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Brief for Association of Commerce & Industry as Amici Curiae, Beaudry v. Farmers Insurance Exchange, et al.

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ORIGINAL

CRAIG BEAUDRY,

Plaintiff-Appellee,

v.

No. S-1-SC-36181
Dist. Ct. No. D-101-CV-2011-00646

FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, FARMERS NEW WORLD LIFE INSURANCE COMPANY, FARMERS INSURANCE COMPANY OF ARIZONA, LANCE CARROLL, and CRAIG ALLIN,

Defendants-Appellants.

Appeal from the First Judicial District Court in Santa Fe County
Honorable Sarah Singleton, District Judge, Presiding

AMICUS CURIAE BRIEF BY THE ASSOCIATION OF COMMERCE & INDUSTRY OF NEW MEXICO

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SUMMARY OF PROCEEDINGS

Amicus Curiae the Association of Commerce and Industry in New Mexico ("ACI")[1] relies on the Summary of the Proceedings put forth by Appellant-Defendants (hereafter referred to as "the Contract Companies") in their Brief in Chief and incorporates that summary herein by reference.

INTRODUCTION TO THE ARGUMENT

Plaintiff-Appellee Craig Beaudry (hereafter referred to as "Beaudry") seeks to make New Mexico the sole jurisdiction in the nation in which the mere act of enforcing an arms-length contract against a breach—lawfully and in compliance with the contract's negotiated terms—can result in the enforcing party being liable under tort to pay compensatory *and punitive* damages to the breaching party. Affirming such a rule would upend long-established business principles and expectations; convolute fundamental distinctions between contract and tort law; materially invade and alter established bodies of substantive law in other areas; and create bad law and even worse policy for the people and businesses of New Mexico by creating an unpredictable business environment, increasing the

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[1] Pursuant to Rule 12-320(C) NMRA, ACI indicates that the Contract Companies' counsel, Lewis Roca Rothgerber LLP, provided comments and proposed edits to the Brief, and that Farmers Group, Inc. made a monetary contribution as the attorney in fact for Farmers Insurance Exchange, which was intended to fund the preparation and submission of the Brief.

costs of doing business, overburdening the judiciary with unnecessary litigation, stifling economic growth, and discouraging investment in the state.

ARGUMENT

I. BEAUDRY'S REQUESTED APPLICATION OF *PRIMA FACIE* TORT UPENDS LONG-ESTABLISHED BUSINESS PRINCIPLES, EXPECTATIONS, AND RIGHTS.

Beaudry has brandished the "catch-all" tort of *prima facie* tort to extract compensatory and punitive damages from Appellant-Defendants Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, Farmers New World Life Insurance Company, and Farmers Insurance Company of Arizona (the "Contract Companies"), for Beaudry's own breach of the long-standing contract between them. Beaudry's position subjects two individuals, who lived and worked in this State (Craig Allin and Lance Carroll), to the same liability for fulfilling their job duties and enforcing the contract. The fact that a stand-alone cause of action for *prima facie* tort was submitted to the jury for consideration, after all other substantive causes of action—including breach of contract and breach of the covenant of good faith and fair dealing—were dismissed or withdrawn, is troubling both as matters of law and policy.

A. Conduct that is Lawful and Complies With the Express Terms of the Parties' Contract Should Be Deemed Inherently "Justified."

New Mexico law requires that a claim for *prima facie* tort be established, in part, by evidence that the defendant's conduct "was not justifiable under all the circumstances." UJI 13-1634 NMRA; see also Schmitz v. Smentowski, 1990-NMSC-002, ¶ 37, 109 N.M. 386 (citing UJI 13-1634); Negrete v. Maloof Distrib. L.L.C., 762 F. Supp. 2d 1254, 1295-96 (D.N.M. 2007) (citing UJI 13-1634). Where, as here, the enforcing party's actions are authorized by the very terms of the negotiated contract, such conduct is inherently "justified" and a *prima facie* tort cannot be established. See, e.g., Carreon v. Goodtimes Wood Prods., Inc., No. CIV 09-161 BB/CEG, 2011 WL 9686895, at *13 (D.N.M. Mar. 22, 2011) (non-precedential) (finding that "if [defendant] was in breach of contract, the remedy for that breach lies in contract, not tort"; and "if [defendant] was not in breach of contract, its legal position was justified and cannot be the basis of a claim for *prima facie* tort").

