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Tort Law - Occupiers of Land Must Exercise Reasonable Care for All Lawful Visitors: Ford v. Board of County Commissioners of the County of Dona Ana

Samuel E. Tuma

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TORT LAW—Occupiers of Land Must Exercise Reasonable Care For All Lawful Visitors: *Ford v. Board of County Commissioners of the County of Doña Ana*

I. INTRODUCTION

In *Ford v. Board of County Commissioners of the County of Doña Ana*,¹ the New Mexico Supreme Court held that landowners² must exercise reasonable care to keep their premises safe for all lawful visitors.³ Prior to *Ford*, a landowner's duty to lawful visitors varied with the status of the visitor: landowners owed a duty of reasonable care to invitees, but a lesser standard of care to licensees.⁴ The *Ford* court abandoned New Mexico's traditional distinctions between invitees and licensees, but retained the common law rules limiting a landowner's duty to trespassers.⁵ This Note describes *Ford's* historical context, examines the *Ford* court's rationale, and explores the implications of the decision.

II. STATEMENT OF THE CASE

Plaintiff-Appellant Billie Jo Ford ("Plaintiff") sued the County of Doña Ana for injuries she suffered when she fell on a slippery walkway outside her place of employment.⁶ Plaintiff worked for the New Mexico Veterans Service Commission, a state agency, in Las Cruces, New Mexico. The agency rented its office building from the County of Doña Ana, which owned and controlled the walkway.

The walkway, which the agency's clients used to enter its office building, collected water and became slick when it rained. On the day of her accident, Plaintiff entered the walkway after a rainstorm to determine if the walkway was safe for her disabled client to use. Plaintiff fell while testing the walkway.

At trial, the district court instructed the jury that Plaintiff was a licensee of the County.⁷ Due to Plaintiff's status as a licensee, the County owed her no duty to repair the walkway because Plaintiff was aware of

1. 118 N.M. 134, 879 P.2d 766 (1994).

2. Although most premises liability lawsuits are against landowners, the party in possession of the real estate generally incurs legal liability for conditions and activities conducted on the premises. See RESTATEMENT (SECOND) OF TORTS § 328E (1965). This Note uses the term "landowner" to mean the party liable for injuries to visitors. For a discussion of the factors that determine a party's legal liability, see JOSEPH A. PAGE, LAW OF PREMISES LIABILITY § 1, (2d ed. 1988).

3. See *Ford*, 118 N.M. at 139, 879 P.2d at 771. This Note uses the term "lawful visitors" to include all visitors who enter a landowner's premises with permission, either express or implied. The term includes licensees and invitees but excludes trespassers.

4. *Id.* at 136, 879 P.2d at 768. For definitions of "invitee" and "licensee," see *infra* notes 18-19.

5. *Id.* at 137, 879 P.2d at 769.

6. *Id.* at 135, 879 P.2d at 767. All subsequent factual references refer to this citation, unless otherwise cited.

7. See *id.* at 136, 879 P.2d at 768.

its dangerous condition.⁸ Consequently, the jury rendered a verdict for the County and Plaintiff appealed.⁹

The court of appeals disagreed with the trial court and found that Plaintiff was a public invitee.¹⁰ In order to determine the County's duty to Plaintiff, the court of appeals certified the following question to the New Mexico Supreme Court: "[is] the duty owed to a public invitee the same as the duty owed to a business visitor[?]"¹¹ In response, the supreme court stated that Plaintiff, as an employee of the County's tenant, was in fact a business visitor of the County and not a public invitee.¹² The supreme court held that the district court had given the wrong jury instruction describing the County's duty to Plaintiff¹³ and remanded the case for a new trial.¹⁴

In making its decision, the *Ford* court abandoned New Mexico's common law rules which determined a landowner's duty to lawful visitors based upon their classifications as either invitees or licensees.¹⁵ In place of the common law rules, the court established a single duty standard of reasonable care for all lawful visitors.¹⁶ The *Ford* court declined to extend the reasonable care standard to cases involving trespassers.¹⁷

III. BACKGROUND

Early common law defined a landowner's duty to visitors based upon the visitor's status as either an invitee,¹⁸ licensee,¹⁹ or trespasser.²⁰ Land-

8. *Id.* In New Mexico, a landowner's duty to a licensee is described in N.M. UNIF. JURY INSTRUCTION CIV. 13-1308 (Repl. Pamp. 1991). The instruction which was given to the jury reads: 13-1308. Duty to a licensee.

