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# THE PALSGRAF “DUTY” DEBATE RESOLVED: *RODRIGUEZ v. DEL SOL* MOVES TO A FORESEEABILITY FREE DUTY ANALYSIS

Brenna Gaytan\*

## INTRODUCTION

A woman is standing on a train platform after buying her ticket to Rockway Beach, New York, when a train stops at the station.<sup>1</sup> Two men run to catch the train.<sup>2</sup> One of them jumps aboard the car carrying a small package about fifteen inches long and wrapped in newspaper.<sup>3</sup> A guard on the train car reaches forward to help him in while another guard pushes him from behind.<sup>4</sup> The package, containing fireworks, becomes dislodged and explodes upon falling on the rails.<sup>5</sup> The shock of the explosion topples a large metal scale used for weighing luggage, hitting and injuring the woman standing on the platform.<sup>6</sup>

The now infamous facts of *Palsgraf v. Long Island Railroad Company*<sup>7</sup> are studied by first-year law students,<sup>8</sup> parodied in YouTube videos,<sup>9</sup> and cited in thousands of tort opinions across the country.<sup>10</sup> In

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1. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Dominick Vetri et al., *Tort Law and Practice* 552–59 (3rd ed. 2006).

9. See Ryan Enrico, Israel Moskovits, Dan Saveedra, *Lego Law: Palsgraf v. Long Island Railroad* (Jun. 11, 2009), <https://www.youtube.com/watch?v=mDEbTudkjh>.

10. See, e.g., *Solon v. WEK Drilling Co., Inc.*, 1992-NMSC-023, ¶ 9, 113 N.M. 566 (“A duty to an individual is closely intertwined with the foreseeability of injury to that individual resulting from an activity conducted with less than reasonable care by the alleged tort-feasor” (citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (N.Y. 1928))); *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 6, 110 N.M. 59 (“A duty to an individual is

*Palsgraf*, Chief Judge Cardozo's opinion and Judge Andrews' dissent advocated for divergent viewpoints with respect to the role, if any, of foreseeability in determining the existence of a legal duty. Chief Judge Cardozo wrote that foreseeability directly relates to the presence of a legal duty.<sup>11</sup> In contrast, Judge Andrews argued that a cognizable duty is as an issue of public policy, independent of foreseeability or the particular facts of any case.<sup>12</sup> The *Restatement (Third) of Torts* adopts a stance similar to Judge Andrews, by defining duty separate from foreseeability.<sup>13</sup> "Foreseeability necessarily depends on the specific facts of the case and hence is appropriately addressed as part of the negligence determination."<sup>14</sup> These differing viewpoints have continued to be debated both in New Mexico and other jurisdictions.

The question of legal duty and its interplay with foreseeability has evolved throughout the history of New Mexico tort law, but has recently been clarified in a case with facts almost as incredible as those in *Palsgraf*.

In March 2006, the driver of a pick-up truck pulled into the parking lot of Santa Fe's Del Sol Shopping Center ("Del Sol").<sup>15</sup> The truck accelerated suddenly due to a mechanical problem.<sup>16</sup> The driver then suffered a seizure, causing her to lose consciousness.<sup>17</sup> The truck continued to accelerate, driving over the curb, missing a concrete support pillar, and crashing through a medical clinic's floor-to-ceiling glass wall.<sup>18</sup> The vehicle struck and killed three people inside the clinic and injured several others.<sup>19</sup> Plaintiffs, representatives of the decedents' estates and the surviving victims and their families, brought two separate premises liability

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closely intertwined with the foreseeability of injury to that individual resulting from an activity conducted with less than reasonable care by the alleged tort-feasor.") (citing *Palsgraf*, 162 N.E. 99 (N.Y. 1928)); *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 8, 134 N.M. 43 (citation omitted) ("Duty and foreseeability have been closely integrated concepts in tort law since the court in *Palsgraf v. Long Island Railroad Co.* stated the issue of foreseeability in terms of duty.").

11. *Palsgraf*, 162 N.E. at 100 ("[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.").

12. *Id.* at 103 (Andrews, J., dissenting) ("[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

13. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7.

14. *Id.* § 7 at cmt. j.

15. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2013-NMCA-020, ¶ 1, 297 P.3d 334, *rev'd*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.

16. *Rodriguez*, 2013-NMCA-020, ¶ 1.

17. *Id.* ¶ 4.

18. *Id.*

19. *Id.* ¶ 1.

suits against the owners and operators of the Del Sol Shopping Center, alleging they "negligently contributed to the occurrence by, among other things, failing to adequately post traffic signage and erect additional physical barriers between the parking lot and shopping center."<sup>20</sup>

The two district court judges granted Defendants' motions for summary judgment in separate proceedings, reasoning that the accident was not foreseeable as a matter of law and therefore no duty existed.<sup>21</sup> The cases were consolidated on appeal and the New Mexico Court of Appeals affirmed the lower courts' ruling.<sup>22</sup> The court of appeals upheld the lower courts' orders for summary judgment but did so "based on a policy driven duty analysis advanced by the Restatement (Third) of Torts . . . and recently embraced by the New Mexico Supreme Court in *Edward C. v. City of Albuquerque*."<sup>23</sup>

The New Mexico Supreme Court granted certiorari to clarify the role of foreseeability in the existence of a legal duty.<sup>24</sup> In *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, the court adopted a similar approach to that of Judge Andrews, holding "foreseeability is a fact-intensive inquiry relevant only to breach of duty and legal cause considerations,"<sup>25</sup> not the threshold issue of whether a duty exists in the first place. The court instructed, that when finding a defendant had no duty to the plaintiff or that such a duty was limited, lower courts must cite to a specific policy reason unrelated to foreseeability.<sup>26</sup> As a result, courts may only consider foreseeability to "analyze a 'no-breach-of-duty' or 'no-legal-cause' as a matter of law, not whether a duty exists."<sup>27</sup> The opinion marks a decisive turn from the foreseeability-driven duty analysis employed by Chief Judge Cardozo in *Palsgraf* and also gives practitioners and lower courts clear instructions for limiting duty in future tort cases.

This Note seeks to be a useful tool to explain the court's decision and its implications to both practitioners and lower courts. The Note begins by exploring the history of New Mexico tort caselaw, charting the development of the role of foreseeability in the duty analysis. Part II ar-

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* (citing *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 15, 148 N.M. 646).

24. *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465 ("In this opinion we clarify and expressly hold that foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases.").

25. *Id.*

26. *Id.*

27. *Id.*

gues that the *Rodriguez* decision properly places the role of foreseeability with the fact-finder, and that by requiring lower courts to cite public policy considerations to limit duty, the result will be an increase in transparency and trust in the legal process. Part III provides guidance to lower courts and to practitioners on crafting policy arguments for the limitation of duty when appropriate. Finally, Part IV discuss the implications of removing foreseeability from the duty analysis, which is a marked change in the legal definition of duty, and may arguably result in little change in practice.

## I. BACKGROUND

This part tracks the history of New Mexico tort caselaw as it relates to the question of the relationship between foreseeability and the existence of a legal duty. As this overview indicates, the role of foreseeability in the duty analysis has often been vague or unclear. It thus provides useful context to understand the clarifying value of *Rodriguez*, which arguably represents the end of the evolution of New Mexico's legal duty analysis.