This framework conforms to existing business practices and expectations of parties to a commercial contract, which rely on the idea that a party to a contract (and presumably persons employed to enforce that contract) need anticipate neither contract *nor* tort law punishment when it lawfully enforces a contract. Beaudry's position and the decision below, however, completely upend this fundamental

understanding of contractual and business relations, and create an alternate universe in which a party that breaches a contract can achieve a windfall—here, compensatory and punitive damages in the amount of approximately $3.5 million—by suing in tort any party that dares to enforce that contract. **[33 RP 8070-72]**

If a party's lawful enforcement of a contract, in full accordance with its express terms—to protect a party's legitimate, bargained-for business interests—cannot constitute inherently justified conduct, it is hard to imagine what would. The trial court's submission of the issue to the jury, the jury's award of astronomical damages, and the decision below affirming the same, erode all of the legitimate interests that drive a business to enforce a contract: economic interests (such as protection of profit margins and application of a cost/benefit analysis), reliance (in predicting business transactions; in relying on agents, employees, and contractors to abide by agreed and bargained-for terms; and in relying on candid business relations), expectation (such as that its representatives will enforce agreed-upon terms on a day-to-day basis and that its business relationships will be protected), the right to exercise freedom of contract (including whether to engage in business with those who breach their agreements), and the protection of a business' competitive edge.

New Mexico law recognizes, and its market relies on, the right of businesses to make lawful business decisions without second-guessing by the court or jury. See Melnick v. State Farm Mut. Auto. Ins. Co., 1988-NMSC-012, ¶ 20, 106 N.M. 726 (concluding that in the context of an employment at-will relationship: "Employers are entitled to be motivated by and to serve their own legitimate business interests, and they must have wide discretion and flexibility in deciding who they employ in an uncertain business world."); see also Cont'l Potash, Inc. v. Freeport-McMoran, Inc., 1993-NMSC-039, ¶ 66, 115 N.M. 690 (refusing to allow plaintiffs to recover damages for defendant's authorized business decisions regarding mining operation: "The defendants were not obligated to act to their economic detriment for the benefit of the plaintiffs." (citation omitted)); DiIaconi v. New Cal Corp., 1982-NMCA-064, ¶ 29, 97 N.M. 782 (citing the "business judgment" rule, "a court will not interfere with internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss." (citation omitted)). If the decision below is permitted to stand, Beaudry's interpretation of *prima facie* tort would deprive businesses such as the Contract Companies from enjoying the "wide discretion and flexibility" to "serve their own legitimate business interests" (see Melnick, 1988-NMSC-012, ¶ 20), and would impose heightened obligations on

businesses far exceeding those bargained for in contract or required by law. Additionally, it would expose countless employees and agents to liability for lawfully exercising their discretion while abiding by the legitimate business wishes of their employers and principals.

B. Affirming the Decision Below Exposes Parties That Take Action Expressly Allowed By Contract to a Jury's Scrutiny and Punishment for Irrelevant Underlying Motivations.

The New Mexico Supreme Court has affirmed the established principle that

> Generally, a party who executes and enters into a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act of the contracting party. Each party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it, and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby.

Smith v. Price's Creameries, Div. of Creamland Dairies, Inc., 1982-NMSC-102, ¶ 13, 98 N.M. 541 (citations omitted). The Court in Smith refused to inquire into the defendant's motives in seeking to terminate the parties' contracts because it determined that such motivation would be immaterial, and the Court's inquiry would result in a construction of the termination clause contrary to the plain wording of the agreement. Id. at ¶¶ 23-24.

To be clear, the law provides established avenues to address bad faith actions taken in performing or enforcing a contract, or wrongfully and intentionally

using a contract to harm others. In fact, "every contract" contains "an implied promise of good faith and fair dealing." UJI 13-1634.[2] A party may establish that the covenant of good faith and fair dealing has been breached by proving the other party "acted in bad faith in [performing] [enforcing] the contract or wrongfully and intentionally used the contract to harm" them. UJI 13-1634(brackets in original). Crucially, however, the implied promise "does not change the express terms of the contract. It does not add terms to the contract. It does not prohibit the parties from doing what the contract expressly allows them to do." UJI 13-1634. Accordingly, the New Mexico Supreme Court has held that an implied covenant of good faith and fair dealing cannot be applied "to override express provisions addressed by the terms of an integrated, written contract." Melnick, 1988-NMSC-012, at ¶ 17. The Court of Appeals has clarified that "the rule in Melnick is not limited to employment contracts, but extends to other types of contracts." Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, ¶ 48, 133 N.M. 669; see also Cont'l Potash, 1993-NMSC-039, at ¶ 56 ("The general rule is that an implied covenant cannot co-

[2] Moreover, it is worth noting that remedies already exist in the law for illegal, unconscionable and oppressive contracts such as contracts of adhesion, usurious contracts, contracts which pose unlawful restraints on trade, contracts with improper provisions such as excessive liquidated damages, and contracts in which consent is improperly obtained by fraud, mistake, duress, or undue influence.

exist with express covenants that specifically cover the same subject matter." (citation omitted)).