An [owner] [occupant] owes a duty to a licensee if, and only if:

(1) [He] [She] knows or has reason to know of a condition of [his][her] land involving an unreasonable risk of harm to the licensee; and

(2) [He] [She] should reasonably expect that the licensee will not discover or realize the danger. In such case, [he] [she] has a duty to make the condition safe or to warn the licensee of the condition and risk involved; however, if the licensee knew or had reason to know of the condition, the [owner] [occupant] has no duty to warn.

9. *Ford*, 118 N.M. at 136, 879 P.2d at 768.

10. *Id.* The *Ford* court described a public invitee as "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 332(2) (1965)).

11. *Id.*

12. *Id.* at 137, 879 P.2d at 769.

13. *Id.*

14. *Id.* at 140, 879 P.2d at 772.

15. *See id.* at 137, 879 P.2d at 769. New Mexico's rules of premises liability are described in N.M. UNIF. JURY INSTRUCTION CIV. Ch. 13 (Repl. Pamp. 1991).

16. *See id.*

17. *Id.*

18. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 62, at 432 (5th ed. 1984). At early common law, "invitees" only included visitors who were on the landowner's premises for a purpose connected with the landowner's business, such as patrons of a store. *Id.* § 61, at 419. Many modern courts have redefined invitees to include visitors whose presence conferred any economic benefit upon the landowner, and "public invitees," such as visitors using public lands. *Id.* § 61, at 420, 422. Invitees are also called "business visitors." *Id.* § 61, at 419.

19. "Licensees" are visitors who enter a landowner's premises with permission, either express or implied, but who do not fall into the category of invitees. *Id.* § 60, at 412-413.

20. Trespassers are visitors who enter land in possession of another without the possessor's consent. *Id.* § 58, at 393.

owners had a duty to exercise reasonable care to make their premises safe for invitees.²¹ In contrast, landowners generally had no duty to licensees or trespassers except to refrain from injuring them by willful, wanton, or reckless conduct.²² Even though all common law jurisdictions continued to use this classification scheme until the late 1950s, it was criticized as mechanical, unduly complex, and overly protective of property owners' interests at the expense of safety to individuals.²³ In order to ameliorate the harsh results of these rules, courts created subcategories within the traditional classifications of invitees, licensees, and trespassers, each with differing duties of care.²⁴ However, the resulting abundance of categories and subcategories created a complex system that was confusing and difficult to apply.²⁵

A. *Modern Developments in Landowner's Liability Law in Other Jurisdictions*

In 1957, England abandoned the common law rules of premises liability when Parliament passed the Land Occupier's Liability Act.²⁶ The English statute eliminated the strict distinctions between invitees and licensees and imposed upon landowners a uniform duty of reasonable care to keep their premises safe for all lawful visitors.²⁷ The statute made no change in the law governing a landowner's liability to trespassers.²⁸

Approximately two years after enactment of the English statute, the United States Supreme Court criticized the rigid common law rules in *Kermarec v. Compagnie Generale Transatlantique*.²⁹ The *Kermarec* Court refused to adopt the common law rules in maritime premises liability cases.³⁰ The Court reasoned that the common law rules developed during a time of feudalism and were inappropriate in a modern urban society.³¹ *Kermarec* noted that modern courts had created a "semantic morass" of confusion and conflict in their attempts to adapt the rigid rules to modern cases.³²

21. *Id.* § 61, at 419.

22. *Id.* § 60, at 415. Courts created many exceptions to the general rule regarding a landowner's duty to trespassers and licensees, such as the duty to refrain from injuring a trespasser or licensee by willful or wanton conduct, the duty to exercise reasonable care once the trespasser's presence is known, and special rules regarding a landowner's duty to child trespassers. See generally *id.* § 59.