### A. *History of Legal Duty in New Mexico*

A claim for negligence in New Mexico requires that the plaintiff establish four elements: “(1) defendant’s duty to the plaintiff, (2) breach of that duty, typically based on a reasonable standard of care, (3) injury to the plaintiff, and (4) the breach of duty as cause of the injury.”<sup>28</sup> Whether a duty exists is a question of law for the courts to decide,<sup>29</sup> whereas proximate cause and breach of duty are commonly questions of fact to be determined by the jury.<sup>30</sup> The “foreseeability” of a risk is an element of negligence that is assessed by the jury to determine whether the defendant exercised appropriate care.<sup>31</sup> Foreseeability depends on the specific facts of a case and cannot be used to assess a category of cases because small changes in the facts could change whether the risk was or was not foreseeable.<sup>32</sup> However, New Mexico has utilized “foreseeability” to determine both the legal question of whether a duty to a plaintiff ex-

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28. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 22, 297 P.3d 334.

29. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43.

30. *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 27, 142 N.M. 583.

31. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j.

32. *Id.*

ists,<sup>33</sup> and the factual questions of whether the defendant breached a duty or whether the defendant's actions were the proximate cause of the plaintiff's injuries.<sup>34</sup>

New Mexico's legal duty analysis traces to *Palsgraf*.<sup>35</sup> *Palsgraf* represents a tension as to what is the proper role of foreseeability in analyzing the existence of a legal duty. Chief Judge Cardozo, in his majority opinion, incorporated foreseeability into the legal duty analysis,<sup>36</sup> even though foreseeability was applied separately as a question of fact for the jury in determining causation and breach of duty.<sup>37</sup> Judge Andrews, in his dissent, argued that "[d]ue care is a duty imposed on each of us to protect society from unnecessary danger" and that any divergence from this should be based in policy rather than foreseeability.<sup>38</sup> The New Mexico Supreme Court first adopted Chief Judge Cardozo's foreseeability-driven duty analysis in *Ramirez v. Armstrong*.<sup>39</sup> "Duty and foreseeability have been closely integrated concepts in tort law since the court in *Palsgraf v. Long Island Railroad Company*, stated the issue of foreseeability in terms of duty. If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."<sup>40</sup>

Following *Ramirez*, the court applied a mixture of foreseeability and policy in its definition of legal duty. In *Calkins v. Cox Estates*, for example, the court defined duty as "closely intertwined with the foreseeability of injury to that individual resulting from an activity conducted with less than reasonable care by the alleged tort-feasor,"<sup>41</sup> and held that, "[t]he existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law."<sup>42</sup>

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33. *Herrera*, 2003-NMSC-018, ¶ 20 (citation omitted) ("Foreseeability is a critical and essential component of New Mexico's duty analysis because 'no one is bound to guard against or take measures to avert that which he [or she] would not reasonably anticipate as likely to happen.'").

34. *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 5, 110 N.M. 59 ("In determining proximate cause, an element of foreseeability is also present—the question then is whether the injury to petitioner was a foreseeable result of respondent's breach, i.e. what manner of harm is foreseeable?").

35. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928).

36. *Id.* at 100 ("The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.").

37. *See Calkins*, 1990-NMSC-044, ¶ 5; *see also Torres v. State*, 1995-NMSC-025, ¶ 15, 119 N.M. 609 ("The issue of foreseeability is a question for the jury.").

38. *Palsgraf*, 162 N.E. at 102–03.

39. *Ramirez v. Armstrong*, 1983-NMSC-104, ¶ 9, 100 N.M. 538.

40. *Id.* (citing *Palsgraf*, 162 N.E. 99 (N.Y. 1928)).

41. *Calkins*, 1990-NMSC-044, ¶ 6 (citing *Palsgraf*, 162 N.E. 99 (N.Y. 1928), and *Ramirez*, 1983-NMSC-104).

42. *Calkins*, 1990-NMSC-044, ¶ 8.

Two years later in *Solon v. WEK Drilling Company*,<sup>43</sup> the court again used both factual foreseeability and references to “social policy” to determine the existence of a legal duty. However, this mixed foreseeability and policy duty analysis was criticized. In a special concurrence, Justice Ransom rejected the reasoning of *Calkins* and *Solon*, stating his view that “[t]he crux of the duty analysis that is required, however, is not a factual foreseeability determination, but rather it is a legal policy determination.”<sup>44</sup>

The court began to move away from this definition of duty in *Torres v. State*.<sup>45</sup> In *Torres*, Justice Ransom, writing for the majority, defined foreseeability as “a question of law when a court, in reviewing whether a duty exists, can determine that the victim was unforeseeable to any reasonable mind.”<sup>46</sup> Although the case marked a departure from precedent, it did so without overturning either *Calkins* or *Solon*. Therefore, both methods of determining duty were still good law.<sup>47</sup> Indeed, the New Mexico Court of Appeals identified the three possible methods in which the court could have applied foreseeability:

- (1) As the primary consideration in a legal duty analysis,<sup>48</sup>
- (2) As a necessary element alongside policy considerations;<sup>49</sup>

43. *Solon v. WEK Drilling Company*, 1992-NMSC-023, ¶ 17, 113 N.M. 566 (“It is thoroughly settled in New Mexico . . . that whether the defendant owes a duty to the plaintiff is a question of law. . . . The social policy of cutting off the liability that would otherwise extend to these family members seems sound . . .”).

44. *Id.* ¶ 21 (Ransom, J., concurring).

45. *Torres v. State*, 1995-NMSC-025, 119 N.M. 609.

46. *Id.* ¶ 15.

47. Quinn M. Bumgarner-Kirby, *The Continuing Debate over Tort Duty in New Mexico: The Role of Foreseeability and Policy in Herrera v. Quality Pontiac*, 34 N.M. L. REV. 433, 440 (2004).

48. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2013-NMCA-020, ¶ 8, 297 P.3d 334, *rev'd*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465 (citing *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 13, 111 N.M. 644 (1991) (“[O]nce a duty is established, the foreseeability of harm governs the scope of that duty.”); *Monett v. Dona Ana Cnty. Sheriff’s Posse*, 1992-NMCA-096, ¶ 23, 114 N.M. 452 (“[T]he issue of duty . . . turn[s] on the question of foreseeability.”); *Reichert v. Atler*, 1994-NMSC-056, ¶ 11, 117 N.M. 623 (“The owner’s duty to protect patrons extends to all foreseeable harm.”)).