Here, Beaudry did not, or could not, present the issue of breach of implied covenant of good faith and fair dealing to the jury.[3] Contrary to logical expectation, however, Appellee was instead able to use *prima facie* tort to circumvent New Mexico law on the implied covenant—an existing cause of action that implicates the same elements—and obtain extraordinary relief.

C. Affirming the Decision Below Eviscerates Business' Right to Freedom of Contract.

Beaudry's interpretation would eviscerate the freedom of contract, which is protected by both the federal and state constitutions. See U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. II, § 19; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (holding that the freedom to contract is entitled to qualified protection under the Fourteenth Amendment). "[I]f there is one thing which more than another public policy requires it is that [persons] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be enforced." Tharp v. Allis-Chalmers Mfg. Co., 1938-NMSC-044, ¶ 13, 42 N.M. 443 (quoting 12 Am. Jur.

[3] The decision below appears inordinately concerned with the distinction between whether Beaudry chose to withdraw, or was forced to abandon on summary judgment, his claims.

Contracts § 172, at 670); see also United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 1989-NMSC-030, ¶ 13, 108 N.M. 467 (New Mexico has a "strong public policy of freedom to contract"). Freedom of contract grants each party the right to refuse to do business with another party—or to cease doing business with a party— and requires that the exercise of that right will not give rise to a claim for tortious interference with prospective contractual relations, much less a nebulous "catch-all" tort, "regardless of the motive for [the] decision." Quintana v. First Interstate Bank of Albuquerque, 1987-NMCA-062, ¶ 12, 105 N.M. 784 (emphasis added), cert denied, 105 N.M. 781."The right to choose freely one's business relations has been described as a fundamental right, [...] and as a fundamental assumption in free business enterprise." Id. at ¶ 14; see also Kropinak v. ARA Health Services, Inc., 2001-NMCA-081, ¶ 14, 131 N.M. 128 (declining "to extend the implied covenant of good faith and fair dealing to cover bad faith conduct of improper motivation, overreaching, or discharge for a reason contrary to a clear mandate of public policy"). Notably, exceptions to freedom of contract such as anti-discrimination statutes provide both fairness to employees and clear guidance to employers regarding what constitutes lawful, permissible behavior, whereas a *prima facie* tort exception provides no such guidance.

Our long-standing system of freedom of contract is founded upon the recognition that the conditions triggered by a breach of lawful contract—when negotiated at arm's-length—should generally operate to dis-incentivize breach, which allows reliance by the parties. See generally Avery Wiener Katz, The Option Element in Contracting, 90 Va. L. Rev. 2187, 2192 (comparing typical contracts to option contracts: "It is a basic principle of the common law that promises are generally not legally enforceable unless they are given in exchange for consideration – some payment, performance, or counter-promise that flows back to the promisor or his designee . . . . [O]ne commonly accepted component of the concept is the element of bargain – that is, promises should presumptively be enforceable if they are made as part of a deliberate and arm's-length economic exchange."). See also id. at 2198 ("In ordinary contracts as interpreted under modern legal doctrine, promisors have a duty not to create unreasonable doubt about their contractual performance, both because certainty of performance is part of what the promisee has bargained for and because excessive doubt disrupts the promisee's ability to prepare for performance and to make appropriate reliance investments.").

Accordingly, Beaudry's asserted "injury" to establish *prima facie* tort—the imposition of a negative consequence specifically set forth in the Agreement—is

actually a necessary component of every contract; the counterbalance to consideration. For instance, in a mortgage contract, the "injury" of consequences arising from default under the loan, including foreclosure and loss of the property, is necessary to secure the parties' agreement and respective consideration. Under the normal order of such relationships, the lender *and* the borrower can anticipate that if the borrower breaches the contract by halting mortgage payments, the remedies set out in the contract will help to restore the lender's consideration. See Schmitz, 1990-NMSC-002, at ¶ 58 (comparing Centerre Bank of Kansas City, N.A. v. Distribs., Inc., 705 S.W.2d 42, 54 (Mo. Ct. App. 1985) ("The counterclaimants demonstrated that the bank knew that by calling its note it would put the corporation out of business, and presented evidence of personal animus toward the corporation's new owners. The court expressed doubt regarding the evidence of intent to injure, but . . . determined that the bank was justified in calling the loan because it was acting to protect its valid business interest.")).