23. *Id.* § 62 at 422.

24. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959); see generally RESTATEMENT (SECOND) OF TORTS § 333-345 (1965) (outlining subcategories such as "known trespassers," "child licensees," "public officers," etc. which create exceptions to the duty rules for the general categories of trespassers, licensees, and invitees).

25. See *Kermarec*, 358 U.S. at 630-31.

26. Land Occupier's Liability Act, 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.). For a detailed history and analysis of the Act, see Douglas Payne, *The Occupier's Liability Act*, 21 MOD. L. REV. 359 (1958).

27. Payne, *supra* note 26, at 359.

28. *Id.*

29. 358 U.S. 625, 631 (1959).

30. *Id.* at 632.

31. *Id.* at 630.

32. *Id.* at 631.

In 1968, California became the first state to abandon the traditional common law distinctions between invitees, licensees and trespassers.³³ In *Rowland v. Christian*,³⁴ the California Supreme Court, relying in part upon *Kermarec*, held that ordinary negligence principles determined a landowner's duty to all visitors upon her land.³⁵ The court listed the following factors for California courts to use in determining a landowner's duty to visitors:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.³⁶

The court noted that these factors often bear no significant relationship to the common law classifications of invitee, licensee, and trespasser.³⁷

Unlike England's statute, *Rowland* extended the duty of reasonable care to trespassers.³⁸ The court reasoned that the foreseeability of harm to the visitor, and the burden on the landowner of exercising reasonable care to keep her premises safe, are often no different for the trespasser than for other visitors.³⁹

After *Rowland*, eight states and the District of Columbia followed California's lead and completely eliminated the traditional common law rules of premises liability in favor of general negligence principles.⁴⁰ Eight other states followed England's example, eliminating only the distinctions between invitees and licensees while retaining the common law rules limiting a landowner's duty to trespassers.⁴¹

33. KEETON ET AL., *supra* note 18, § 62, at 432.

34. 443 P.2d 561 (Cal. 1968).

35. *Id.* at 568.

36. *Id.* at 564. The court stated that a plaintiff's status as trespasser, licensee, or invitee may have some bearing on the question of liability, but the classification is no longer determinative. *Id.* at 568.

37. *Id.* at 567. Justice Burke argued that the decision would open the door to unlimited liability and reasoned that such sweeping reform is the legislature's job. *Id.* at 569 (Burke, J., dissenting).

38. *Id.* at 568.

39. *Id.* at 567.

40. See, e.g., *Smith v. Arbaugh's Restaurant, Inc.* 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Webb v. Sitka*, 561 P.2d 731 (Alaska 1977); *Mile High Fence Co. v. Radovich* 489 P.2d 308 (Colo. 1971); *Pickard v. City and County of Honolulu*, 452 P.2d 445 (Haw. 1969); *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833; *Ouellette v. Blanchard*, 364 A.2d 631 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868 (N.Y. 1976); *Mariorenzi v. Joseph Di Ponte, Inc.* 333 A.2d 127 (R.I. 1975); and *Limberhand v. Big Ditch Co.*, 706 P.2d 491 (Mont. 1985); see generally, *Landowner Liability—Injured Party Status*, 22 A.L.R.4TH 294, 301-07 (1983 & Supp. Sept. 1994). Illinois has also abolished the distinctions for child visitors. See *Cope v. Doe*, 464 N.E.2d 1023 (Ill. 1984).

41. See e.g., *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Zimring v. Wendrow*, 485 N.E.2d 478 (Ill. 1985); *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984); *Antoneiwicz v. Reszcynski*, 236 N.W.2d 1 (Wis. 1975); see also *Landowner Liability—Injured Party Status*, 22 A.L.R.4TH 294, 307-10 (1983 & Supp. Sept. 1994).

