,] and this presumption is sufficient in the absence of evidence to the contrary to support a verdict [based on respondeat superior]." *Id.*, at ¶ 11, 638 (first two alterations in original) (quoting *Morris v. Cartwright*, 1953-NMSC-030, 57 N.M. 328, 332-33, 258 P.2d 719, 722). Ultimately, the employer was not liable because the employee was on a personal mission and respondeat superior liability is premised upon whether or not an employee is acting within the scope of his employment. *Id.* at ¶ 19, 639.

In *Lessard v. Coronado Paint & Decorating Ctr., Inc*., 2007-NMCA-122, ¶¶ 15-20, 142 N.M. 583, 590, 168 P.3d 155, 162 the employer was granted summary judgment on the plaintiff's respondeat superior claim, even though there was evidence that the employer had consented to its employee's use of the automobile and its control over the operation could be implied under the circumstances, as the Plaintiff failed to prove that employee's conduct at the time was in furtherance of the employer's business.

Subsequently in *Ovecka v. Burlington N. Santa Fe Ry.*, 2008-NMCA-140, 145 N.M. 113, 194 P.3d 728, the Court of Appeals found the employer was not vicariously liable for death caused by employee because the employee's driving at the time of the accident did not occur within the course and scope of his employment, given that his driving was not a core part of his employment as a member of railroad resurfacing crew and the employer's control over the employee's driving was limited to paying for miles that were work related, and employee was on extended trip pursuing personal business with family members and imbibing enough alcohol to render him severely intoxicated.

2. Negligent Entrustment

   a. What are the elements necessary to establish liability under a theory of negligent entrustment?

This theory requires proof that: 1) the owner or person in control of the vehicle loaned or entrusted the vehicle to another person; 2) the owner or person in control of the vehicle knew or should have known that the other person was an incompetent driver; 3) the person driving the vehicle was incompetent in its operation; and 4) that incompetence was the cause of the injury to another person. *Spencer v. Gamboa*, 1985-NMCA-033, ¶ 8, 102 N.M. 692, 693, 699 P.2d 623, 624; *Armenta v. A.S. Horner, Inc*., 2015-NMCA-092, ¶12, 356 P.3d 17, 22, cert. granted (Aug. 26, 2015) (burden of proof is on plaintiff); *see also* UJI 13-1646 NMRA (negligent entrustment of a motor vehicle). Stated another way, New Mexico law recognizes that one who negligently

entrusts a motor vehicle to an incompetent driver may be liable for injury to a third person caused by the driver's incompetence.

Unlike respondeat superior, the theory of negligent entrustment permits imputation of negligence regardless of whether the employee was acting within the course and scope of his employment. *See, e.g., Bryant v. Gilmer*, 1982-NMCA-010, ¶ 5, 97 N.M. 358, 360, 639 P.2d 1212, 1214 (court's sole inquiry to establish negligent entrustment was whether employer knew or should have known that employee was not a competent driver). Various provisions of New Mexico's Motor Transportation Act provide further guidance. *See* NMSA 1978, § 65-2A-19 (2003) (safety requirements for motor vehicles and drivers used in compensated transportation); § 65-3-7 (2009) (qualifications of drivers); § 65-3-14 (2009) (drug and alcohol testing program; report of positive test).

b. Representative New Mexico cases

In the negligent entrustment context, New Mexico law states that only when the entrustor knew or should have known that the entrustee was not qualified to engage in the activity does a duty to investigate exist. *Spencer v. Gamboa*, 1985-NMCA-033, ¶ 9, 102 N.M. at 694, 699 P.2d at 625 (holding that car dealers are under no affirmative duty to learn the qualifications of customers when allowing test drives of automobiles); *DeMatteo v. Simon*, 1991-NMCA-027, ¶ 6, 112 N.M. 112, 114-15, 812 P.2d 361, 363-64 (holding that an employer who failed to fully investigate a driver's record despite knowledge of several traffic citations knew or should have known the driver was incompetent); *McCarson v. Foreman*, 1984-NMCA-129, ¶17, 22, 102 N.M. 151, 157, 692 P.2d 537, 543 (holding that evidence of an employer's knowledge of an employee's DWI conviction and cocaine charges, as well as a failure to inquire into the employee's social habits, was sufficient to support a jury finding that employer negligently entrusted a vehicle); *Hermosillo v. Leadingham*, 2000-NMCA-096, ¶ 20, 129 N.M. 721, 726 13 P.3d 79, 84 (holding that husband was not liable under theory of negligent entrustment for injuries caused by wife when couple was estranged, had been living separately for approximately two months, and husband lacked control and legal authority over the vehicle); *Cf. Sanchez v. San Juan Concrete Co.,* 1997-NMCA-068, ¶ 28, 123 N.M. 537, 544, 943 P.2d 571, 578 (holding that employer may have been grossly negligent in entrusting a truck to employee when the employer's dispatcher recognized that employee was obviously drunk).

