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1       **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2       **CHRIS LUTTRELL and**  
3       **DAWN DAVIDE LUTTRELL,**

4               Plaintiffs-Appellants,

5       v.

**NO. A-1-CA-35047**

6       **ROSALES LAW GROUP, P.C.,**

7               Defendant-Appellee,

8       and

9       **AMERICAN NATIONAL PROPERTY**  
10       **AND CASUALTY COMPANY,**

11              Defendant.

12       **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

13       **Alan M. Malott, District Judge**

14       Mescall Law Firm, P.C.

15       Thomas J. Mescall, II

16       Phillip Patrick Baca

17       Albuquerque, NM

18       for Appellants

19       APNLAW, LLC

20       Amelia P. Nelson

1 Albuquerque, NM

2 for Appellee

3 **MEMORANDUM OPINION**

4 **VIGIL, Judge.**

5 {1} This case comes to us on appeal from the district court’s order dismissing  
6 Plaintiffs Chris and Dawn Luttrell’s action for damages and specific performance  
7 against Defendant Rosales Law Group, P.C. For the reasons that follow, we hold that  
8 the district court erred in granting Defendant’s motion, and we reverse and remand for  
9 further proceedings. Because this is a memorandum opinion and the parties are  
10 familiar with the facts and procedural posture of the case, we set forth only such facts  
11 and law as are necessary to decide the merits.

12 **BACKGROUND**

13 {2} Plaintiffs’ pickup truck was stolen on March 6, 2015. At the time the pickup  
14 was stolen, Plaintiffs were insured by American National Property and Casualty  
15 Company (Insurer) against vehicle theft. Plaintiffs filed an insurance claim for the  
16 theft of their pickup with Insurer on March 6, 2015.

17 {3} On April 21, 2015, Plaintiffs received notification in writing that their “claim  
18 file has been reassigned for further investigation.” Defendant was under contract to  
19 conduct claims investigations for Insurer, but may have had additional duties and

1 responsibilities. On May 14, 2015, and as part of Insurer's claims process, Defendant,  
2 by and through one of its attorneys, David Ray Rosales, sent Plaintiffs a letter  
3 requesting that Plaintiffs produce numerous financial, business, and tax records, as  
4 well as submit to examinations under oath (EUOs). On June 26, 2014, Plaintiffs  
5 requested in writing that Insurer and Defendant promptly provide them with an  
6 explanation as to why their claim had not been paid. Plaintiffs submitted to EUOs  
7 taken by attorney Rosales.

8 {4} At the EUO of Chris Luttrell, attorney Rosales stated that:

9 to be clear, this is not a deposition. It is not intended to be, by design, an  
10 adversarial process. You are here under contract, and it is an inquiry  
11 made by your carrier that ultimately should serve to benefit both parties;  
12 namely, the insurance company and yourself. I'm the face of the  
13 insurance company. You have an obligation under the contract to  
14 substantiate [your] claim, and that's what it is.

15 {5} As of July 16, 2015, the record indicates that Insurer had not (1) recognized or  
16 denied any insurance coverage for Plaintiffs' claim; or (2) paid or made any offer to  
17 pay the claim. Neither does the record indicate that Insurer had initiated adversarial  
18 proceedings against Plaintiffs in relation to their claim. As a result, seeking damages  
19 and an order requiring Insurer to determine whether their claim would be indemnified,  
20 Plaintiffs filed suit against Insurer and Defendant, alleging six counts pertaining to the  
21 handling of their claim: (1) breach of fiduciary duty; (2) breach of the covenant of  
22 good faith and fair dealing; (3) breach of contract; (4) violation of the Trade Practices

1 and Fraud Article of the Insurance Code; (5) violation of the Unfair Practices Act; and  
2 (6) constructive fraud.

3 {6} Defendant responded by filing a motion to dismiss Plaintiffs’ action under Rule  
4 1-012(B)(6) NMRA. Defendant argued that Plaintiffs’ action arose from a “calculated  
5 misuse of the legal process to frustrate and interfere with the rights and obligations  
6 between Plaintiffs and [Insurer under their insurance contract], as well as to obstruct  
7 [Insurer]’s due process right to competent counsel.” Specifically, Defendant  
8 contended that Plaintiffs’ action should be dismissed because based on the attorney-  
9 client status of Insurer and Defendant’s relationship, Defendant owed no fiduciary  
10 duties to Insurer’s adversary—Plaintiffs—and that as an attorney, David Ray Rosales  
11 was not subject to liability to Plaintiffs under the Insurance Code or the Unfair  
12 Practices Act, and that Plaintiffs’ lawsuit violated public policy by interfering with  
13 Insurer’s right to counsel.