B. New Mexico Landowner's Liability Law Before Ford

New Mexico courts first applied the early common law rules of premises liability in 1909.⁴² In 1966, New Mexico adopted more complex versions of the rules, including the expanded subcategories⁴³ outlined in the Restatements (Second) of Torts.⁴⁴ New Mexico courts applied the Restatements' versions of the common law rules until *Ford*.⁴⁵ In 1991, however, in *Bober v. State Fair of New Mexico*,⁴⁶ the New Mexico Supreme Court indicated that it might abandon the common law rules in favor of a single standard of reasonable care in premises liability cases.⁴⁷ The *Bober* court reasoned that a landowner must exercise reasonable care to ensure that activities conducted on her land do not endanger persons outside the land's physical boundaries.⁴⁸ The court stated in dicta that a landowner's duty to others is not determined "by the identity of the person injured (e.g., an invitee, licensee, or other entrant upon the land . . .)." ⁴⁹ Thus, *Bober* foreshadowed *Ford's* elimination of the common law distinctions between a landowner's duty to invitees and licensees.⁵⁰

IV. RATIONALE OF THE FORD COURT

In *Ford*, the New Mexico Supreme Court looked beyond the rigid and technical common law rules of premises liability, and applied ordinary negligence principles in determining a landowner's duty to lawful visitors.⁵¹ The *Ford* court reasoned that the principal issue should *not* be, "in what category shall we place the injured person," but rather, whether the landowner managed her property as a reasonable person in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.⁵² The court recognized that a visitor's status as either a licensee or invitee may

42. See *Chavez v. Torlina*, 15 N.M. 53, 99 P. 690 (1909) (holding that a landowner's only duty to a licensee or trespasser was to refrain from any wanton or willful act producing injury).

43. See *supra* notes 18-25 and accompanying text.

44. See *Mozert v. Noeding*, 76 N.M. 396, 400, 415 P.2d 364, 366-67 (1966). Prior to *Mozert*, New Mexico's Uniform Jury Instruction on the duty of a landowner to a licensee or trespasser read: "An (owner) (occupant) has no duty to use ordinary care to see that his premises are reasonably safe for a (trespasser) (licensee) (social guest)." N.M. UNIF. JURY INSTRUCTION CIV. No. 10.2 (1966).

45. See *Ford*, 118 N.M. at 136, 879 P.2d at 768 (recognizing that the court of appeals had found that Plaintiff was a public invitee within the RESTATEMENT'S view).

46. 111 N.M. 644, 808 P.2d 619 (1991).

47. See *id.* at 648, 808 P.2d at 618.

48. See *id.* at 650, 808 P.2d at 620. In support of its reasoning, the court referred to N.M. UNIF. JURY INSTRUCTION CIV. 13-1604, which reads: "Every person has a duty to exercise ordinary care for the safety of the person and the property of others." See *id.* at 648, 808 P.2d at 618.

49. *Bober*, 111 N.M. at 648, 808 P.2d at 618. The court recognized that, under New Mexico law, the status of the victim is usually relevant in determining the landowner's duty. *Id.* at 648 n.5, 808 P.2d at 618 at n.5. The court noted, however, that many states had criticized the common law rules governing landowner's liability and had replaced them with a single duty of reasonable care under the circumstances. *Id.*

50. See *Ford*, 118 N.M. at 137, 879 P.2d at 769.

51. See *id.* at 138, 879 P.2d at 770.

52. See *id.* at 139, 879 P.2d at 771 (citation omitted).

still be a factor in the analysis, but concluded that the visitor's status will no longer be the determining factor.⁵³

The *Ford* court also recognized that New Mexico's uniform jury instructions for premises liability "have the potential of creating much confusion."⁵⁴ The abundance of confusing instructions on the duty of care owed to licensees and invitees reinforced the court's decision to abandon the common law distinctions.⁵⁵ The facts of *Ford* illustrate the court's point.⁵⁶ In *Ford*, three separate courts determined three different classifications for the plaintiff,⁵⁷ demonstrating that New Mexico's courts could not consistently apply its confusing common law rules.