Recently, the New Mexico Court of Appeals expressly recognized that a claim for "negligent entrustment does not impose liability upon the alleged [en]trustor for the negligent operation of a vehicle which he had expressly forbidden the alleged [en]trustee to drive." *Armenta v. A.S. Horner, Inc*., 2015-NMCA-092, at ¶ 13, 356 P.3d at 22. The Court explained that permission is an integral part of an entrustment claim, and such permission may be express or implied. *Armenta*, 2015-NMCA-092, at ¶ 22, 356 P.3d at 25. "Implied permission to use a motor vehicle can be inferred from a course of conduct or relationship between the parties, or other facts and circumstances signifying the assent of the owner." *Id*. (quoting *Allstate Ins. Co. v. Jensen*, 1990–NMSC–009, ¶ 8 n. 3, 109 N.M. 584, 788 P.2d 340 (discussing implied consent in the context

of permissive use of an insured vehicle) and *Trujillo v. Rivera*, 1953–NMSC–064, ¶ 7, 57 N.M. 451, 260 P.2d 365 (holding that the evidence supported a finding of implied consent for a minor child to use a family vehicle)). The Armenta Court found a question of fact existed as to whether there was implied consent: although Defendant did expressly permit the employee to drive the vehicle on the evening on the accident, the employee's supervisors knew he had the keys and had been driving the vehicle throughout the week, knew the employee had been drinking the night in question, and did not object to him driving the vehicle. Id., at ¶ 24-25.

3. Negligent Hiring/Retention

a. What are the elements necessary to establish liability under a theory of negligent retention/hiring?

In New Mexico, the elements necessary to prove negligent retention are the same as for those needed to prove negligent hiring. *Lessard v. Coronado Paint & Decorating Ctr.*, 2007-NMCA-122, ¶ 28, 142 N.M. 583, 593, 168 P.3d 155, 164. This theory requires proof that: 1) the employee was unfit, considering the nature of the employment and the potential risk he posed to those with whom he would foreseeably associate; 2) the employer knew or should have known, through the exercise of reasonable care, that the employee was unfit; and 3) the employer's negligence was a proximate cause of the plaintiff's injuries. *Id*., at ¶¶ 27-28; *see also* UJI 13-1647 NMRA. "For an employer to be liable for negligent hiring and retention there must be a connection between the employer's business and the injured plaintiff." *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 22, 137 N.M. 64, 107 P.3d 504, citing *Valdez v. Warner*, 1987-NMCA-076, ¶ 12,106 N.M. 305, 307, 742 P.2d 517, 519.

"An employer may be held liable for negligent hiring or retention, even if the employer is not vicariously responsible for the employee's negligent acts under a theory of respondeat superior." *Lessard*, 2007-NMCA-122, ¶¶ 28, 40.

See also NMSA 1978, § 65-2A-19 (2013) (safety requirements for motor vehicles and drivers used in compensated transportation); § 65-3-7 (2009) (qualifications of drivers)[2]; § 65-3-14 (2009) (drug and alcohol testing program; report of positive test); NMSA 1978 § 66-5-42 (1978) (no person shall employ as a driver of a motor vehicle any person not licensed)

b. Representative New Mexico cases

The New Mexico Court of Appeals has declined to draw a bright-line rule precluding recovery in a negligent hiring or retention claim if the employee was not acting within the course and scope of his employment. *Lessard*, 2007-NMCA-122, at ¶ 40. "It is well settled that an

[2] The New Mexico State Senate had introduced, but subsequently postponed indefinitely, legislation that would restrict the applicability of this provision of the Motor Transportation Act concerning the qualifications of drivers to only ***commercial*** motor vehicles instead of all motor vehicles. *See* Senate Bill 486 (2013), available at http://www.nmlegis.gov/Sessions/13%20Regular/bills/senate/SB0486.pdf

employer may be liable for negligently hiring or retaining an employee even if the employee's acts were outside the scope of his employment. Whether the employee was acting within the course and scope of employment is but one factor that the fact-finder may consider in determining foreseeability in the context of proximate cause." *Id.* (citations omitted); *see also Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶ 25, 274 P.3d 97, 105 ("even when an employee is alleged to have negligently caused injury to a plaintiff outside the employee's scope of employment, scope of employment may still be a factor for the jury to consider under a negligent hiring, supervision, or retention claim.").

