IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRANKLIN J. MORRIS, as Personal Representative of the Wrongful Death Estate of MARCELLINO MORRIS, JR., (Deceased),

Plaintiff,

vs. No. 1:15-cv-00055-JCH-LF

GIANT FOUR CORNERS, INC. d/b/a GIANT #7251 and ANDY RAY DENNY, an Individual,

Defendants.

REPLY IN SUPPORT OF DEFENDANT'S
OPPOSED MOTION FOR JUDGMENT ON THE PLEADINGS

In denying Plaintiff's motion for summary judgment, this Court recognized that "New Mexico law does not impose a duty of care on gas vendors to refrain from selling gasoline to an intoxicated person." *Morris v Giant Four Corners, Inc.*, 294 F. Supp. 3d 1207, 1212 (D.N.M. 2018). Plaintiff has done nothing to alter than conclusion. Giant owed no duty to the decedent to refrain from selling gasoline to an intoxicated person. Plaintiff failed to articulate specific policy reasons unrelated to foreseeability to justify the imposition of such a duty. In the absence of a legally cognizable duty, Plaintiff's claim for negligent entrustment fails as a matter of law. As a result, the Court should dismiss Plaintiff's complaint.

I. PLAINTIFF MISCONSTRUES THE TORT OF NEGLIGENT ENTRUSTMENT.

Plaintiff repeatedly contends that because Giant is a seller of gasoline and New Mexico has an interest in curtailing accidents involving drunk drivers, the mere assertion that Giant sold gasoline to an intoxicated person is enough to state a viable claim for negligent entrustment. This simplistic hypothesis avoids the essential predicate that, in order to be held liable for any

form of negligence, Giant must owe a duty to the decedent. In the absence of an enforceable duty, then regardless of Giant's status as a seller of gasoline, there can be no liability for negligent entrustment.[1]

The narrow context in which Plaintiff's claim arises highlights this essential point. Giant is not responsible for Denny's level of intoxication, nor can it be held liable for the manner in which he drove his vehicle while he was intoxicated. Plaintiff's only possible claim against Giant arises from its sale of gasoline before the accident. This commercial transaction was not illegal and was not prohibited by any form of statute or regulation. Moreover, as a matter of general tort law, Giant had no duty to control Denny's conduct so as to prevent personal harm to the decedent. *Estate of Haar v. Ulwelling*, 2007-NMCA-032, ¶ 14, 154 P.3d 67 (citing Restatement (Second) of Torts § 314 (1965)).

Negligent entrustment may require such conduct in limited situations. But this cause of action does not create a legal duty where none otherwise exists, and merely alleging a claim for negligent entrustment is insufficient to a hold a defendant liable for this tort. Instead, as a species of negligence, negligent entrustment "is dependent upon the existence of a duty on the part of the defendant." *Schear v. Bd. of Cty Comm'rs*, 1984-NMSC-079, ¶ 4, 687 P.2d 728 (citation omitted); *see Paez v. Burlington N. Santa Fe Ry.*, 2015-NMCA-112, ¶ 9, 362 P.3d 116 ("It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff"). If there is no legal duty, a purported claim for negligent entrustment will not lie.

[1] In addition, Giant's asserted wrongful act was the negligent entrustment of gasoline to an intoxicated driver. But if Andy Denny was not the driver of the car at the time of the purchase, then the premise for Plaintiff's asserted duty does not exist and Giant cannot be found liable for negligent entrustment. *See Morris*, 294 F. Supp. 3d at 1210 ("Denny and Yazzie provide conflicting testimony about who . . . drove Denny's vehicle – Denny stated that Yazzie drove throughout the time they were together, while Yazzie explained that Denny drove at all times she was with him.").

New Mexico law supports this obvious conclusion. In *Gabaldon v. Erisa Mortgage Co.*, 1999-NMSC-039, ¶ 23, 990 P.2d 197, the New Mexico Supreme Court rejected the application of negligent entrustment to real property and held that non-possessory landlords did not have "an affirmative duty to investigate their potential tenant's ability to safely operate the leased premises." Reversing the court of appeals' imposition of this duty, the Supreme Court noted "that there are no direct statutory or regulatory provisions bearing on the issue of a landlord's obligation when selecting a tenant." *Id.* ¶ 25 (internal quotation marks & citation omitted). Given this lack of a doctrinal mooring, the Supreme Court criticized the lower court's recognition of the purported duty because it did "not provide sufficient demarcations that identify when the duty is triggered." *Id.* ¶ 35. "Without specific guidelines, landlords will likely be unable to conform their conduct in a manner that would reasonably assure them that they would be insulated from liability when selecting a tenant." *Id.* ¶ 36. The court relied on the decision of a Florida appellate court which adopted Restatement (Second) of Torts § 390, but held that a car dealer had no duty to assure that a car buyer would not negligently operate a vehicle and thus was not liable under this cause of action:

> The imposition of this new duty not to sell would create uncertainty and retard the free flow of commerce and the creation of a duty on the part of the seller to guarantee the acts of a buyer, would effectively require independent investigation to establish each buyer's fitness to use each product, and would be manifestly unreasonable.