49. *Rodriguez*, 2013-NMCA-020, ¶ 8 (citing *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 9, 134 N.M. 43 (“The Court of Appeals has similarly recognized that duty requires analysis of both foreseeability and policy.”)); *Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 7, 134 N.M. 789 (“Determination of duty is based in part on whether the injury to the plaintiff was foreseeable. . . . [Yet], policy also determines duty.”); *Chavez v. Desert Eagle Distrib. Co. of New Mexico, LLC*, 2007-NMCA-018, ¶ 16, 141 N.M. 116 (“The initial step in a common law duty analysis is to

(3) Relegated to the less resolute status of a “false jury issue,” which is ripe for summary judgment only when a court determines that no rational trier of fact could find the victim foreseeable.<sup>50</sup>

More recently, the court of appeals utilized a more *Ramirez*-style understanding of foreseeability in *Romero v. Giant Stop-N-Go of New Mexico, Inc.*<sup>51</sup> In *Romero*, the plaintiffs brought suit against a convenience store owner for injuries following a targeted criminal attack by a third party.<sup>52</sup> The court held that although a property owner has a duty to protect business patrons from harm caused by third-party criminal conduct where the conduct and resultant harm were foreseeable,<sup>53</sup> the defendant had no duty to protect from the “sudden, deliberately targeted assassination of customers on its premises.”<sup>54</sup> The court reasoned that foreseeability was a “critical and essential component of New Mexico’s duty analysis.”<sup>55</sup> The *Romero* court considered foreseeability the initial step in the duty analysis—looking to what someone might objectively, reasonably expect to occur with respect to both the status of the plaintiff and the type of harm involved.<sup>56</sup>

Shortly thereafter, the New Mexico Supreme Court in *Edward C. v. City of Albuquerque* held that foreseeability is one factor to consider, but not the principal one, when determining whether a duty exists.<sup>57</sup> *Edward C.* represented a question of what duty is owed by the owners of a commercial baseball stadium to safeguard spectators from projectiles leaving the field of play.<sup>58</sup> The court, relying on public policy considerations, held

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determine whether a particular plaintiff and a particular harm are foreseeable[;] . . . we then determine whether policy considerations preclude the imposition of a common law duty in a particular case.”).

50. *Rodriguez*, 2013-NMCA-020, ¶ 8 (citing *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609 (declaring for the first time—with Justice Ransom as author for the majority—that “policy determines duty”)).

51. 2009-NMCA-059, 146 N.M. 520. See *infra* text accompanying notes 150–156.

52. *Romero*, 2009-NMCA-059, ¶¶ 2–3.

53. *Id.* ¶ 7.

54. *Id.* ¶ 12.

55. *Id.* ¶¶ 7–8 (holding that the purposeful targeted criminal behavior in the parking lot of a convenience store was unforeseeable as a matter of law as result the owner had no duty).

56. *Id.* ¶ 8.

57. 2010-NMSC-043, ¶ 18, 148 N.M. 646, *overruled by*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465 (disapproving the use of foreseeability to limit liability in preference for “articulat[ing] polic[ies] or principle[s] . . . to facilitate more transparent explanations of the reasons for a no-duty [or limited-duty] ruling and to protect the traditional function of the jury as factfinder”) (citing RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j).

58. *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 2, 148 N.M. 646.



that the owner/occupiers of a baseball stadium have a more limited duty than that of the ordinary care owed by a premises owner but did not fully adopt the traditional baseball rule.<sup>59</sup> “We believe that commercial baseball stadium owners/occupants owe a duty to their fans that is justifiably limited given the unique nature of their relationship, as well as the policy concerns implicated by this relationship.”<sup>60</sup> The decision in *Edward C.* was not inconsistent with *Romero* but seems to be the initial step towards a limitation of foreseeability as a part of the duty analysis.

Additionally, *Edward C.* cited to the Restatement (Third) of Torts as support for the holding that foreseeability is but one factor to consider in the determination of duty. However, the Restatement (Third) defines duty as devoid of any consideration of “foreseeability,”<sup>61</sup> not as a factor to be considered. The Restatement (Third) differs from the earlier Restatements in that it seeks to provide a definition of “duty” in Section 7 that was not earlier incorporated. The Restatement defines duty as:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm, (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability to a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modifications.<sup>62</sup>

As a clarification to subsection (b), requiring a countervailing public policy reason to limit duty, comment j specifically limits any assessment of foreseeability to the jury unless no reasonable minds could differ on the matter.<sup>63</sup> *Edward C.* did not fully adopt the definition of duty from the Restatement (Third) but marked the initial step towards such an adoption.

As is evident from the outline of the caselaw above, the role of foreseeability in the duty analysis of tort law was formerly a nebulous concept. Foreseeability as part of the duty analysis moved from an integral factor, to one element alongside public policy considerations, to an issue for consideration only when no reasonable minds could differ. The su-

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59. *Id.* ¶ 41 (“We hold, therefore, that an owner/occupant of a commercial baseball stadium owes a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk.”).

60. *Id.* ¶ 40.

61. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7.

62. *Id.*

63. *Id.*

preme court's decision in *Rodriguez* sought to clarify the law by providing a clear definition of duty as a policy-driven analysis devoid of foreseeability.

*B. Rodriguez v. Del Sol Shopping Center Associates, L.P.*

1. Facts

On March 17, 2006, Rachel Ruiz drove a pick-up truck into the Del Sol Shopping Center in Santa Fe.<sup>64</sup> Ms. Ruiz was aware that the truck had previously experienced mechanical failures, both sudden acceleration and loss of brake controls, and she had been advised not to operate motor vehicles by a physician treating her for seizures.<sup>65</sup> As Ms. Ruiz drove down the 600 ft. straightaway within the parking lot, the truck's accelerator became stuck and the brakes failed.<sup>66</sup> Ms. Ruiz then claimed to have a "baby seizure," causing her to lose consciousness.<sup>67</sup> The truck veered to the left, jumped the curb, missed a concrete pillar, sped across a ten-foot wide pedestrian sidewalk, snapped a metal handrail, and finally crashed through Concentra Medical Clinic's floor-to-ceiling glass wall.<sup>68</sup> A mother and her son as well as a medical receptionist were struck and killed inside.<sup>69</sup> Six other patients were also seriously injured.<sup>70</sup> In the aftermath, Ms. Ruiz pled guilty to three counts of homicide by vehicle and was imprisoned.<sup>71</sup>

2. Lower Court Rulings

The plaintiffs, representatives of the victims and the injured parties, filed separate suits against the owners and operators of Del Sol.<sup>72</sup> The plaintiffs alleged that Del Sol "negligently contributed to the accident by, among other things, failing to adequately post signage; failing to install speed bumps; failing to erect barriers that would have protected build-

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64. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2013-NMCA-020, ¶ 1, 297 P.3d 334, *rev'd*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.

65. *Id.* ¶ 3.

66. *Id.* ¶ 4.

67. *Id.*

68. *Id.*

69. *Id.* ¶ 1.

70. *Id.*

71. *Id.* ¶ 5.

72. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, ¶ 2, 326 P.3d 465.

ings, employees, and visitors from errant vehicles; or failing to use other traffic controls in the parking lot.”<sup>73</sup>

Two district courts granted summary judgment for the defendants, finding that the accident was not “foreseeable” as a matter of law and, therefore, no duty existed.<sup>74</sup> Both courts relied primarily on the holding from *Romero*,<sup>75</sup> that targeted criminal behavior in the parking lot of a convenience store was unforeseeable as a matter of law.<sup>76</sup> The first district court judge to consider the question of duty explained in his memorandum opinion that a finding of foreseeability would require someone to anticipate a remarkable series of events.<sup>77</sup> The decisions and reasoning of the district courts illustrate a foreseeability-driven analysis of duty.<sup>78</sup> The cases were consolidated on appeal.