In *F & T Co. v. Woods*, 1979-NMSC-030, ¶ 15, 92 N.M. 697, 701, 594 P.2d 745, the New Mexico Supreme Court held that, even if the company was negligent in the hiring or retention of the employee, such negligence must be the proximate cause of the incident.[3] "Whether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case." *Id*., at ¶ 22. For example, notice of an employee's drinking problem and violent propensities may make an assault and battery by that employee on a business invitee or customer foreseeable. *Valdez v. Warner*, 1987-NMCA-076, ¶ 15,106 N.M. 305, 308, 742 P.2d 517, 520 (holding that injured invitee was entitled to instruction on negligent hiring because bar hired employee with a background of violence for a job where he would be in constant contact with the public, many of whom would have been drinking and argumentative).

4. Negligent Training/Supervision

a. What are the elements necessary to establish liability under a theory of negligent training/supervision?

One can sue an employer on the theory that their negligent training and supervision of their subordinates caused the misconduct. This theory requires proof that (1) "the employer knew or reasonably should have known that some harm might be caused by the acts or omissions of the employee who is entrusted with such position;" (2) there is some "connection between the employer's business and the injured plaintiff;" and (3) the employer's negligence was a proximate cause of the plaintiff's injuries. *Cain v. Champion Window Co.*, 2007-NMCA-085, ¶ 18, 142 N.M. 209, 164 P.3d 90 (quoted authority omitted); *Gonzales v. Sw. Sec. & Prot. Agency, Inc.*, 1983-NMCA-071, ¶¶ 12-13, 100 N.M. 54, 56-57, 665 P.2d 810, 812-13; s*ee also* NMSA 1978, § 65-2A-19 (2013) (safety requirements for motor vehicles and drivers used in compensated transportation); NMSA 1978, § 65-3-7 (2009) (qualifications of drivers); NMSA 1978 § 65-3-14 (2009) (drug and alcohol testing program; report of positive test). An employer may be held liable for negligent supervision of an employee even where it is not responsible for that employee's wrongful acts under the doctrine of respondeat superior. *E.E.O.C. v. Univ. of Phoenix,*

[3] The court held that: 1) the company was not liable under a negligent hiring theory for the criminal act of the employee because, as a matter of law, the act of the employee could not have been foreseen by the company at the time it hired the employee; 2) the company was not liable under a negligent retention theory because the rape of the injured party by the employee was not foreseeable by the company, nor was it a natural or probable result of the company's retention of the employee. *F & T Co.*, 1979-NMSC-030, at ¶¶ 15-20.

Inc., 505 F. Supp. 2d 1045, 1058 (D.N.M. 2007)(applying New Mexico law) (citing *Chavez v. Thomas & Betts Corp.,* 396 F.3d 1088, 1099 (10th Cir. 2005)).

b. Representative New Mexico cases

Gonzales v. Sw. Sec. & Prot. Agency, Inc., 1983-NMCA-071, ¶¶ 12-13, concluded that defendant negligently equipped, trained, supervised and retained security guards who battered and falsely imprisoned plaintiff at a public event, and that defendant's negligence was the cause of plaintiff's injuries. Moreover, the New Mexico Court of Appeals has held that an employer may be liable for negligent supervision "even though it is not responsible for the wrongful acts of the employee under the doctrine of respondeat superior." *Cain v. Champion Window Co*., 2007-NMCA-85, at ¶ 18. In *Cain*, the defendant employer was sued for damages caused by its employee's installation of a gas stove, which the employee installed on his own time and using his own truck. *Id.,* at ¶ 4. The claim was dismissed because the employer did not pay for the stove installation, the work was not done on the employer's premises, and the employer did not know that the stove was going to be installed, meaning that the employer could not have supervised or monitored the work. *Id*, at ¶ 20.

Most recently in *Dahlberg v. MCT Transp., LLC*, 571 F. App'x 641, 655 (10th Cir. 2014) the Tenth Circuit found that the jury's no-negligence verdict as to the employee operator of a tractor-trailer foreclosed any possibility that the plaintiff could have succeeded on her negligent training and negligent supervision claims against the operator's employer because there was no causal link between the employer's failure to train and supervise the employee and the harm ultimately suffered by the plaintiff. The Tenth Circuit Court further noted that, while "New Mexico courts recognize a distinction between vicarious liability based on imputed liability and claims based on direct negligence in which an employer is allegedly to blame for its own tortious conduct[,] … a survey of New Mexico case law suggests that negligent-training and negligent-supervision claims *depend on* underlying employee wrongdoing." *Id*. (emphasis added) (cited authority omitted).