Gabaldon, 1999-NMSC-039, ¶ 37 (quoting *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So.2d 560, 563 (Fla. Dist. Ct. App. 1987)).

Other jurisdictions which, like New Mexico, recognize Restatement (Second) of Torts § 390, have reached similar conclusions. *See, e.g., Beasley v. Best Car Buys, Ltd.*, 363 P.3d 777 (Colo. App. 2015) (car vendor had no duty in inquire into buyer's driving history before selling car; without a duty, trial court properly dismissed claim for negligent entrustment); *Cowan v.*

Jack, 922 So.2d 559, 569-70 (La. App. 2005) (car rental company not liable for negligent entrustment; no duty to investigate driving history of customer who presented valid driver's license); *Sligh v. First Nat'l Bank*, 735 So.2d 963, 975 (Miss. 1999) (bank trustee who loaned money to driver to buy car not liable for negligent entrustment when driver collided with another vehicle while intoxicated; lender had no duty to investigate driver's fitness to drive at the time of the loan); *Liebelt v. Bob Penkhus Volvo-Mazda, Inc.*, 961 P.2d 1147, 1149 (Colo. App. 1998) (no claim for negligent entrustment given court's refusal "to recognize a duty on sellers of vehicles to inquire whether potential purchasers have liability insurance, and to refuse sales to those who do not").

Plaintiff's persistent reliance on *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, 356 P.3d 17, is entirely misplaced. The court in *Armenta* focused on a "first-party" negligent entrustment claim; a claim brought by the intoxicated entrustee/vehicle driver against the entrustor/vehicle owner (as compared to the present "third-party" claim brought against the entrustor/chattel owner by a person injured by the buyer of the chattel). The court never addressed the underlying requirement of a legal duty; instead, it skipped over that prerequisite and held only that "*[p]rovided that the elements of negligent entrustment are proven*, an entrustee may state a claim for simple negligent entrustment against the entrustor when the entrustee's voluntary intoxication causes injury." *Id.* ¶ 19 (emphasis added). The court then reversed summary judgment in favor of the vehicle owner on the grounds that there were disputed facts with regard to whether the owner entrusted the vehicle to the driver. *Id.* ¶ 21.

In sharp contrast, Plaintiff's claim for negligent entrustment in the present case hinges not on Giant's status as a "seller" of a chattel or on whether Giant "entrusted" the chattel to Denny. Instead, Plaintiff's claim depends on whether there is a "legally recognized obligation of the defendant to the plaintiff." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 9, 73 P.3d 181

(internal quotation marks & citation omitted). Because no such duty exists, Plaintiff's negligent entrustment claim fails as a matter of law and must be dismissed.

II. GIANT'S ALLEGED DUTY DOES NOT EXIST AS A MATTER OF LAW

Plaintiff's response assumes a duty exists. To the extent that Plaintiff scrutinizes the basis for such an asserted duty, his analysis is couched wholly in terms of "foreseeability," which is insufficient as a matter of law.

As explained fully in Giant's Motion [Doc. 90], in *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, ¶1, 326 P.3d 465, the New Mexico Supreme Court held "that foreseeability is not a factor for courts to consider when determining the existence of a duty." "Instead, courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited." *Id.* ¶ 25. The "question of policy [is] to be answered by reference to legal precedent, statutes, and other principles of law." *Oakey v. May Maple Pharm., Inc.*, 2017-NMCA-054, ¶ 22, 399 P.3d 939 (internal quotation marks & citations omitted).

Plaintiff never addresses this current and controlling form of analysis in his response. Instead, Plaintiff continues to base his argument related to Giant's alleged duty in terms of foreseeability and what results were likely to follow from Giant's asserted negligence.[2] This omission is fatal to Plaintiff's claim. Viewed through the lens mandated by the New Mexico Supreme Court, New Mexico law does not impose a duty on gasoline vendors to refrain from

[2] *See, e.g.*, Pl.'s Resp. at 2 (Giant's duty derived, in part, from "an intoxicated driver['s] . . . use of that chattel in a manner likely to cause injury or death); *id.* at 4 ("one who negligently entrusts chattel to an incompetent person is subject to liability for any resulting foreseeable harm") (internal quotation marks & citation omitted); *id.* at 7 (proper to find "a duty based on the legal principals *[sic.]* [derived] from allow[ing] others to use that property in a manner likely to cause harm.") *Cf. Lewis v Samson*, 2001-NMSC-035, ¶ 27, 131 N.M. 317, 35 P.3d 972, (equating what is "foreseeable" with facts that "should have been known").

selling gasoline to an intoxicated person. In the absence of this duty, Plaintiff failed to state a viable claim for negligent entrustment.