### 3. New Mexico Court of Appeals

The New Mexico Court of Appeals upheld the trial courts’ summary judgments, but did so on different reasoning. The court focused on the New Mexico Supreme Court’s reasoning in *Edward C.*<sup>79</sup> that applied a more policy-based approach to the determination of duty.

The court began by rejecting the district courts’ reliance on *Romero*<sup>80</sup> and the duty analysis they applied.<sup>81</sup> The court of appeals reasoned that the establishment of legal duty is not possible when the analysis focuses on the minute and infinite number of events that occur before any given event<sup>82</sup> characterizing the analysis as “convoluted” and fallible.<sup>83</sup>

73. *Id.*

74. *Id.*

75. *Romero v. Giant Stop-N-Go of New Mexico, Inc.*, 2009-NMCA-059, ¶¶ 7–8, 146 N.M. 520.

76. *Rodriguez v. Del Sol Shopping Ctr. Associates*, 2013-NMCA-020, ¶ 9, 297 P.3d 334, *rev’d*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.

77. *Id.*

78. *Id.*

79. *Edward C. v. City of Albuquerque*, 2013-NMCA-020, 148 N.M. 646.

80. *Romero v. Giant Stop-N-Go of New Mexico, Inc.*, 2009-NMCA-059, 146 N.M. 520.

81. *Rodriguez*, 2013-NMCA-020, ¶ 10.

82. *Id.* ¶ 9 (“If a single flap of a butterfly’s wings can be instrumental in generating a tornado, so also can all the previous and subsequent flaps of its wings, as can the flaps of the wings of millions of other butterflies, not to mention the activities of innumerable more powerful creatures, including our own species.”) (citing EDWARD N. LORENZ, *THE ESSENCE OF CHAOS* 181 (1995)).

83. *Id.* ¶ 9 (“[T]he now-combined cases serve to illustrate the fallibility of an overly foreseeability-dependent analysis by district courts tasked with determining order in a convoluted area of law . . . .); *see also* *Herrera v. Quality Pontiac*, 2003-

The court looked to the analysis by the supreme court in *Edward C.*, which used "foreseeability to limit liability,"<sup>84</sup> and employed a three-factor test to determine the scope of a defendant's duty of care: (1) the activity in question, (2) the parties' general relationship to the activity, and (3) the public policy considerations.<sup>85</sup> The court also adopted *Edward C.*'s interpretation of foreseeability as "but one factor when determining duty" and drew on the Restatement (Third) to hold that "duty is a policy question."<sup>86</sup>

The court defined the issues before it as whether the "scope of the duty of ordinary care for owners/occupiers in this circumstance incorporated the protection of invitees inside buildings from third-party vehicles uncontrollably straying from the adjacent parking lot."<sup>87</sup> The court applied the three-factor test from *Edward C.*. The court analyzed the first two factors together, and found that the nature of the activity, namely the provision of goods and services to the public in the shopping center and the adjacent parking lot, did not bear an inherent risk of automobile-pedestrian accidents within the buildings.<sup>88</sup> The court also found that the low risk associated with such accidents did not justify a "broadened standard of care to visitors."<sup>89</sup> After, the court analyzed the public policy considerations.<sup>90</sup> The court record lacked any argument that Del Sol was not in full compliance with law, codes, or ordinances regulating the safety of

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NMSC-018, ¶ 42, 134 N.M. 43 ("When we attempt to define legal duty in terms of a foreseeable plaintiff, it is all too tempting to use 'foreseeability' as a surrogate for result-oriented conclusions.") (Bosson, J., concurring).

84. *Rodriguez*, 2013-NMCA-020, ¶ 10 (citing *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 18, 148 N.M. 646).

85. *Rodriguez*, 2013-NMCA-020, ¶ 11.

86. *Id.* ("disapproving the use of foreseeability to limit liability in preference for 'articulat[ing] polic[ies] or principle[s] . . . to facilitate more transparent explanations of the reasons for a no-duty [or limited-duty] ruling and to protect the traditional function of the jury as factfinder'") (quoting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j).

87. *Rodriguez*, 2013-NMCA-020, ¶ 14.

88. *Id.* ¶ 15.

89. *Id.* ¶ 17 (discussing the high number of vehicles using the parking lot per day, the 20 years the shopping center has been operating, and the three vehicle-building collisions to conclude that the low inherent risk in building-vehicle collision of this type is commonly cited in other jurisdictions as a reason not to extend a specific duty of care to this category of accidents); see, e.g., *Mack v. McGrath*, 150 N.W.2d 681, 686 (1967) ("We agree that liability cannot be predicated on the fact that out of the many thousands of vehicles which use parking areas in a normal way, one or two may occasionally jump the curb and expose pedestrians as well as tenants to the remote possibility of injury.").

90. *Rodriguez*, 2013-NMCA-020, ¶ 18.

businesses such as strip malls.<sup>91</sup> In addition, there was no citation to any law indicating the legislature's stance with respect to liability in such instances.<sup>92</sup> In finding no regulation, code, or professional norm of safety, the court looked to New Mexico precedent as well as out-of-state precedent to determine whether the duty of care includes a requirement to protect visitors from third-party harm.<sup>93</sup> The court identified no basis to require premises owners to "anticipate, implement ways to thwart, or to otherwise shoulder the burden of financial liability for the disastrous consequences of remote mechanical and human fallibility. To do so would . . . require premises owners to become absolute insurers of patron safety . . ." <sup>94</sup> The court cited to out-of-state authority that similarly refused to extend a duty in factually similar instances.<sup>95</sup>

In conclusion, the court, while appreciative of the troubling circumstances of the case, held "as a matter of policy, that the owners and operators of Del Sol were not assigned the duty to prevent the tragedy that occurred on its premises, or to protect its patrons from the extraordinary events arising from pervasive modern-day risks."<sup>96</sup>

#### 4. New Mexico Supreme Court

The New Mexico Supreme Court held that foreseeability is "not a factor for courts to consider when determining the existence of a duty or when limiting an existing duty on a particular class of cases."<sup>97</sup> The court reaffirmed the adoption of the Restatement (Third) of Torts: Liability and Emotional Harm, § 7, comment j,<sup>98</sup> ("comment j") and required lower courts "to articulate specific policy reasons, unrelated to foreseeability, if deciding that a defendant does not have a duty or that an existing duty should be limited."<sup>99</sup> The court's rationale relied primarily on the principle that foreseeability determinations are a question a jury considers when it decides whether a defendant acted reasonably under the

91. *Id.* ¶ 21.

92. *Id.*

93. *Id.* ¶ 22.

94. *Id.* ¶ 27.

95. *Id.*; see, e.g., *Carpenter v. Stop-N-Go Markets of Georgia, Inc.*, 512 So.2d 708, 709 (Miss. 1987) ("[N]o duty owed by a convenience store owner to persons inside the store, to erect barriers in order to prevent vehicles from driving through the store's plate glass window.").

96. *Rodriguez*, 2013-NMCA-020, ¶ 29.

97. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465.

98. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7, cmt. j.