Under Beaudry's interpretation, however, the borrower could stop payments, thereby breaching the contract, and then sue the lender under a stand-alone claim of *prima facie* tort (including punitive damages) if the lender attempted to enforce the terms of the mortgage according to its express terms. Further, even if the borrower were unable to establish or sustain causes of action for breach of contract

or breach of the covenant of good faith and fair dealing, a jury would still be empowered to scrutinize the private thoughts and motives of employees administering the mortgage and punish the lender. Beaudry's assertion of the law, as affirmed by the decision below, completely disrupts the fundamental paradigm of contract law and creates an illogical and inequitable rule under which parties who properly perform their contracts are left vulnerable to severe tort liability (including punitive damages) that parties who breach their contracts are not. Not only would this remove the disincentive for a party to breach a contract, but it would erode any incentive for a party to enter into a contract in the first place.

II. BEAUDRY'S ANALYSIS OF *PRIMA FACIE* TORT CONTRADICTS EXISTING LAW ALLOWING EMPLOYERS TO TERMINATE AT-WILL EMPLOYEES.

In addition to the law in the area of contracts, Beaudry's interpretation would invade upon and alter the substantive law in other areas. For example, New Mexico law generally upholds the employment-at-will doctrine of employment law, which applies by analogy to the Contract Companies' lawful termination of Beaudry's contractual relationship for a reason spelled out in the Agreement. In Schmitz, the New Mexico Supreme Court instructed "that *prima facie* tort should not be used to evade stringent requirements of other established doctrines of law," and gave as its first example a Missouri case holding that "*prima*

facie tort cannot be used to avoid employment at will doctrine." 1990-NMSC-002, at ¶ 63 (citing Lundberg v. Prudential Ins. Co. of Am., 661 S.W.2d 667, 671 (Mo. App. 1983)). See also Hill v. Cray Research, 864 F. Supp. 1070, 1079 (D.N.M. 1991) ("[T]he New Mexico Supreme Court . . . specifically referred with approval to the law of Missouri where *prima facie* tort cannot be used to avoid the employment at will doctrine."). Therefore, under well-established New Mexico law, a plaintiff may not advance a claim for wrongful termination of an at-will employment "under the guise of *prima facie* tort," because that "would emasculate the doctrine of employment terminable at will." E.E.O.C. v. MTS Corp., 937 F. Supp. 1503, 1516 (D.N.M. 1996).

> There may be some indication that the New Mexico legislature, in giving effect to its proclaimed interest in greater job security, might be inclined to modify the at will doctrine. But, to date, it has not addressed the matter and it is not for this Court to engage in piecemeal judicial tinkering in an area so peculiarly suited to comprehensive legislative consideration. Thus, in New Mexico, the at will doctrine continues to permit termination for reasons other than those specifically proscribed and those that do not fall within one of the two narrow exceptions previously discussed . . . The Court therefore concludes . . . that *prima facie* tort is unavailable to remedy the termination of an at will employee, even where he is terminated for bad cause.

Yeitrakis v. Schering-Plough Corp., 804 F. Supp. 238, 249 (D. N.M. 1992).

Accordingly, the court in Yeitrakis recognized that such drastic revisions to the

existing legislative landscape were in the province of the legislature, and not the judiciary. See id. The same applies here, even though Beaudry was an independent contractor terminated for cause under the Agreement. The employment-at-will doctrine is premised on an implied contract allowing termination with or without cause. Thus, an employer can lawfully terminate that employment relationship without having a jury second-guess its business judgment. There is no plausible rationale for prohibiting a *prima facie* tort claim when the employer terminates an at-will relationship (as New Mexico unequivocally does), but allowing stand-alone a *prima facie* tort claim when (as here) a business lawfully terminates another type of contract relationship pursuant to its express terms.

III. BEAUDRY'S REQUESTED APPLICATION OF *PRIMA FACIE* TORT CREATES A HOSTILE BUSINESS ENVIRONMENT IN NEW MEXICO, THEREBY STIFLING ECONOMIC GROWTH AND INVESTMENT.