The *Ford* court limited its holding to licensees and invitees, declining to extend ordinary negligence principles to cases involving trespassers.⁵⁸ The court gave two reasons for its decision to retain trespassers as a separate category.⁵⁹ First, the court stated that licensees and invitees enter a landowner's property under color of right, whereas the trespasser has no legal basis for claiming protections.⁶⁰ Second, the court reasoned that abandonment of the trespasser status might place an unfair burden on landowners who have no reason to expect a trespasser's presence.⁶¹

The *Ford* court gave its decision retroactive effect.⁶² The court stated that the decision will "apply to all cases involving entrants upon land 'who are entitled to reasonable care under the circumstances, except such cases as have been concluded by judgment or settlement or have been barred by the running of a statute of limitations.'"⁶³

The *Ford* court relied upon other jurisdictions for its reasoning.⁶⁴ The holding in *Ford*, however, is consistent with the New Mexico judiciary's recent trend in tort cases to apply a flexible general negligence standard

53. *Id.*

54. *Id.* at 138 n.3, 879 P.2d at 770 n.3.

55. *See id.*

56. *Ford*, 118 N.M. at 136-37, 879 P.2d at 768-69.

57. *See id.* The trial court determined that Ford was a licensee, the court of appeals determined that Ford was a public invitee, and the supreme court determined that Ford was a business visitor (invitee). *Id.*

58. *Id.* at 138, 879 P.2d at 770.

59. *Id.*

60. *Id.* Implicit in this reasoning is the principle that owners are entitled to privacy upon their own land and should not be liable for injuries to those who choose to enter it at will. *See Wood v. Camp*, 284 So. 2d 691, 693 (Fla. 1973).

61. *Ford*, 118 N.M. at 139, 879 P.2d at 771.

62. *See id.*

63. *See id.* (quoting *Hudson v. Gaitan*, 675 S.W.2d 699, 704 (Tenn. 1984)). The court's language may indicate that the new law will apply to cases currently undecided irrespective of whether Plaintiff has preserved the issue for appeal. *Cf. Scott v. Rizzo*, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981) (holding that "the new rule shall be applicable to any case presently pending in the appellate courts in which the issue is preserved" (emphasis added)). *Id.*

64. *See generally Ford*, 118 N.M. at 137-39, 879 P.2d at 769-71 (citing *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984); *Antoneiwicz v. Reszcynski*, 236 N.W.2d 1 (Wis. 1975)).

instead of rigid, technical rules to determine a plaintiff's right to recovery.⁶⁵

V. IMPLICATIONS

Ford impacts New Mexico law in three ways. The decision gives plaintiffs greater access to jury trials, mandates changes in New Mexico's Uniform Jury Instructions for premises liability cases, and focuses increased attention upon New Mexico's limited duty rules regarding trespassers.

A. *More Jury Trials After Ford*

After *Ford*, landowners must exercise reasonable care to keep their premises safe for all lawful visitors, not just for invitees.⁶⁶ Fewer cases will end in summary judgments or directed verdicts because more suits must now go to juries to determine if the landowner breached her duty of reasonable care.⁶⁷ Because landowners owe the duty of reasonable care to more classes of visitors, it logically follows that more premises liability lawsuits will be filed in New Mexico. Hopefully, the expanded duty of landowners will result in greater efforts to keep premises safe.

B. *Ford Mandates Changes In Uniform Jury Instructions*

New Mexico's common law rules of premises liability are articulated in its civil Uniform Jury Instructions.⁶⁸ Because *Ford* changed New Mexico's rules of premises liability, the decision mandates changes to the uniform jury instructions for premises liability cases. The court, however, did not specify the scope of those changes.

Ford clearly calls for revision or elimination of three jury instructions. First, the decision made the two jury instructions relating to licensees⁶⁹ obsolete because there is no longer a distinction between the duty owed licensees and other lawful visitors.⁷⁰ Second, *Ford* revised N.M. Unif. Jury Instruction Civ. 13-1309, the former jury instruction describing a landowner's duty to business visitors, by deleting the word "business"

65. See *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 156, 824 P.2d at 293, 299 (1992) (holding that the obvious danger rule was incompatible with the doctrine of comparative negligence); *Calkins v. Cox Estates*, 110 N.M. 59, 64, 792 P.2d 36, 41 (1990) (holding that the foreseeability of injury to the plaintiff, not the physical boundaries of the property, determine the scope of a landlord's duty); and *Scott v. Rizzo*, 96 N.M. 682, 690, 634 P.2d 1234, 1241 (1981) (abolishing contributory negligence and establishing comparative negligence as the law in New Mexico).