99. *Rodriguez*, 2014-NMSC-014, ¶ 1.

circumstances.<sup>100</sup> The court held that foreseeability determinations are reserved for the jury because "such determinations require the jury's common sense, common experience, and its consideration of community behavioral norms."<sup>101</sup>

The New Mexico Supreme Court expanded on the legal framework identified by the court of appeals as controlling on this issue that "an owner/occupier owes a duty of ordinary care under the circumstances . . . unless the owner/occupier can establish a policy reason . . . that compels a limitation on the duty or an exemption from the duty of ordinary care."<sup>102</sup> The court sought to clarify the difference between a foreseeability-driven duty analysis and one based on policy by highlighting cases that properly defined duty as devoid of foreseeability. The court first provided two examples of prior supreme court decisions that limited the duty of ordinary care through the use of public policy considerations. In *Edward C.*, the court limited the duty of baseball stadium owners/occupiers and adopted a limited reading of the "the baseball rule."<sup>103</sup> The other case, *Baldonado v. El Paso Natural Gas Co.*,<sup>104</sup> adopted "the firefighter's rule," limiting the liability of property owners to injuries sustained by firefighters while fighting fires.<sup>105</sup> These examples serve to illustrate a policy-based approach to foreseeability with respect to a class of cases.

The court also distinguished cases that relied too heavily on foreseeability to limit or find no duty. One case the court cited, also included in the Restatement (Third),<sup>106</sup> illustrates such a foreseeability-driven duty analysis.<sup>107</sup> In *Chavez v. Desert Eagle Distributing Co.*,<sup>108</sup> the court held that an alcohol distributor did not owe a duty to the plaintiffs, injured by a drunk driver served alcohol at a casino, due to the un-foreseeability of the harm to that plaintiff. The supreme court rejected this approach, writing, "[f]oreseeability considerations should not be used by a judge to determine the scope of duty, because not even the most experienced judge is capable of anticipating all possible facts that might affect future foreseeability determinations in similar cases."<sup>109</sup> The supreme court further

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100. *Id.* ¶ 4.

101. *Id.* ¶ 22.

102. *Id.* ¶ 5.

103. *Id.* ¶ 6 (citing *Edward C.*, 2010-NMSC-043).

104. *Baldonado v. El Paso Natural Gas Co.*, 2008-NMSC-005, ¶ 2, 143 N.M. 288.

105. *Rodriguez*, 2014-NMSC-014, ¶ 7.

106. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7, cmt. j.

107. *Rodriguez*, 2014-NMSC-014, ¶¶ 8–10.

108. 2007-NMCA–018, ¶1, 141 N.M. 116, *overruled by*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.

109. *Rodriguez*, 2014-NMSC-014, ¶ 9.

rejected cases cited by the court of appeals as illustrating the concept of remoteness.<sup>110</sup> Justice Ransom believed the concept of “remoteness” was a policy determination, not a factual one.<sup>111</sup> However, the court reasoned that, in application, remoteness invites a discussion of foreseeability instead of policy.<sup>112</sup>

The court then rejected the analysis of the court of appeals. First the court clarified that when employing public policy considerations to limit the duty owed by a defendant, the limitation is to the “scope of the duty” not the “scope of ordinary care,” as stated by the court of appeals.<sup>113</sup> The court further admonished the court of appeals for what it viewed as incorrectly focusing on foreseeability considerations by analyzing the facts presented and whether Defendant’s conduct was reasonable under the circumstances.<sup>114</sup> “Courts should not engage in weighing evidence to determine whether a duty of care exists or should be expanded or contracted—weighing evidence is the providence of the jury; instead, courts should focus on policy considerations when determining the scope or existence of a duty of care.”<sup>115</sup>

The supreme court addressed two potential critiques to its opinion. First, the court addressed the contention that finding a duty in this case would make owners/occupiers “absolute insurers of patron safety.”<sup>116</sup> The court countered that the comparative fault system and the role of the jury as fact-finder protects landowners and that the costs identified by the court of appeals to ensure patron safety from such collisions appear to be reasonable as presented by Plaintiffs’ expert witness.<sup>117</sup> Secondly, the court addressed concerns that its ruling would result in courts being unable to dismiss meritless claims at summary judgment. The court held that lower courts may still make the determination that there was “no breach” or “no causation” claims as a matter of law.<sup>118</sup> The court emphasized that

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110. *Id.* ¶ 13.

111. *Id.*; see also Justice Ransom’s discussion of remoteness in *Calkins v. Cox Estates*, 1990-NMSC-044, ¶¶ 23–25, 110 N.M. 59; *Solon v. WEK Drilling Co., Inc.*, 1992-NMSC-023, ¶ 21, 113 N.M. 566.

112. *Rodriguez*, 2014-NMSC-014, ¶ 13 (citing *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 5, 110 N.M. 59 (Ransom, J., concurring)).

113. *Rodriguez*, 2014-NMSC-014, ¶ 16.

114. *Id.* ¶ 22.

115. *Id.* ¶ 19.

116. *Id.* ¶ 27 (citing *Rodriguez v. Del Sol Shopping Ctr. Associates*, 2013-NMCA-020, ¶ 27, 297 P.3d 334, *rev’d*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.).

117. *Rodriguez*, 2014-NMSC-014, ¶ 20.

118. *Id.* ¶ 24 (“[A] directed verdict is appropriate only when there are no true issues of fact to be presented to a jury. A trial court should not grant a motion for

such a decision should only be made if a judge could imagine that twelve jurors, from a variety of diverse socioeconomic backgrounds, could only make the determination of breach or causation one way.<sup>119</sup> The supreme court held that neither district court engaged in such an analysis, and therefore, reversed and remanded the case to the district court for further proceedings.<sup>120</sup>

In effect, the court's opinion requires lower courts to identify a specific public policy consideration, unrelated to foreseeability, when deciding whether a defendant has a duty or if that duty is limited.<sup>121</sup> The court also limited lower courts' consideration of foreseeability in analyzing breach of duty or causation as a matter of law only to instances in which no reasonable mind could differ.<sup>122</sup> "The judge can enter judgment as a matter of law only if the judge concludes that no reasonable jury could decide the breach of duty or legal cause questions except one way."<sup>123</sup> The opinion overruled all caselaw which may be in conflict with its holding, including *Edward C.*, to the extent that these cases may be read to include foreseeability as a limitation to or the exclusion of a legal duty.<sup>124</sup>

## II. ANALYSIS

By adopting the Restatement (Third) comment j,<sup>125</sup> the New Mexico Supreme Court has clarified for lower courts the duty analysis by excluding any consideration of foreseeability from the determination of duty. The supreme court's holding in *Rodriguez* properly removes foreseeability from the duty analysis, as foreseeability is inherently a question of fact appropriately analyzed by the jury. Additionally, by requiring judges to cite to public policy considerations to limit or find no duty, the result will be greater transparency in the legal process.

Although the decision to remove foreseeability from the duty analysis will clarify a formerly complicated duty analysis, the supreme court did not provide guidance to lower courts or to practitioners on when it is appropriate or how to craft effective public policy arguments. Section 7(c-

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directed verdict unless it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result.") (quoting *Torres v. El Paso Elec. Co.* 1999-NMSC-029, ¶ 26, 127 N.M. 729).

119. *Rodriguez*, 2014-NMSC-014, ¶ 24.

120. *Id.*

121. *Id.* ¶ 1.

122. *Id.*

123. *Id.* ¶ 24.

124. *Id.* ¶ 3.

125. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j.



f) of the Restatement (Third) outlines the instances in which it is appropriate to consider policy arguments for limiting or making no duty determinations.<sup>126</sup> Practitioners, as well as the courts, should look to these sections of the Restatement to make arguments for limiting duty of a defendant or to argue against such a limitation on behalf of the plaintiff.

### A. *The Proper Role of Foreseeability*

#### 1. Foreseeability Should Be Left to the Fact-Finder

In addition to providing clarity to a complex area of law, the court properly reserved the factual foreseeability analysis for the jury in removing it from the duty determination.

The United States Supreme Court best articulated the differing roles of judge and jury. “The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”<sup>127</sup> The jury’s role as fact-finder has an important place in the common law’s history, and society values the jury as being a representative cross-section in terms of race, religion, economic class, gender, and other diverse views and backgrounds.<sup>128</sup> As the New Mexico Supreme Court noted in *Rodriguez*, the United States Supreme Court in 1873 wrote that “[i]t is assumed that twelve [people] know more of the common affairs of life than does one [person], that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”<sup>129</sup> The court further observed that the United States and New Mexico Constitutions both contain provisions compelling jury service but contain no other mandatory citizen participation.<sup>130</sup> “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>131</sup> As a result, when judges make factual determi-

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126. *Id.* § 7 cmts. c–f.

127. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

128. *See, e.g., Baldwin v. New York*, 399 U.S. 66, 72 (1970) (“But the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.”); Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407 (1999).

129. *Sioux City & Pac. R.R. v. Stout*, 84 U.S. 657, 664 (1873).

130. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, ¶ 22, 326 P.3d 465 (citing U.S. Const. amend. VII; N.M. Const. art. II, §§ 12, 14; NMSA 1978, § 38-5-1 (2006)).

131. *Dimick*, 293 U.S. at 486.

nations as a matter of law, when in fact reasonable minds could differ, the decision should be closely examined.

Foreseeability is inherently a question of fact as whether an event or plaintiff is foreseeable depends on the specific facts of a case. Arguably, however, prior to the decision in *Rodriguez*, both judge and jury made factual determinations under the guise of foreseeability. Specifically with regards to “no duty” determinations, judges cited that the harm to the plaintiff was unforeseeable as a matter of law.<sup>132</sup> This analysis required that judges look to the specific facts of the case and not to the general standard of care owed by the plaintiff. For example, one of the district court judges in the *Rodriguez* case explained in his memorandum opinion that:

[A] finding of foreseeability would require anticipation of a remarkable confluence of events. Defendants would have had to foresee that a woman, diagnosed with a seizure disorder and advised by her doctor not to drive, would nevertheless decide to drive, that her vehicle would malfunction and the stress of the malfunctioning vehicle would cause her to suffer from a mini-seizure, which would result in her vehicle swerving, jumping a curb, crossing a ten foot covered sidewalk and missing a concrete pillar, and crashing through the front window of a business.<sup>133</sup>

The court entered summary judgment on behalf of the Del Sol Shopping Center, finding “no duty” as a matter of law. In doing so, the judge made both a legal and factual determination. By striking foreseeability from the duty analysis, the court has ensured that foreseeability, which is inherently a question of fact, is left to the jury.<sup>134</sup> The supreme court’s opinion

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132. See *Chavez v. Desert Eagle Distrib. Co. of New Mexico, LLC*, 2007-NMCA-018, ¶ 17, 141 N.M. 116 (“Whether one owes a duty to another rests in part on whether the resulting harm was foreseeable to the defendant.”); *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 8, 134 N.M. 43 (“Both questions of foreseeability are distinct; the first must be decided as a matter of law by the judge, using established legal policy in determining whether a *duty* was owed petitioner, and the second, proximate cause, is a question of fact.”).

133. *Rodriguez v. Del Sol Shopping Ctr. Associates*, 2013-NMCA-020, ¶ 9, 297 P.3d 334, *rev’d*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465.

134. *But see*, Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 275–76 (2012). Professor Alan Golanski argues a distinction between the foreseeability analyses made by the judge in determining duty versus the analysis by jury under the breach or causation analysis. The jury deliberates on “the evidence and applies the law to the facts, it asks whether the defendant was in a position to foresee harm—either some harm or the particular harm—or whether, given the circumstances, it should have foreseen—such

in *Rodriguez* contains strong language regarding the limited circumstances in which a judge can usurp the role of the jury. “This determination requires judges to abandon their own personal thoughts regarding the merits of cases and to imagine the thoughts of twelve adult citizens from a variety of socioeconomic backgrounds—such as scientists, college faculty, laborers, uneducated, rich, poor, persons with different political persuasions—and what that diverse group might find regarding the merits of a case.”<sup>135</sup>

## 2. A Policy-Driven Duty Analysis Will Lead to Greater Transparency

In addition to maintaining the factual question of foreseeability for the jury, the adoption of the comment j, also ensures greater transparency in the judicial process. Prior to *Rodriguez*, when a judge made a no duty determination based upon a lack of foreseeability, the decision possibly acted as a shield for the motivation or reasoning of the judge. The holding operated as a legal fiction when a judge was in fact weighing policy concerns or doubted the defendant had breach or caused the harm to the plaintiff.<sup>136</sup> “The more flexible, nebulous, or undefined a legal concept, the more likely it is to be used as a front, a screen for the real reasons that a court reaches its decision. To the extent that foreseeability serves as cover for judicial discretion, it enshrouds the decision making process and creates an impression of arbitrariness.”<sup>137</sup> After *Rodriguez*, judges are compelled to state specific public policy considerations to limit or exclude

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that a reasonable actor would have foreseen—the harm.” *Id.* at 275. While a judge’s foreseeability analysis “look(s) at the relationship of the parties, the nature of the plaintiff’s interest and the defendant’s conduct, and the public policy in imposing a duty on the defendant. [The court] look[s] at both foreseeability and whether the obligation of the defendant is one to which the law will give recognition and effect.” *Id.* at 276. Golanski argues that this assessment takes into account “community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law.” *Id.*; see also W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 672 (2008); Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 269–70 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 661–62 (2001).

135. *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014-NMSC-014, ¶ 24, 326 P.3d 465.

136. W. Jonathan Cardi, *Purging Foreseeability the New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 787 (2005) (“[C]ourts sometimes ostensibly decide the issue of duty on grounds of foreseeability, when in fact their decisions rest on considerations of public policy.”).

137. Cardi, *supra* note 136, at 793.

a duty to a plaintiff.<sup>138</sup> This will lead to greater transparency in the legal process and as a result, to more trust in judicial decisions by attorneys and parties.<sup>139</sup>

For example, in *Chavez v. Desert Eagle Distributing Company of New Mexico*, the plaintiffs brought a negligence action against a casino and an alcohol distributor after being injured in an automobile accident involving a drunk driver who was served alcohol distributed by the wholesaler to the casino.<sup>140</sup> The court held that Desert Eagle had no duty to the plaintiff because the sale of alcohol by a distributor to such an establishment does not make the foreseeability of an alcohol-related accident anything more than speculation.<sup>141</sup> Although the decision cited a lack of foreseeability, the court could have used foreseeability to shield its true reasoning. For example, the judge may have considered whether, as a matter of policy, a duty should exist between the distributor and the injured party even though the distributor did not personally serve the drunken individual. The judge may have also questioned whether the casino had in fact breached its duty. The Restatement (Third) acknowledged the awkwardness of the court's analysis:

Had the court eschewed foreseeability as a rationale and instead recognized that the wholesalers were not negligent as a matter of law for refusing to sell alcohol to a licensed retailer who was going to sell it legally, it could have avoided the awkwardness of acknowledging that the risk was foreseeable but relying on foreseeability to conclude the defendants owed no duty to the plaintiffs.<sup>142</sup>

Additionally, there is evidence that the court weighed the specific facts of the case and that if there had been evidence the distributor knew the casino served alcohol in violation of state or tribal law, the outcome might have been different.<sup>143</sup> On close inspection, this reasoning could be more appropriate in support of a holding that the distributor did not breach its duty or that the distributor was not the proximate cause of the accident as a matter of law.

