

# NEW MEXICO INJURY ATTORNEY BLOG

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## **Employers Generally Not Liable for After Hours Actions of Employees**

In the case of *Ovecka v. Burlington Northern Santa Fe Railway Company*, the New Mexico Court of Appeals addressed the issue of vicarious employer liability in the context of a wrongful death suffered in a DWI auto accident involving an employee of Burlington Northern. The central issue in the case was whether the drunken employee's actions could be imputed to Burlington Northern.

The employee, Kenneth Long, had a long history of DWI and alcoholism. His job duties carried him around a wide area of New Mexico. Due to the remote locations of the job sites, Burlington Northern employees were often provided lodging near job locations. Kenneth Long often took advantage of the lodging. He utilized his own vehicle in commuting to and from location. After work one day in Rio Puerco, Mr. Long headed to Grants where lodging was provided by the company. However, Mr. Long did not check in. Instead, he picked up a 12 pack of beer and headed to Gallup to visit estranged family members. Mr. Long became extremely intoxicated and headed back toward Grants. At 9:00 PM, well after leaving work that afternoon, he crossed the highway median colliding head-on and killing Angela Ovecka.

Ms. Ovecka's parents brought the suit on behalf of Angela alleging Burlington Northern's vicarious liability under respondeat superior for Mr. Long's actions. They further alleged negligent hiring and supervision. Burlington Northern moved for summary judgment which was granted by the district court and affirmed on appeal by the New Mexico Court of Appeals.

The court set forth well established principles of respondeat superior. In short, the court found that Mr. Long was not acting within the course and scope of employment at the time of the accident. The court stated that an "an employee enroute 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." Under the facts, the court found that Mr. Long was returning home, well after business hours, and there was no other evidence suggesting control over Mr. Long at the time of the accident.

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The court also refused the plaintiff's arguments regarding negligent hiring and supervision. The court stated that negligent hiring and supervision claims require both foreseeability of harm and a duty on the part of the employer. The court determined basically that an accident such as this was not a foreseeable harm arising from the hiring of Mr. Long. In the absence of foreseeability, there could be no duty to prevent the harm.

Naturally, Mr. Long was driving an uninsured vehicle at the time of the accident. The case did not address whether or not Ms. Ovecka carried uninsured/underinsured motorist coverage. In the absence of such coverage, Ms. Ovecka's tragic death likely would have gone completely uncompensated.

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