14 {7} In support of its motion, Defendant attached a demand letter dated July 22,  
15 2015, from counsel for Defendant to Plaintiffs, in which counsel requested that  
16 Plaintiffs seek dismissal of their lawsuit against Insurer and Defendant, otherwise  
17 Defendant would file a motion to dismiss and seek statutory attorney’s fees. The letter  
18 further stated that Defendant could not be liable in Plaintiffs’ lawsuit since attorney  
19 Rosales was functioning as Insurer’s legal counsel during its work in the handling of

1 Plaintiffs' claim. Defendant also attached the affidavit of attorney Rosales, in which  
2 attorney Rosales stated that he and Defendant had been retained by Insurer to  
3 represent Insurer as counsel with regard to Plaintiffs' insurance claim. "My role in  
4 representing [Insurer,]" attorney Rosales continued, "was undertaken strictly in my  
5 capacity as attorney for [Insurer] and not as an investigator, adjuster, or claim  
6 representative. As counsel, I reported to the adjuster assigned to" Plaintiffs' claim.  
7 Defendant also stated in its motion that Insurer had retained Defendant as counsel to  
8 conduct Insurer's investigation into Plaintiffs' insurance claim, to take the EUOs of  
9 Plaintiffs, and to provide Insurer with legal advice.

10 {8} Recognizing that Defendant's attachment of materials outside the pleadings  
11 turned its motion to dismiss into a motion for summary judgment, Plaintiffs argued  
12 that a dispute as to material issues of fact in the case existed, including as to whether  
13 Defendant was or was not acting as counsel for Insurer in an adversarial proceeding  
14 during the course of Insurer's handling of Plaintiffs' claim. *See* Rule 1-012(B) ("If,  
15 on a motion asserting the defense [under Rule 1-012(B)(6)] to dismiss for failure of  
16 the pleading to state a claim upon which relief can be granted, matters outside the  
17 pleading are presented to and not excluded by the court, the motion shall be treated  
18 as one for summary judgment and disposed of as provided in Rule 1-056 NMRA[.]").  
19 Specifically, Plaintiffs contended that this dispute of material fact stemmed from the

1 inconsistency between: (1) attorney Rosales’ statements to Plaintiff Chris Luttrell  
2 during the taking of his EUO, that attorney Rosales served as the “face” of Insurer in  
3 its handling of Plaintiffs’ claim, and that the EUO was “not intended to be, by design,  
4 an adversarial process”; (2) attorney Rosales’ May 14, 2015 letter to Plaintiffs stating  
5 that “my office has been retained to assist with gathering information for their  
6 evaluation of your insurance claim”; and (3) attorney Rosales’ affidavit stating that  
7 he and Defendant had been retained by Insurer “to represent [Insurer] with regard to  
8 [Plaintiffs’] insurance claim” and that his representation “was undertaken strictly in  
9 [his] capacity as attorney for [Insurer] and not as an investigator, adjuster, or claim  
10 representative.”

11 {9} Plaintiffs also argued that under the facts alleged in their complaint, Defendant:  
12 (1) was not performing legal work assisting in the handling of Plaintiffs’ insurance  
13 claim; (2) was not acting as defense counsel for Insurer in an adversarial proceeding;  
14 and (3) as a result, that Defendant could be held liable for the claims alleged in  
15 Plaintiffs’ complaint.

16 {10} Without a hearing and without substantive findings of fact and conclusions of  
17 law, the district court granted Defendant’s motion. Plaintiffs appeal.

## 18 **DISCUSSION**

19 {11} Plaintiffs frame the critical issue in this appeal as follows:

1 [Defendant argued below] that it was immune from suit because  
2 [attorney] Rosales allegedly represented [Insurer] as an attorney, and  
3 allegedly did not work as a claim investigator.

4 But these allegations were conclusively contradicted  
5 by . . . Defendant[’s] previous admissions that [Defendant] was working  
6 exclusively as a claim investigator. In fact, nowhere in the record below  
7 is there any evidence that [Defendant] actually performed any legal work  
8 for [Insurer]. And more significantly, [Defendant] was not sued for  
9 performing legal work; instead, [Defendant] was only sued for  
10 conducting an abusive claim investigation.

11 Thus, this appeal focuses on whether [Defendant] should be protected  
12 from civil liability merely because it belongs to ‘a special class or  
13 group[.]’

14 (alteration omitted). In support of their position that the record demonstrated that  
15 Defendant was retained merely as a third-party claim investigator or adjuster to handle  
16 their insurance claim—and not as attorneys retained by a client as counsel in an  
17 adversarial proceeding entitled to protection from liability in a civil suit—Plaintiffs,  
18 in pertinent part, rely upon: *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, 135 N.M.  
19 397, 89 P.3d 69; *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-  
20 014, 106 N.M. 757, 750 P.2d 118; *Dellaira v. Farmers Ins. Exch.*, 2004-NMCA-132,  
21 136 N.M. 552, 102 P.3d 111; and *O’Neel v. USAA Ins. Co.*, 2002-NMCA-028, 131  
22 N.M. 630, 41 P.3d 356.