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138. *Rodriguez*, 2014-NMSC-014, ¶ 1.

139. See William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069, 1099 (1999) (“[T]he Rule of Law is impossible without transparency and the accountability it makes possible.”).

140. *Chavez v. Desert Eagle Distributing Company of New Mexico*, 2007-NMCA-018, ¶¶ 2–4, 141 N.M. 116.

141. *Id.* ¶ 24.

142. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7.

143. *Chavez*, 2007-NMCA-018, ¶ 23.

In the case of *Rodriguez*, the lower courts used a foreseeability-driven duty analysis to hold that the Defendants owed no duty to the Plaintiffs. Whether the decision was purely based on the judges' interpretation of foreseeability or whether foreseeability was used to mask an alternative reasoning is purely speculative. However, on remand, if the judges believe that summary judgment is still appropriate, they must look to specific public policy considerations for limiting or finding no duty or must hold that no reasonable juror could find that Del Sol breached their duty or caused the injury. Either of these holdings by the court would lead to greater transparency, giving insight into what the court considered in making its determination other than whether the accident was "foreseeable."

### *B. Guidance for Crafting No Duty Arguments Based on Public Policy*

The Restatement (Third) of Torts, Section 7 makes it appropriate to consider exempting or limiting the defendant's duty in five contexts, outlined in subsections c–g of Section 7:<sup>144</sup> (1) where a duty of care conflicts with social norms such as when courts have held that "commercial establishments that serve alcohol have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts do not have a similar duty to those who might be injured by their guests;"<sup>145</sup> (2) where a duty conflicts with another domain of law, such as when courts have relied upon the First Amendment concerns to limit liability of media publishers where plaintiffs allege physical harm caused by the content of a publication;<sup>146</sup> (3) where a duty should be limited by a relational limitation, such as when the court may hold a landowner liable for harm to a guest but not a trespasser;<sup>147</sup> (4) where a

144. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7; *see also*, DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* § 255 (2014).

145. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. c; *see, e.g.*, *Walker v. Key*, 1984-NMCA-067, ¶ 29, 101 N.M. 631 ("In adopting Section 41-11-1, the legislature intended to limit the rights of third parties to recover against social hosts who provided alcoholic beverages to intoxicated guests who negligently injure a third party. The enactment of this statute did not create a new cause of action but instead was a limitation on existing rights."); *but see* NMSA 1978, § 41-11-1 (1986) (protecting social hosts from liability).

146. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. d.

147. RESTATEMENT § 7 cmt. e; *see also* *Ford v. Bd. of County Com'rs of County of Dona Ana*, 1994-NMSC-077, ¶ 7, 118 N.M. 134 ("We now undertake . . . to follow the minority of jurisdictions that have eliminated the distinction between licensees and invitees, and substitute instead a single standard of reasonable care under the circumstances, while retaining trespassers as a separate classification.").

category of negligence claims would be difficult to adjudicate,<sup>148</sup> such as where the "the plaintiff asserts that it is negligent to make motor vehicles at all,"<sup>149</sup> and (5) where deference to another branch of government may be appropriate, such as courts limiting the duty owed by the government in deciding how best to allocate police protection.<sup>150</sup> These five sections should be utilized by practitioners in crafting arguments to limit duty of a defendant or by the court in determining whether such a limitation is appropriate. This list should serve as a guide but there may be unanticipated instances that cannot be specifically placed under one category over another.

### 1. A New Look at *Romero* Under *Rodriguez*

In *Romero v. Giant Stop-N-Go of New Mexico, Inc.*, the plaintiffs, as personal representatives of the estates of two shooting victims, filed premises liability claims against the convenience store owner arising from a shooting incident that occurred in the store's parking lot.<sup>151</sup> Before arriving at the store, the victim, Eric Tollardo, threatened the shooter, Jason Parea, in his home.<sup>152</sup> After Tollardo left, Parea loaded two guns and went in search of him.<sup>153</sup> Parea drove around the town of Taos for two to three hours and eventually spotted Tollardo's car parked in the Defendant's parking lot.<sup>154</sup> Parea exited the vehicle and, believing he had been shot at, began firing at the vehicle.<sup>155</sup> He killed Tollardo and two other passengers and seriously injured a fourth person.<sup>156</sup> Although a property owner has a duty to protect business patrons as the victims from harm caused by third-party criminal conduct where the conduct and resultant harm were foreseeable,<sup>157</sup> the court held that the Defendant had no duty to protect from the "sudden, deliberately targeted assassination of customers on its premises."<sup>158</sup>

The court in *Romero*, used a foreseeability-driven analysis to hold there was no duty owed by the Defendant. However, if the case were to be re-examined now, post-*Rodriguez*, the court should look to the five

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148. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. f.

149. DOBBS, *supra* note 144.

150. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. g.

151. *Romero v. Giant Stop-N-Go of New Mexico, Inc.*, 2009-NMCA-059, ¶ 2, 146 N.M. 520.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* ¶ 2.

156. *Id.*

157. *Id.* ¶ 7.

158. *Id.* ¶ 20.

instances in which policy-driven no duty analyses are appropriate to craft a policy reason to limit or find no duty. The principles most likely to be utilized in *Romero* could be whether a duty of care conflicts with social norms,<sup>159</sup> or whether a duty should be limited by a relational limitation.<sup>160</sup> The court could consider whether as a societal norm it is unreasonable to require business or premise owners to protect against the criminal actions of a third party, especially when such acts are targeted at a specific individual or individuals. Additionally, the court could look to the relationship between the property owner, the patron, and the criminal to find that although the property owner owes a duty to the patron, third party acts of the criminal intervene in a manner sufficient to relieve a defendant from a duty of care.<sup>161</sup>

### III. IMPLICATIONS

Some critics of the Restatement's definition of duty believe that by removing foreseeability from the duty analysis, the court has left the door open to the adjudication of meritless claims and to greater liability and cost for defendants to protect against unforeseeable harm. However, the adoption of comment j<sup>162</sup> will most likely have little if any effect on the practice of tort law or the outcome for the majority negligence cases. Moreover, for those few cases which would have been limited by a finding of "no duty" based on a lack of foreseeability, protecting the jury's role as fact-finder surpasses any financial cost to these possible defendants.

First, it is important to remember that there are safeguards in place to protect against baseless litigation. Plaintiffs still need to show a *prima facie* case of negligence and the New Mexico rules of ethics prohibit lawyers from bringing frivolous claims.<sup>163</sup> Additionally, a defendant is able to

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159. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. c.