While a few of the nation's states recognize *prima facie* tort claims, many have rejected it. See generally Kenneth J. Vandevelde, The Modern Prima Facie Tort Doctrine, 79 Ky. L.J. 519, 525-528 (1990/1991) (listing various jurisdictions and their general approach to *prima facie* tort). In any event, none—other than New Mexico, should Beaudry's interpretation be adopted and validated—fail to recognize that legitimate business interests (and, specifically, the legal enforcement

of a bargained contract by its own terms) inherently constitute valid justification sufficient to defeat a *prima facie* tort claim.

A. Affirming the Decision Below Would Produce a Chilling Effect on Commerce and Business in New Mexico.

Enforceable contracts are the bedrock of a functioning economy that creates business opportunities and jobs. Permitting the imposition of nebulous tort liability against parties who lawfully enforce the terms of their negotiated contracts will destabilize that bedrock foundation and have a chilling effect on commerce in New Mexico. Parties should be permitted to rely on contractual expectations and take advantage of their contractual rights "without feeling the chill that prima facie torts may bring." Mosley v. Titus, 762 F. Supp. 2d 1298, 1333-34 (D.N.M. 2010). To subject businesses (and their employees and agents) to liability and punishment for exercising their rights and expectations would encourage breach of contract and "may create mischief" with contracts statewide. See id. Similarly, parties should (within the legal parameters defined by statute and case law) be permitted to exercise their rights to contract and work with—or refrain from contracting and working with—any other party. See, e.g., Ewing v. State Farm Mut. Auto. Ins. Co., 6 F. Supp. 2d 1281, 1291 (D.N.M. 1998) ("[I]t is unlikely [*prima facie* tort] was meant to interfere with a company's prerogative to select its employees or independent contractors.").

Beaudry's interpretation to the contrary would produce a chilling effect, not only on business relationships in general, but on economic development and investment in the state. In addition to the uncertainty and unreliability that would permeate all contractual relations, as described above, Beaudry's interpretation would introduce a significantly increased need for litigation with regard to any and all aspects of contractual enforcement. Clearly, this would create a hostile and unfriendly business environment that would diminish the struggling rate of economic growth and development in the state – both from within New Mexico and from other states. Businesses, afraid of added liability not present in other states, may be deterred from conducting business in New Mexico out of fear that they could do everything right, and still go bankrupt because of a rogue jury.

B. Affirming the Decision Below Creates a Vacuum of Guidance Regarding Acceptable Conduct in Business Relationships, and Creates Undue Unpredictability and Vulnerability.

If the decisions below are upheld, the predictability of contracts and the ability to conduct business in New Mexico will be seriously jeopardized. The damages awarded in this case illustrate the absurd consequences that flow from a determination that the lawful enforcement of a contract by its own terms may not be deemed justified as a matter of law. Here, despite having his contract lawfully terminated for breach, Beaudry was able to obtain a multi-million dollar judgment

from the Contract Companies for *prima facie* tort. **[33 RP 8070-72]** Had the Contract Companies gone so far as to *breach* the Agreement, they would likely have only been liable for a fraction of the ultimate award.

In addition, employees of the Contract Companies, who were executing their jobs as representatives of the Contract Companies **[6 RP 1435 at ¶ 5; 7 RP 1468 at ¶ 5; 6 RP 1435 at ¶ 7; 7 RP 1468 at ¶ 7]**, were personally levied with a multi-million-dollar judgment for enforcing the Agreement. **[33 RP 8070-72]** Beaudry's interpretation of *prima facie* tort undermines the ability of businesses to manage and delegate to their employees, and robs employees and agents of their ability to engage in lawful work-related duties without fear of incurring extreme liability. Indeed, when confronted with another party's breach, the employees or agents tasked with enforcing the contract would face a dilemma – look the other way to avoid tort liability to the breaching party (while exposing themselves to discipline or termination for not fulfilling their job duties); or fulfill those duties, get sued by the breaching party, and have a jury scrutinize and second-guess the private motives behind their lawful business behavior. If upheld, the law would no longer provide guidance on how to conduct oneself in the business world as an employer, employee, agent, or contractor, and produce a chilling effect on business.