23 {12} Defendant responds that attorney Rosales was acting as legal counsel for  
24 Insurer during the investigation into Plaintiffs’ insurance claim, and not as an

1 insurance adjuster. And “New Mexico legal authority is clear that an attorney has no  
2 duty to protect the interests of a non-client, adverse party for the obvious reasons that  
3 the adverse party is not the intended beneficiary of the attorney’s services and that the  
4 attorney’s undivided loyalty belongs to the client.”

5 {13} We agree that the arguments and authority cited by the parties raise a potentially  
6 critical question in determining whether Defendant, while investigating a pre-litigation  
7 insurance claim at the request of the Insurer, may be liable to Plaintiffs under the  
8 claims alleged in their complaint. We reject, however, the district court’s conclusion  
9 that Defendant was entitled to judgment as a matter of law in its favor, warranting  
10 dismissal of Plaintiffs’ complaint. Rather, we conclude that the pleadings and record  
11 below raised a genuine issue of material fact as to the nature of the services Defendant  
12 provided to Insurer related to the handling of Plaintiffs’ claim, foreclosing dismissal  
13 of Plaintiffs’ complaint.

14 **I. Standard of Review**

15 {14} This court reviews motions to dismiss “for failure to state a claim under Rule-1-  
16 012(B)(6) de novo.” *Tunis v. Country Club Estates Homeowners Ass’n*, 2014-NMCA-  
17 025, ¶ 16, 318 P.3d 713 (internal quotation marks and citation omitted). However, as  
18 stated above, “where matters outside the pleadings are considered on a motion to  
19 dismiss for failure to state a claim, the motion becomes one for summary judgment.”



1 *Id.* ¶ 17 (alterations, internal quotation marks, and citation omitted). Rule 1-056(C)  
2 provides that summary judgment shall be granted “if the pleadings, depositions,  
3 answers to interrogatories and admissions on file, together with the affidavits, if any,  
4 show that there is no genuine issue as to any material fact and that the moving party  
5 is entitled to a judgment as a matter of law.” Summary judgment “is not used to decide  
6 an issue of fact, but, rather, to determine whether one exists.” *Pharmaseal Labs., Inc.*  
7 *v. Goffe*, 1977-NMSC-071, ¶ 27, 90 N.M. 753, 568 P.2d 589. (“A motion for  
8 summary judgment is not to be used as a substitute for a trial on the merits.”). *Id.*  
9 “[W]here a conflict arises in statements made by a witness in an affidavit and  
10 deposition on a material fact [to the plaintiff’s claim], summary judgment is  
11 improper.” *Griego v. Grieco*, 1977-NMCA-018, ¶ 39, 90 N.M. 174, 561 P.2d 36.

## 12 **II. Analysis**

13 {15} In *Garcia*, our Supreme Court held that “in accordance with established  
14 law . . . an attorney cannot be held liable on a cause of action in negligence to his  
15 client’s adversary.” 1988-NMSC-014, ¶ 15; *see id.* ¶¶ 11-14 (determining that  
16 attorney-defendants’ conduct in representing a client in a prior lawsuit against the  
17 plaintiffs in a later case did not give rise to a duty of care owed by attorney-defendants  
18 to the plaintiffs, the breach of which could form an action for professional negligence  
19 against the attorney-defendants). This principle was reaffirmed in *Hovet*, where our

1 Supreme Court held that “defense attorneys may not be named as party-defendants in  
2 claims brought under the unfair claims practices section. In New Mexico, defense  
3 attorneys do not owe opposing parties any common-law duty of care. The same is true  
4 with respect to any statutory duties under the Insurance Code. The private right of  
5 action under the Insurance Code is limited by statute to violations by insurance  
6 companies and their agents; attorneys are not included.” 2004-NMSC-010, ¶ 27; *see*  
7 NMSA 1978, § 59A-16-30 (1990); *Durham v. Guest*, 2007-NMCA-144, ¶ 36, 142  
8 N.M. 817, 171 P.3d 756 (same), *rev’d on other grounds*, 2009-NMSC-007, 145 N.M.  
9 694, 204 P.3d 19.