66. *Ford*, 118 N.M. at 139, 879 P.2d at 771.

67. Cf. *Bogart v. Hester*, 66 N.M. 311, 316-18, 347 P.2d 327, 330-32 (1959) (affirming summary judgment for landowner because plaintiff was a licensee and landowner's only duty to plaintiff was to refrain from willful or wanton injury); see Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1 UTAH L. REV. 15, 58 (1981) (demonstrating that, even though more cases go to juries after abolition of the common law categories, judges still have substantial control over premises liability lawsuits).

68. See generally N.M. UNIF. JURY INSTRUCTION CIV. Ch. 13 (Repl. Pamp. 1991).

69. N.M. UNIF. JURY INSTRUCTION CIV. 13-1302 and 13-1308.

70. See *Ford*, 118 N.M. at 137, 879 P.2d at 769.

from the instruction.⁷¹ The new instruction, as revised by the *Ford* court, reads: "An [owner][occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor."⁷²

Finally, the court needs to create an instruction defining "visitors." The court could create the instruction by amending N.M. Unif. Jury Instruction Civ. 13-1302 to read, "A visitor is a person who enters or remains on the premises with the permission or invitation of the [owner] [occupant]. [Such permission or invitation may be express or implied.]"⁷³

Arguably, *Ford* also mandates amendment of N.M. Unif. Jury Instruction Civ. 13-1311 to provide that a lawful visitor's right to enter a landowner's premises is limited by the scope of the landowner's invitation or permission.⁷⁴ The amendment of this instruction is necessary to limit a landowner's duty to a visitor who goes beyond the scope of his lawful use of the landowner's property and, therefore, becomes a trespasser.⁷⁵ The following revised version of N.M. Unif. Jury Instruction Civ. 13-1311 may accomplish this goal:

13-1311. Duty to visitor limited in scope. (proposed)

Where an [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use, this duty is limited.

First, it extends only to the area which the plaintiff has permission to use or the area the defendant might reasonably expect the plaintiff to use.

Second, within that area it extends only to the manner of use which the defendant might reasonably expect of the plaintiff.

71. *Id.* at 139, 879 P.2d at 771. Prior to *Ford*, N.M. UNIF. JURY INSTRUCTION CIV. 13-1309 read:

13-1309. Duty to business visitor (invitee) arising from a condition of the premises. An [owner] [occupant] owes a business visitor the duty to use ordinary care to keep the premises safe for use by the business visitor.

72. *Ford*, 118 N.M. at 139, 879 P.2d at 771. On its face, this instruction now applies to all visitors except trespassers.

73. In its current form, N.M. UNIF. JURY INSTRUCTION CIV. 13-1302 reads:
13-1302. Licensee; definition.

A licensee is a person who enters or remains on the premises with the permission or invitation of the [owner] [occupant]. [Such permission or invitation may be express or implied.] [A social guest is a licensee.]

74. In its current form, N.M. UNIF. JURY INSTRUCTION CIV. 13-1311 reads:
13-1311. Duty to licensee-business visitor limited in scope.

Where an [owner] [occupant] owes a [licensee] [business visitor] the duty to use ordinary care to keep the premises safe for use, this duty is limited.

First, it extends only to the area which the plaintiff has been invited to use or the area the defendant might reasonably expect the plaintiff to use.

Second, within that area it extends only to the manner of use which the defendant might reasonably expect of the plaintiff.

Therefore, if plaintiff was on a portion of the premises to which [he] [she] was not invited and that [he] [she] would not reasonably be expected to use, or if [he] [she] was using the premises for a purpose other than that for which [he] [she] was invited and for which [he] [she] would not reasonably be expected to use them, then the defendant only owed [him] [her] the duty that would be owed to a trespasser.