Presently, businesses rely on the established principle that a court will uphold the intent of the contracting parties, at the time of contracting, when clearly set forth in the contract's unambiguous language. "When a contract is clear as written, a court 'must give effect to the contract and enforce it as written.'" ConocoPhillips Co. v. Lyons, 2013-NMSC-009, ¶ 67, 299 P.2d 844 (quoting Ponder v. State Farm Mut. Auto Ins. Co., 2000-NMSC-033, ¶ 11, 129 N.M. 698). Courts "cannot create a new agreement for the parties and will not give effect to a party's undisclosed intentions." ConocoPhillips, 2013-NMSC-009, at ¶ 67 (citations and quotations omitted). In direct contravention, Beaudry's interpretation will require that courts and juries blatantly ignore the parties' intent at the time of contracting and the express terms agreed upon, and instead place singular focus on the intent of the purported *prima facie* tortfeasor at the time of contractual enforcement.

In fact, that is precisely what happened in this case. The Contract Companies entered into an independent contractor agreement with Beaudry, with negotiated terms and conditions that plainly reflected the parties' intent at the time. **[4-23-13 Tr. 86:22-23, 92:1-7, 132:19-23]** The Agreement reflected the parties' intent as to what conduct would constitute breach of the contract, as well as what remedies were available and appropriate for such breach. For more than a decade,

the parties were able to conduct business in a mutually beneficial manner, in accordance with their negotiated terms. **[4-23-13 Tr. 86:22-23, 92:1-7, 132:19-23]** During that time, Beaudry enjoyed the benefits of the parties' mutual understanding and predictability of the parties' contractual agreement, as well as the opportunity to do business with the Contract Companies. Then, Beaudry (through his employee) breached a core, material, and central term of the contract by placing a policy with the Contract Companies' competitor.[4] After confirming that Beaudry's conduct constituted a material breach of the Agreement, the Contract Companies and their representatives scrupulously followed the Agreement's termination requirements to terminate the Agreement.[5] Despite finding the Contract Companies had lawfully enforced the Agreement **[28 RP 6926-30]**, the court permitted the jury to nullify the parties' original negotiated intentions and instead—under an amorphous tort theory—grant a multi-million dollar damages award, including punitive damages. **[33 RP 8070-72]** By doing so, the court permitted the jury to expand the universe of contract damages well

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[4] **[4-23-13 Tr. 110:13-111:11, 239:11-240:20, 253:4-254:11, 257:16-258:12; 4-24-13 Tr. 115:15-22, 119:7-21, 123:22-124:11; 4-29-13 Tr. 182:20-186:19; 1 RP 17 ¶¶ B-C; 19 RP 4490-91, 4556, 4559-60, 4603, 4615-34; 28 RP 6926-30]**

[5] **[4-24-13 Tr. 53:3-13, 118:8-124:11, 130:19-136:19, 206:2-207:7; 4-25-13 Tr. 154:1-159:17; 4-26-13 Tr. 11:22-14:8, 74:18-24, 19:17-23:13, 92:6-112:2, 115:2-119:16; 6 RP 1435-37, 1468-70; 16 RP 3772; 18 RP 4280-84; 20 RP 4703]**

beyond that intended by the parties at the time of contracting. See, e.g., Amrep Sw. v. Shollenbarger Wood Treating, Inc., 1995-NMSC-020, ¶ 28, 119 N.M. 542 (stating the purpose of the economic loss rule, which conceptually separates tort and contract, "is to preserve the bedrock principle that contract damages be limited to those within the contemplation and control of the parties framing their agreement" (citations and internal quotation marks omitted)). In addition, contrary to New Mexico law, which "holds that as a matter of policy, the parties to a contract should not be allowed to use tort law to alter or avoid the bargain struck in the contract . . . [as t]he law of contract provides an adequate remedy," the court permitted an improper blurring of the lines between tort and contract and permitted the jury to rewrite the parties' agreement. See U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co., 952 F. Supp. 2d 1259, 1269 (D.N.M. 2013) (dismissing *prima facie* tort claim because the economic loss rule "prevents plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract" (internal quotation marks and citations omitted)).

Beaudry's interpretation of *prima facie* tort robs businesses and their employees of the ability to engage in lawful work-related duties without fear of incurring extreme monetary liability levied against employees at various levels of seniority. The law would no longer provide reliable guidance on how to conduct

oneself in the business world as an employer, employee, agent, contractor, sub-contractor, vendor, or consumer, with regard to contracts – a fundamental aspect of all business relationships. Moreover, employers and all employees would need to assess the costs of defense and risks of liability for *prima facie* tort against the need to enforce major (and even minor) breaches of contract, before taking any action pursuant to the contract. This would impact the ability of a business (and its employees) to operate with efficiency. Pursuant to the decision below, even something as simple as terminating a vendor contract, rental agreement, or service contract—for breach—could have devastating consequences for a business and its employees, and would require the non-breaching party to investigate the reasons for the breach, any personal life factors influencing the breach, and any harm that enforcing the contract could cause to the breaching party. As such, the repercussions of Beaudry's requested interpretation of *prima facie* tort would impact various areas of commerce that rely on contracts and legally-defined business relationships, including employer/employee relations, contractor/subcontractor relations, lender/borrower relations, tenant/landlord relations, seller/purchaser relations, and general person/person or business/business relationships.