First, just like in *Gabaldon*, there are no statutory or regulatory provisions prohibiting the sale of gasoline to an intoxicated person. Indeed, there is no New Mexico statute or regulation that constrains who may purchase gasoline from a retail vendor. Plaintiff tries to evade this undisputed fact by claiming that "[i]n the absence such legislation, the New Mexico courts have found a duty based on the legal principals underlying the doctrine and the state's compelling policy to discourage those that control the instrumentalities necessary to drive from agreeing to allow others to use that property in a manner likely to cause harm." (Pl.'s Resp. at 7.) Plaintiff failed to provide any citation of authority to support this expansive assertion. Plaintiff also ignores the New Mexico Supreme Court's rejection of this position in *Gabaldon*, where the court noted instead "that the mere lack of a prohibition does not constitute a mandate to create new duties or to apply old duties in new contexts." *Gabaldon*, 1999-NMSC-039, ¶ 27.

Second, there is no New Mexico appellate decision holding that a commercial vendor has a duty not to sell gasoline to an intoxicated person. As this Court previously observed, "federal courts sitting in diversity 'are generally reticent to expand state law without clear guidance from the state's highest court, for it is not a federal court's place to expand state law beyond the bounds set by the highest court of the state.'" *Morris*, 294 F. Supp. 2d at 1212 (quoting *Amparan v. Lake Powell Car Rental Companies*, 882 F.3d 943, 948 (10th Cir. 2018)).

Third, there is no other colorable policy rationale that compels judicial recognition of Plaintiff's proposed form of legal duty. Plaintiff relies entirely on the amorphous "state's policy against drunk driving" (Pl.'s Resp. at 2, 5 & 6) to support his claim. But as genuine as that interest may be, Plaintiff never disputed that New Mexico's long-standing response to the danger caused by automobiles driven by an intoxicated driver has been to punish the intoxicated driver

and to hold responsible the person who provided the alcohol to the inebriated vehicle operator. There has been no effort to regulate the sale of gasoline to an intoxicated person. In this circumstance, as noted by the Colorado Court of Appeals in *Beasley v. Best Car Buys, Ltd.*, 363 P.3d 777, 781 (Colo. App. 2015), "[i]mposing a legal duty on . . . vendors, particularly one that has not previously been recognized, is better left to the legislative process."

Giant properly noted in its Motion that to impose a duty on a gas station to refrain from selling gasoline to an intoxicated person would "open the floodgates" for lawsuits against other vendors who provide chattels which distract drivers behind the wheel. In response, Plaintiff argues that California applied the doctrine of negligent entrustment to the sale of gasoline to intoxicated customers 20 years ago[3] and Tennessee reached the same result 10 years ago,[4] and yet "there has not been a flood of litigation for commercial vendors." (Pl.'s Resp. at 10-11.) More likely than not, that conclusion follows from the simple fact that no appellate court in any other state has followed these two rulings.

Adopting Plaintiff's novel legal theory would "'unwittingly impose unreasonable and uncertain duties.'" *Gabaldon*, 1999-NMSC-039, ¶ 37 (quoting Robert M. Howard, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to "Defective" Customers*, 1988 Duke L.J. 755, 758). As Professor Howard commented, by judicially imposing new obligations on vendors, "the duty to screen patrons will no longer be limited to transactions regulated by statutes, which provide reasonable and ascertainable guidelines. Instead, merchants will have to investigate their customers and then sell their products only to those whom judges will deem competent." Howard, 1998 Duke L.J. at

[3] *O'Toole v. Carlsbad Shell Service Station*, 247 Cal. Rptr. 663 (Cal 4th App. District 1988) (unpublished).

[4] *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545 (Tenn. 2005).

780. Given the specter of open-ended judge-made duties imposed on sellers requiring them to match all kinds of products with "acceptable" consumers, this Court should reject Plaintiffs' broad theory of negligent entrustment and dismiss his Complaint.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2018, the foregoing *Reply in Support of Defendant's Opposed Motion for Judgment on the Pleadings* was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record:

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