B. Defenses

1. Admission of Agency

New Mexico has not specifically adopted or rejected the view that a claim under a theory of respondeat superior precludes a claim for negligent supervision or training. In a case falling under the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27, the defendants argued that such a claim would not increase the plaintiff's recovery and would only allow the plaintiff to "obtain otherwise unavailable discovery … and to introduce otherwise inadmissible inflammatory evidence at trial." *Ortiz v. N.M. State Police*, 1991-NMCA-031, ¶ 11, 112 N.M. 249, 252, 814 P.2d 117, 120. In dicta, the Court of Appeals held that they saw no bar to such a cause of action under the Tort Claims Act, and any concerns about discovery and evidence could be resolved "through concessions on matters such as defenses or liability … and by bifurcating trial of the underlying claims." *Id.*, at ¶ 12.

2. Traditional Tort Defenses

All traditional tort defenses (such as comparative fault, failure to mitigate damages, independent intervening cause, etc.) may be used to defend against any of the above claims.

C. Punitive Damages

1. Is evidence supporting a derivative negligence claim permissible to prove an assertion of punitive damages?

Unlike some other states, New Mexico does not apply a heightened burden of proof for punitive damages. Rather, the standard is simply proof by a preponderance of the evidence. *Jessen v. Nat'l Excess Ins. Co.*, 1989-NMSC-040, ¶ 15, 108 N.M. 625, 628, 776 P.2d 1244, 1247, *limited on other grounds by Sloan v. State Farm Mut. Auto. Ins. Co*., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 1985-NMSC-090, ¶ 74, 103 N.M. 480, 485, 709 P.2d 649, 654 (finding facts justified award of punitive under "preponderance of the evidence" standard).

Punitive damages can be recovered for negligent entrustment, negligent retention/hiring, and negligent supervision/training, provided that there is evidence that the employer's conduct was malicious, willful, reckless, wanton, fraudulent or in bad faith. *See* UJI 13-1827 NMRA. Additionally, punitive damages can be awarded for vicarious liability if: 1) the conduct of the agent or employee was malicious, willful, reckless, wanton, fraudulent or in bad faith; 2) the agent or employee was acting in the scope of his or her employment and had sufficient discretionary or policymaking authority to speak and act for the employer with regard to the conduct at issue, independently of higher authority; or 3) the employer in some other way authorized, participated in or ratified the conduct of the agent or employee. *Id.* In other words, "a master or principal is not liable for punitive damages unless it can be shown that in some way he also has been guilty of the wrongful motives upon which such damages are based." *Samedan Oil Corp. v. Neeld*, 1978-NMSC-028, ¶ 11, 91 N.M. 599, 602, 577 P.2d 1245, 1248, *abrogated on other grounds by Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 1994-NMSC-078, ¶ 23, 118 N.M. 140, 146, 879 P.2d 772, 778 (adopting rule of managerial capacity).

Before a claim for punitive damages can be submitted to a jury, it is incumbent on the plaintiff to make a prima facie showing that the defendant has the appropriate mental state to support an award of punitive damages. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, at ¶ 16 (prima facie showing of insurance bad faith sufficient for punitive damages instruction); *Green Tree Acceptance, Inc. v. Layton*, 1989-NMSC-006, ¶ 10, 108 N.M. 171, 174, 769 P.2d 84, 87 (plaintiffs "established a prima facie case of at least recklessness and bad faith, if not of willful, wanton and malicious wrongdoing"); *Mitschelen v. State Farm Mut. Auto. Ins. Co.*, 1976-NMCA-093, ¶ 46, 89 N.M. 586, 593, 555 P.2d 707, 714 (refusing to submit punitive damages instructions to jury when "plaintiff failed to make a prima facie case of any malicious, willful, wanton and

intentional conduct on the part of the defendant or any of its employees"); *Grassie v. Roswell Hosp. Corp*., 2011-NMCA-024, ¶ 39, 150 N.M. 283, 258 P.3d 1075, 1086 (to impose punitive damages, there must be proof in some form of the employer's own culpable state of mind and conduct). This threshold determination may be appropriate for resolution on a motion for partial summary judgment. *See Sipp v. Unumprovident Corp.*, 107 Fed.Appx. 867, (10th Cir. 2004) (applying New Mexico law and affirming trial court's ruling on summary judgment that defendant lacked the requisite culpable mental state for an award of punitive damages). Typically, though, a court would wait until the directed verdict stage. *McGinnis v. Honeywell, Inc.*, 1990-NMSC-043, ¶ 31, 110 N.M. 1, 9, 791 P.2d 452, 460; *Leon, Ltd. v. Carver*, 1986-NMSC-015, ¶ 26, 104 N.M. 29, 34, 715 P.2d 1080, 1085; *McNeill v. Rice Eng'g & Operating, Inc.*, 2003-NMCA-078, ¶ 32,133 N.M. 804, 812-13, 70 P.3d 794, 802-03.