C. Affirming the Decision Below Would Cause Businesses to Incur, and Pass On to Consumers, Increased Costs of Doing Business.

If Beaudry's interpretation of *prima facie* tort is permitted to stand, the costs of doing business in New Mexico will certainly rise due to the increased need for businesses to: engage in more litigation, hire counsel and obtain legal advice, enter into inflated settlements, pay excessive jury awards (potentially including, as here, astronomical punitive damages), obtain enhanced insurance coverage, and refrain from taking measures that could increase efficiency and productivity if it meant enforcing or terminating a contract (employment contract, service contract, vendor contract, contractor/subcontractor agreement, rental agreement, etc.). All of these additional expenditures can potentially increase costs for consumers and employees as well. In addition, businesses would likely become more skeptical of engaging in moderate or higher risk endeavors or innovation, as well as entering into relationships with individuals or entities that posed higher financial risks, which could further stratify the public and impact the economic climate in New Mexico. Businesses, consumers, employers, employees, and individuals throughout the state would suffer. This burden would be particularly onerous on small and mid-sized businesses, whose already challenged profit margins would be further burdened by other businesses declining to risk contracting with them and employees and contractors bringing suit, as well as the cost of obtaining legal

advice or defending *prima facie* tort lawsuits for simply enforcing their bargained-for contractual rights.

D. Affirming the Decision Below Would Jeopardize New Mexico's Hard-Earned Growth, and Discourage Future Business and Economic Investment in the State.

If Beaudry's interpretation and the decision below are affirmed, the resulting uncertainty in the business climate, increase in overall costs, and increase in litigation would inhibit New Mexico's ability to grow businesses of all sizes in New Mexico, and jeopardize the very existence small and mid-sized businesses. This would also severely hamper New Mexico's ability to attract—and retain—out-of-state companies to invest and establish headquarters, satellite locations, manufacturing facilities, or any other business presence here in New Mexico.

The encouragement of business in New Mexico is one of the most important goals of the state. In her 2016 State of the State address, New Mexico Governor Susana Martinez urged:

> Of course, it's also our responsibility to ensure there are jobs for our kids when they graduate – because we want them to work in New Mexico and raise their families here. This means attracting new jobs and businesses from elsewhere, while creating conditions that encourage New Mexico companies to expand. We must never be so arrogant or naïve to forget that businesses can locate anywhere in the world. Whether we like it or not, whether it makes us comfortable or not, we are in a high-stakes daily competition with other states and other

> countries. It's our job to make New Mexico more welcoming, more predictable for job creators, and we've come a long way in doing so – largely by focusing on the fundamentals to better compete."

Susana Martinez, Governor of New Mexico, State of the State Address, at 7 (Jan. 19, 2016) (accessed Mar. 11, 2017), http://www.governor.state.nm.us/uploads/PressRelease/191a415014634aa89604e0b4790e4768/Governor_Susana_Martinez_Delivers_State_of_the_State_Address_2016.pdf.

See also generally Susana Martinez, Governor of New Mexico, State of the State Address, at 3-5 (Jan. 20, 2015) (accessed Mar. 11, 2017), http://www.governor.state.nm.us/uploads/PressRelease/191a415014634aa89604e0b4790e4768/2015_State_of_the_State_Address.pdf (discussing the importance of growing businesses of all size, and increasing investment, to the prosperity of the state). Unfortunately, for years New Mexico has experienced a relatively negative reputation for its business climate. For instance, in a 2014 study by the U.S. Chamber of Commerce Foundation on the perception of the general business climates of various states, New Mexico ranked 31st in the nation for business climate, down seven places from its ranking in 2013. See generally U.S. Chamber of Commerce Foundation, Enterprising States 2014 Study (accessed Mar. 11, 2017),

http://www.uschamberfoundation.org/sites/default/files/legacy/foundation/Enterprising%20States%202014_0.pdf.