160. See *id.* § 7 cmt. e.

161. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 21, 134 N.M. 43 (“[a]s a general rule, a person does not have a duty to protect another from harm caused by the criminal acts of third persons unless the person has a special relationship with the other giving rise to a duty.’ . . . However, ‘the criminal acts of a third person will not relieve a negligent defendant of liability if the defendant should have recognized that his or her actions were likely to lead to that criminal activity.’”).

162. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j.

163. Rule 16-301 NMRA; see also Rule 1-011 NMRA (requiring attorneys to sign all pleadings).

recover for attorney's fees if such a claim is determined to be frivolous or meritless.<sup>164</sup>

Furthermore, Professor Joseph Cardi, in his analysis of the Restatement's purge of foreseeability from the determination duty, provides a useful example of negligence claims brought by the victims of handgun-related violence against manufacturers as an example of how the new analysis may have little if any effect on the outcome of cases.<sup>165</sup> Cardi writes that even if gun manufacturers had a duty to the victims of gun-related violence, that most likely, courts would dismiss the case as a matter of law for breach or proximate cause.

In the absence of evidence that a particular gun manufacturer intentionally set out to attract criminal customers . . . many claims of negligent product design, marketing, or distribution are supported by reasonable sales-related goals and thus potentially amenable to summary judgment on the issue of breach. Furthermore, even when it was foreseeable to a gun manufacturer that a particular design or sales practice might lead to guns falling into the hands of dangerous individuals, the costs of avoiding such a result might well lead a court to rule against breach as a matter of law. In addition, many gun-related cases are subject to dismissal as a matter of law for lack of proximate cause, either because "the route that a gun takes from manufacturer to the city streets [is] "long and tortuous," or because most such cases involve superseding gross negligence or intentional misconduct on the part of the gun owner or victim.<sup>166</sup>

This example could also be used to show how a court may cite a specific public policy consideration for limiting or finding no duty. In *Sambrano v. Savage Arms, Inc.*,<sup>167</sup> the personal representative of the estate of a shooting victim and his wife brought a wrongful death action against both the manufacturer of the rifle and the manufacturer of the

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164. *Seipert v. Johnson*, 2003-NMCA-119, ¶ 12, 134 N.M. 394 ("In New Mexico, a court may award attorney fees 'to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.") (quoting *State ex rel. New Mexico State Highway & Transp. Dept. v. Baca*, 1995-NMSC-033, ¶12, 120 N.M. 1); see, e.g., Jonathan Fischbach, Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 *BYU J. PUB. L.* 317, 317 (2005).

165. Cardi, *supra* note 136, at 807–08.

166. *Id.* at 807 (citing Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 *S.C. L. REV.* 907, 909 (2002); Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 *TEMP. L. REV.* 825, 829 (2004).

167. 2014-NMCA-113, 338 P.3d 103.



rifle lock, which were packaged and sold together as a set.<sup>168</sup> An intruder had entered the home of the defendant and killed the victim after unlocking the rifle without a proper key.<sup>169</sup> The court of appeals held that the Protection of Lawful Commerce in Arms Act (PLCAA)<sup>170</sup> insulated the rifle manufacturer and lock manufacturer from liability from criminal or unlawful misuse of a firearm.<sup>171</sup> In a special concurrence, Judge Vigil agreed with the court's opinion but believed that such analysis under the PLCAA was unnecessary as the manufacturer, Savage, had no duty to the plaintiff and cited as support public policy reasons to deny such a duty.<sup>172</sup> "There is no relationship between the manufacturer, the shooter, and the victim that justifies imposing such a legal duty upon the manufacturer. Further, the manufacturer played no role in creating the risk suffered by Plaintiffs, nor is there any ability on the part of the manufacturer to control that risk."<sup>173</sup> Judge Vigil further cited to other jurisdictions that have found no duty of gun manufacturers to victims of gun related crimes based on "no duty" determinations.<sup>174</sup> In both these examples, as either no breach/no causation or no duty as a matter of policy, gun manufacturers are not liable to the victims of injuries due to criminal acts of a third party. This serves as one example of how the court's decisions in *Rodri-*

168. *Id.* ¶ 2.

169. *Id.*

170. 15 U.S.C. §§ 7901–03 (2012).

171. *Sambrano*, 2014-NMCA-113, ¶ 1.

172. *Id.* ¶¶ 17–18.

173. *Id.*; *But see* *Smith v. Bryco Arms*, 2001-NMCA-090, ¶ 26, 131 N.M. 87, in which the court engaged in a different analysis of the duty owed to the victim of a gun accident brought as a product liability claim. "The basic policy decision has been made that the duty of a product distributor extends to persons who can be foreseeably injured by a defective product—including injuries caused by foreseeable misuse of the product if the defect proximately contributes to the injury." *Id.*

174. *Sambrano*, 2014-NMCA-113, ¶ 18 (concluding that gun manufacturers are under no legal duty to protect citizens from the deliberate and unlawful use of their products by applying a five factor test to determine if sound public policy dictates that a particular plaintiff is entitled to protection) (citing *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F.Supp.2d 882, 898–903 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002)); *Bloxham v. Glock Inc.*, 53 P.3d 196, 199 (Ariz. Ct. App. 2002) (considering public policy and holding that a gun manufacturer owed no duty to plaintiffs where the gun was sold at a gun show and the purchaser later used the gun to shoot and kill the victims); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 204–05 (Ark. 1995) (holding that the manufacturer of a handgun owed no duty to the victim who was murdered); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1059–63 (N.Y. 2001) (holding that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of their handguns to persons killed or injured through the use of illegally obtained handguns, and concluding that public policy does not justify imposing such a duty).

*quez*, although arguably a major shift in the law, may have little effect on the outcome of cases either at the summary judgment stage or through trial.

Finally, there may be some rise in the financial cost of litigation by defendants who previously may have avoided trial by arguing no duty based on foreseeability. This is most likely to be the case in those instances in which no duty has been established and in those cases with unbelievable facts like *Rodriguez* or *Palsgraf*. However, as stated earlier, allowing foreseeability to be assessed as a matter of law by the judge undercuts the jury's role as fact-finder. The importance of protecting the role of the jury outweighs any additional financial cost to defendants, and *Rodriguez* is consistent with this view.

In conclusion, although it seems unlikely the *Rodriguez* opinion dramatically changed the landscape of tort litigation in New Mexico, defendants are still protected from meritless claims by the safeguards in place and any additional financial cost is outweighed by the importance of protecting the role of the jury.

## CONCLUSION

In *Rodriguez v. Del Sol Shopping Center*, the New Mexico Supreme Court clarified and arguably put an end to the debate regarding the role foreseeability plays in the determination of a legal duty that a defendant owes to a plaintiff in a suit for negligence. In removing foreseeability from the duty analysis, the court properly ensured that factual-based analyses are left to the jury. Additionally, by requiring lower courts to state specific public policy considerations in the limitation of duty, the court ensured greater transparency and greater trust in the judicial process. This note has sought to provide some guidance to both practitioners and lower courts on the appropriate policy arguments that may be crafted to limit duty. Additionally, this note sought to provide some assurances that there may be little effect on the practice of tort law and therefore, possibly little additional cost to defendants.