2. Representative New Mexico cases

In *Samedan Oil Corp.*, 1978-NMSC-028, ¶ 2, the defendant-appellant owned a gas well in New Mexico. An employee of defendant designed and installed a vent system on the well. *Id, at ¶* 3. The vent exploded because it was improperly designed, killing a contractor who was working on the well. *Id.* An award of punitive damages was reversed and remanded for a new trial because the jury had not been instructed "that there is no vicarious liability for punitive damages on the part of a master or principal absent participation, authorization or ratification of the tortious conduct." *Id.* at ¶¶ 19-20.

Samedan Oil Corp. would probably be decided differently under the managerial capacity rule adopted in *Albuquerque Concrete Coring Co*., 1994-NMSC-078. In the latter case, the plaintiff was awarded punitive damages in a contract dispute when an employee of the defendant made intentionally false statements in order to coerce the plaintiff to complete a job that was outside the scope of the original contract. 1994-NMSC-078, ¶¶ 2-4.The district court made no findings as to whether the defendant "authorized, ratified, or participated in the culpable conduct" of its employee. *Id.*, at ¶ 8. The New Mexico Supreme Court, however, adopted the "managerial capacity" rule of the *Restatement (Second) of Torts* (1997), which states that "'[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent if . . . the agent was employed in a managerial capacity and was acting in the scope of employment.'" *Id*., at ¶ 18 (quoting *Restatement (Second) of Agency* § 217C(c) (1957)); *see also Chavarria v. Fleetwood Retail Corp.,* 2006-NMSC-046, ¶ 24, 140 N.M. 478, 486, 143 P.3d 717, 725, *as revised* (Oct. 11, 2006). The Court in *Albuquerque Concrete Coring Co*., further noted that this rule "tends to deter the employment of unfit persons for important positions and encourage their supervision." 1994-NMSC-078, at ¶ 22 (citation omitted).

The New Mexico Supreme Court has adopted the rule that a corporation may have "the requisite culpable mental state [for punitive damages] because of the cumulative conduct of its employees." *Clay v. Ferrellgas, Inc.*, 1994-NMSC-080, ¶ 16, 118 N.M. 266, 270, 881 P.2d 11, 15. In *Clay*, employees of the defendant corporation had partially converted the plaintiffs' vehicle to run on propane. *Id.*, at ¶ 3. More than one employee worked on the vehicle and, because they

did not communicate with each other, the installation was never properly completed. *Id.,* at ¶¶ 5-7. The vehicle exploded when it was started, severely burning the plaintiffs. *Id.* at ¶ 9. The evidence showed that there was a lack of communication between employees, that safety equipment required by law was not installed, and that the corporation failed to file required forms with the state on each of its conversions. *Id.*, at ¶¶ 21-24. "Viewed cumulatively," this evidence, coupled with the "high risk of harm that accompanies the handling of propane gas . . . amounts to corporate indifference and reckless conduct." *Id*.

The Court of Appeals later applied *Clay* in *Grassie v. Roswell Hosp. Corp*., 2011-NMCA-024, ¶ 47, 150 N.M. 283, 258 P.3d 1075, to hold that, although the jury did not find that the defendant's employees' actions constituted a "completed tort," their conduct when viewed in the aggregate demonstrated an overall culture of indifference and "a scenario of aggravated patient neglect broad enough in its sources to support finding a culpable mental state" of the employer.

A Tenth Circuit decision explained New Mexico's punitive damage rule as follows: "punitive damages may not be imposed on an employer for the misconduct of an employee absent some evidence that the employer in some way contributed to, or participated in, the employee's misconduct." *Campbell v. Bartlett,* 975 F.2d 1569, 1582 (10th Cir. 1992) (construing New Mexico law). The court held that trucking officials who knew a driver had been convicted of a DWI several years earlier, but had not had an incident since, were not liable for punitive damages in an accident because "the evidence [of the previous alcohol related crime] was too remote and unconnected with the grossly negligent conduct of Bartlett in the October 1986 accident to meet the standard under New Mexico law." *Id.*, at 1583.