When viewed under the more focused lens of tort liability and litigation, the broader business community's perception of New Mexico is even less favorable. In 2012, the U.S. Chamber of Commerce conducted a study to "explore how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses." See U.S. Chamber Institute for Legal Reform, 2012 State Liability Systems Survey Lawsuit Climate Ranking the States, at 4 (Mar. 11, 2017), at https://www.uschamber.com/2012-state-liability-systems-survey-lawsuit-climate-ranking-states. "Participants in the survey were comprised of a national sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who indicated that they are knowledgeable about litigation matters at companies with at least $100 million in annual revenues." Id. In the category of overall treatment of tort and contract litigation, New Mexico was ranked 44th in the nation. Id. at 14. In the category of damages, New Mexico was also ranked 44th in the nation. Id. at 17.

Recently, however, through various economic, tax, legislative, and regulatory initiatives, New Mexico has begun to gain success in attracting out-of-state businesses to locate and invest in the state, and has encouraged the expansion

and development of home-grown businesses as well. See Susana Martinez, Governor of New Mexico, State of the State Address (Jan. 15, 2017) (accessed Mar. 11, 2017) http://www.newmexicopbs.org/productions/newmexicoinfocus/the-2017-state-of-the-state-address/ (referencing the growth and expansion of companies such as Dean Baldwin Aircraft Painting, Wildflower, Ideum, and Skorpios, and the attraction of out-of-state companies such as Safelite, Keter, PCM, Valley Cold Storage, Pre-Check, and Facebook). Clearly, New Mexico's stated goals of business and economic development cannot be achieved—or sustained in the long run—without positively changing the perception of the state in the business community nationwide, beginning with contract enforcement and the tort liability and litigation environment in the state. Allowing the pursuit of a stand-alone *prima facie* tort in the manner requested by Beaudry would create an environment that is anti-business, discourage further investment in the state, and jeopardize any hard-earned economic growth and development.

E. Affirming the Decision Below Would Create the Need for Increased Litigation and Unnecessarily Overburden the Judiciary.

Given the significant risks associated with a party's enforcement or termination of a contract under *prima facie* tort, Beaudry's interpretation would highly increase the demand for litigation. As described above, upon a breach of

contract, the non-breaching party would need to immediately obtain legal counsel and file a lawsuit in order to protect its ability to enforce or terminate that contract. Even the act of pursuing litigation for the breach could be argued by the breaching party as a *prima facie* tort; however, any action taken in an attempt to enforce the contract through non-judicial means would likely place the non-breaching party at greater risk. Not only would this race to the courts encourage bad faith filings by breaching parties of a "catch-all" *prima facie* tort claim, it would leave non-breaching parties—who simply wish to enforce or terminate their contracts in a lawful manner that complies with the express terms of such contracts—with little choice than to file a preemptive breach of contract claim. This would also result in a rise in anticipatory breaches of contract. In addition, due to the subjective nature of the intent/motive element of *prima facie* tort, as discussed above, there would likely be an increased need for litigation to proceed to trial rather than be addressed on dispositive motions. Clearly, all of these factors would clog and burden an already overloaded court system and drain scarce judicial resources.

This new landscape would not only severely impact large businesses and corporations, but business of all sizes, their employees, agents, and contractors, as well as the people of New Mexico. As noted above, Beaudry's interpretation would impact insurance agent contracts such as the Agreement at issue here, as

well as simple real estate contracts, mortgages, tenancies, employment contracts allowing termination only for cause, sales contracts and service contracts of all types, and all other types of contracts. In turn, this would create an untenable situation for most New Mexicans going about their daily lives. There is no good or legitimate reason to validate and enact such a policy and a plethora of reasons why it should be eliminated.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Association of Commerce & Industry of New Mexico respectfully requests that this Court order reversal of the district court judgment, and grant such other and further relief as may be just and proper.

STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae Association of Commerce & Industry of New Mexico requests oral argument. Oral argument may assist the Court in understanding the interests of ACI and the business community in New Mexico, assessing legal and policy concerns that impact the business community in New Mexico, and disposing of the merits of this appeal.

Dated: March 13, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2017, a true and correct copy of the foregoing AMICUS CURIAE BRIEF BY ASSOCIATION OF COMMERCE & INDUSTRY OF NEW MEXICO was served via first-class mail, prepaid and addressed to:

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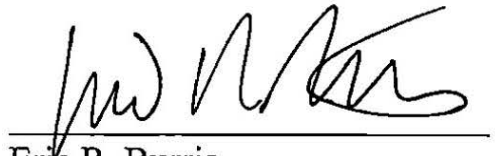

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