10 {16} Consistent with *Garcia*, in *Dellaira*, this Court addressed “whether the bad faith  
11 dealing rule applies between an insured and an entity that handles the insurance  
12 function of claim determination, a function inherent in the insurance transaction.”  
13 2004-NMCA-132, ¶¶ 10, 12-14. We held that it did, recognizing with approval that  
14 a non-attorney third-party “entity owe[s] a duty of good faith and fair dealing to the  
15 insured, even where no privity of contract existed between the two, [where] the entity  
16 ha[s] primary control over benefit determinations, assume[s] some of the insurance  
17 risk of loss, undert[akes] many of the obligations and risks of an insurer, and had the  
18 power, motive, and opportunity to act unscrupulously in the investigation and  
19 servicing of insurance claims.” *Id.* ¶ 12 (internal quotation marks and citation

1 omitted); *see also O'Neel*, 2002-NMCA-028, ¶¶ 10-11 (holding that claim of bad faith  
2 in failing to pay an insurance claim cause of action between insured and insurer could  
3 be premised upon evidence that in its investigation into the insured's claim, insurer  
4 "intentionally and maliciously misrepresented the policy, coverages, and duties of the  
5 insured[,]” the scope of the insurer's "examination process ignored the terms of the  
6 policy[,]” the insurer "engaged in an inquisition-style examination and documentation  
7 process without justification or support[,]” and that the insurer's claim that the insured  
8 "failed to cooperate was inconsistent with the record”).

9 {17} Under these principles, the availability of a private action under the Insurance  
10 Code, unfair claims practices section, or for a breach of fiduciary duty against an  
11 attorney retained by an insurer to assist in the handling of an insured's claim, turns on  
12 whether the attorney was acting as counsel in an adversary proceeding against the  
13 insured or rather as a third-party claim investigator or adjuster. Here, attorney Rosales  
14 claimed in his statements to Plaintiff Chris Luttrell during the taking of his EUO, that  
15 he served as the "face" of Insurer in its investigation into Plaintiffs' claim and that the  
16 EUO was "not intended to be, by design, an adversarial process[.]” That Defendant  
17 was merely the "face[,]” or stated another way, the agent of Insurer in an ordinary  
18 claims investigation was also indicated in attorney Rosales' May 14, 2015 letter to  
19 Plaintiffs stating that "my office has been retained to assist with gathering information

1 for their evaluation of your insurance claim.” However, attorney Rosales contradicted  
2 these statements in his affidavit attached to Defendant’s motion to dismiss, where he  
3 stated that he and Defendant had been retained by Insurer “to represent it with regard  
4 to [Plaintiffs’] insurance claim” and that his representation “was undertaken strictly  
5 in [his] capacity as attorney for [Insurer] and not as an investigator, adjuster, or claim  
6 representative.” Moreover, in the July 22, 2015 demand letter sent from counsel for  
7 Defendant to Plaintiffs, counsel wrote that Defendant could not be liable in Plaintiffs’  
8 lawsuit since attorney Rosales was functioning as Insurer’s legal counsel during  
9 Defendant’s work in the handling of Plaintiffs’ claim.

10 {18} Therefore, based on the pleadings and record before us, we conclude that  
11 because there is a possibility that whether Defendant was retained as legal counsel to  
12 represent Insurer in adversarial proceedings against Plaintiffs in regard to the handling  
13 of Plaintiffs’ insurance claim or instead as a third-party claim investigator or adjuster  
14 was relevant to the ultimate disposition of the case, a material issue of fact in the case  
15 forecloses dismissal of Plaintiffs’ complaint under Rule 1-056(C). *See Butler v.*  
16 *Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 45, 140 N.M. 111, 140 P.3d 532  
17 (recognizing that “if there is any possibility that disputed facts might be relevant to  
18 the ultimate disposition of a case, a court should be exceedingly cautious in dismissing  
19 the case before discovery has occurred”); *Rodriguez v. State*, 1974-NMCA-083, ¶¶ 1,

1 4, 86 N.M. 535, 525 P.2d 895 (holding that in the plaintiffs' personal injury claim  
2 against the State Highway Department for applying dangerously slick coating on the  
3 surface of Highway 54 causing the plaintiffs' automobile accident, where statements  
4 of a witness in his affidavit and deposition conflicted on the crucial question of where  
5 the plaintiffs' accident occurred, summary judgment was inappropriate). Accordingly,  
6 we conclude that the district court erred in dismissing Plaintiffs' complaint.

7 **CONCLUSION**

8 {19} For the reasons stated, we reverse the district court order and remand to the  
9 district court for further proceedings.

10 {20} **IT IS SO ORDERED.**

11 \_\_\_\_\_  
12 **MICHAEL E. VIGIL, Judge**

13 **WE CONCUR:**

14 \_\_\_\_\_  
15 **JULIE J. VARGAS, Judge**

16 \_\_\_\_\_  
17 **STEPHEN G. FRENCH, Judge**