75. See *Ford*, 118 N.M. at 139, 879 P.2d at 771 (retaining New Mexico's limited duty rules in cases involving trespassers).

Therefore, if plaintiff was on a portion of the premises to which [he] [she] was not invited and that [he] [she] would not reasonably be expected to use, or if [he] [she] was using the premises for a purpose other than that for which [he] [she] had permission, and for which [he] [she] was invited and for which [he] [she] would not reasonably be expected to use them, then the defendant only owed [him] [her] the duty that would be owed to a trespasser.⁷⁶

The court did not clearly state whether *Ford* will change or eliminate more jury instructions than those necessary to remove the distinctions between licensees and invitees. An examination of the court's reasoning, however, reveals that the *Ford* court may favor elimination of additional premises liability jury instructions. Before *Ford*, New Mexico had eight uniform jury instructions describing a landowner's duty to visitors other than trespassers.⁷⁷ The *Ford* court stated that, after *Ford*, a "single standard of reasonable care under the circumstances"⁷⁸ will apply to all lawful visitors except trespassers.⁷⁹ This statement may indicate that the court intends to replace all of the current jury instructions which describe a landowner's duty to non-trespassers with the revised version of N.M. Unif. Jury Instruction Civ. 13-1309.⁸⁰ Furthermore, the court's comment that New Mexico's abundance of jury instructions in the premises liability area "have the potential for producing much confusion"⁸¹ suggests the supreme court's desire to reduce the number of premises liability jury instructions.⁸²

C. *Ford* Focuses Increased Attention Upon the Trespasser Classification

Prior to *Ford*, a defendant in a premises liability lawsuit could limit his duty to a visitor by showing that the visitor was a licensee rather than an invitee.⁸³ After *Ford*, defendants will owe a limited duty only to trespassers.⁸⁴ More defendants will, therefore, try to categorize visitors as trespassers. For example, a defendant may successfully argue that a business visitor who wanders beyond the scope of his invitation is a

76. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1311, *supra* note 74.

77. N.M. UNIF. JURY INSTRUCTION CIV. 13-1308 (duty to licensee); 13-1309 (duty to business visitor (invitee) arising from a condition of the premises.); 13-1310 (duty to business visitor; known or discoverable danger.); 13-1311 (duty to licensee-business visitor limited in scope.); 13-1314 (landlord's duty regarding repairs.); 13-1315 (place reserved for common use.); 13-1316 (duty where property abuts sidewalk.); 13-1318 (slip and fall; business visitor; dangerous condition not created by proprietor.); and 13-1319 (slip and fall; business visitor; dangerous condition caused by proprietor or actual knowledge shown.)

78. *Ford*, 118 N.M. at 137, 879 P.2d at 769.

79. See *id.* at 139, 879 P.2d at 771.

80. *Id.*; see *supra* text accompanying notes 72-73.

81. *Ford*, 118 N.M. at 138 n.3, 879 P.2d at 770 n.3.

82. See *id.*

83. See *Bogart*, 66 N.M. at 318, 347 P.2d at 332; see also *supra* note 69 and accompanying text.

84. *Ford*, 118 N.M. at 139, 879 P.2d at 771.

trespasser.⁸⁵ For this reason, this note explores *Ford's* view of the trespasser class and how it might impact future decisions.

The *Ford* decision clearly maintains trespassers as a separate category of visitors to whom landowners owe a limited duty of care.⁸⁶ Nevertheless, *Ford* provides two reasons to believe that in future cases, the court may be willing to liberalize the distinction between trespassers and lawful visitors.⁸⁷ First, the *Ford* court reasoned that general negligence principles, rather than rigid rules, should determine a landowner's duty to visitors.⁸⁸ This reasoning would logically apply to negligent trespassers.

Second, the court's reasons for retaining the trespasser classification do not apply to all trespassers.⁸⁹ While burglars, vandals, and willful trespassers may have no legal basis for protection, a lawful visitor who reasonably, or even negligently, wanders beyond his invitation may have a right to seek damages when injured by an unreasonably dangerous condition.⁹⁰ Furthermore, elimination of the trespasser category should not place an unreasonable burden upon landowners because, in New Mexico, foreseeability of harm to the individual plaintiff is a necessary element of duty in negligence cases.⁹¹

Finally, New Mexico's rules that limit a landowner's duty to trespassers may be inconsistent with the doctrine of comparative negligence. In *Klopp v. Wackenhut Corp.*, the New Mexico Supreme Court expressed its disfavor with N.M. Unif. Jury Instruction Civ. 13-1310, the obvious danger rule, because the instruction was incompatible with the comparative negligence doctrine.⁹² The *Ford* court cited *Klopp* in its decision to give only the general negligence instructions on remand.⁹³ New Mexico's trespasser rules may, like the obvious danger rule, also constitute a comparative negligence-type bar to recovery. Consider, for example, N.M. Unif. Jury Instruction Civ. 13-1307, which states that a landowner has no liability to a trespasser injured by a natural hazard.⁹⁴ If a visitor

85. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1311 (Duty to licensee-business visitor limited in scope.) (stating that a lawful visitor who goes beyond her invitation (or permission) is treated as a trespasser in determining a landowner's duty to the visitor).

86. *Ford*, 118 N.M. at 139 n.4, 879 P.2d at 771 n.4.

87. See *Ford*, 118 N.M. at 137-138, 879 P.2d at 769-770. New Mexico already has exceptions for child trespassers, N.M. UNIF. JURY INSTRUCTION CIV. 13-1312; activities of landowner, 13-1306; and artificial conditions on premises (duty to warn a known trespasser), 13-1305.

88. See *Ford*, 118 N.M. at 137, 879 P.2d at 769.

89. See *supra* text accompanying notes 61-63.

90. Cf. *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 157, 824 P.2d 293, 297 (1992) (holding that a business visitor's negligence cannot act as a bar to recovery).

91. See *Calkins v. Cox Estates, Inc.*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990).

92. *Klopp*, 113 N.M. at 159, 824 P.2d at 299. The obvious danger rule provides that "there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them." KEETON, ET AL., *supra* note 18, § 61 at 427.

93. See *Ford*, 118 N.M. at 137 n.2, 879 P.2d at 769 n.2. Even though the 1994 supplement to the N.M. UNIFORM JURY INSTRUCTIONS CIV. cited *Klopp* in its annotations to 13-1310, the committee did not eliminate the instruction. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1310 annots.

94. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1307, which reads:

13-1307. Duty to trespasser; natural conditions.

An [owner][occupier] of land has no liability to a trespasser injured on [his][her] land from a natural condition of that land.

negligently trespasses onto property where she is injured by a natural condition, N.M. Unif. Jury Instruction Civ. 13-1307 could constitute a comparative negligence-type bar to recovery.⁹⁵

The court could resolve the apparent contradiction between its decision to retain the trespasser classification, and its reasoning that general negligence principles should apply in premises liability cases, by extending the duty of reasonable care to negligent trespassers. If the limited duty rules only applied to willful, knowing, or grossly negligent trespassers, then the rules would not be inconsistent with the court's reasoning that general negligence principles should apply in premises liability cases. The trespasser rules would also be consistent with the comparative negligence doctrine.

VI. CONCLUSION

In *Ford*, the New Mexico Supreme Court abandoned the traditional common law rules which determined a landowner's duty to lawful visitors based upon the visitor's status as either an invitee or licensee.⁹⁶ The court held that New Mexico owners and occupiers of land have a duty to exercise reasonable care to keep their premises safe for all lawful visitors. *Ford* retained, however, the existing common law rules limiting a landowner's duty to trespassers.⁹⁷ The decision mandates changes in New Mexico's Uniform Jury Instructions and increases plaintiffs' access to jury trials in premises liability cases. The court's reasoning indicates that it may liberalize the trespasser rules in future cases.

SAMUEL E. TUMA

95. See *Klopp*, 113 N.M. at 159, 824 P.2d at 299; see also *supra* note 94 and accompanying text.

96. *Ford*, 118 N.M. at 139, 879 P.2d at 771.

97. *Id.*