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. **Case No. 1:15-cv-00055 JCH-LF**

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

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Giant Four Corner, Inc.'s Motion for Judgment on the Pleadings [Doc. 90] should be denied in its entirety for the reasons that follow:

INTRODUCTION

New Mexico follows the Second Restatement of Torts, and the New Mexico Supreme Court has specifically adopted Section 390, which provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

The doctrine applies to all chattel and to commercial vendors, *i.e.*, it applies to "**sellers**, lessors, donors, or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for consideration." *Restatement (Second) of Torts* § 390, cmt. a. (emphasis added). The New Mexico Court of Appeals has specifically articulated the policy rationale for

imposing this duty on suppliers of chattel, which is:

> [T]he idea that the 'third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.'

Armenta v. A.S. Horner, Inc., 2015-NMCA-092, ¶ 12, 356 P.3d 17, 22 (emphasis added; citations in original). Coupled with the state's public policy against drunk driving, the New Mexico appellate courts have extended this legal principal to entrustors that consent to intoxicated entrustees using their chattel. In other words, the policy rationale for Giant's duty is its control over its chattel (gas) and its consent for an intoxicated driver to use that chattel in a manner likely to cause injury or death.

Undeterred by this precedent and this Court's previous rationale in upholding this particular claim, Giant argues that there is no legal doctrine or principal to hold commercial vendors liable for selling gas to someone who is intoxicated and uses that gas to drive and kill someone. Giant's position completely ignores New Mexico's negligent entrustment jurisprudence, the Second Restatement Tort's formulation of liability for suppliers of chattel, the New Mexico jury instruction which confirms that the doctrine may be applied to chattel other than motor vehicles, as well the cases and their rationales previously relied on by this Court.

Instead of even attempting to reconcile its position with the applicable legal precedent regarding the duties of suppliers of chattel, Giant urges this Court to apply the law that governs when a person has affirmative duty to render aid or protect another. But Plaintiff has not alleged that Giant had a general duty to render aid to decedent Morris or affirmatively take any action to prevent Denny from driving drunk. Had Giant done nothing, no liability would attach. However, as a supplier of chattel, its liability arises from the fact that it consented to the use of its chattel in

a manner its agents admit is dangerous and could lead to drunk driving fatalities.

Giant goes on to argue that public policy militates in favor of limiting Giant's duty of reasonable care because failing to do so would open the flood gates of litigation. However, the negligent entrustment doctrine has been part of the Second Restatement since 1965, California applied the doctrine to the sale of gasoline twenty (20) years ago and Tennessee followed suit ten (10) years ago, and New Mexico and Colorado applied the doctrine to intoxicated entrustees more than twenty (20) years ago, and yet the sky has not fallen.

ARGUMENT AND AUTHORITIES

A. NEW MEXICO HAS ADOPTED THE SECOND RESTATEMENT OF TORTS WHICH PLACES A DUTY ON SUPPLIERS OF CHATTEL TO REFRAIN FROM NEGLIGENTLY ENTRUSTING CHATTEL TO INTOXICATED ENTRUSTEES THAT MAY OPERATE A MOTOR VEHICLE

1. New Mexico Negligent Entrustment Jurisprudence Establishes that Giant had a Duty to Refrain from Selling Gasoline to an Intoxicated Individual.

New Mexico has adopted the general definition of negligent entrustment from the Restatement (Second) of Torts. *See Hermosillo v. Leadingham*, 2000-NMCA-096 ¶ 19, 13 P. 3d 79. That is, "[i]t is negligence to permit a third person to use a thing or engage in activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in activity in such a manner as to create an unreasonable risk of harm to others." *See e.g. Armenta* 2015-NMCA-092, ¶ 12 (relying upon *Restatement (Second) of Torts* § 308 (1965)). This includes when:

> [o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to known to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to him and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts, § 390 adopted by New Mexico in *Armenta v. A.S. Horner, Inc.*, 2015-NMCA-092, ¶ 12, 356 P. 3d 17.

"The general rule is that one who negligently entrusts chattel to an incompetent person is subject to liability for any resulting foreseeable harm." *Sanchez v. San Juan Concrete Co.*, 1997-NMCA-068 ¶ 21, 943 P. 2d 571 (emphasis added). This rule "applies to anyone who supplies a chattel for the use of another." This includes "**sellers**, lessors, donors, or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for consideration." *Restatement (Second) of Torts* § 390, cmt. a. (emphasis added). Section 390 establishes that "[An] actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." *Restatement (Second) of Torts* § 390, cmt. b. The only limitation on a claim for negligent entrustment that has been recognized in New Mexico is regarding negligent entrustment of real property. *See Gabaldon v. Erisa Mortg. Co.*, 1999-NMSC-039 ¶27, 990 P.2d 197. The rationale for imposing that limitation was that "the Restatement makes no reference to negligent entrustment of real property." *Id.* No chattel, however, has been excluded from the doctrine to date and the Uniform Jury Instruction confirms that the doctrine may be applied to chattels other than motor vehicles. *See* UJI 13-1646 ("This instruction should be used if the negligent entrustment doctrine is the basis of the plaintiff's claim against defendant. The instruction is not applicable to a claim of negligent entrustment of real property. However, **the instruction may apply to chattels other than automobiles**.")(emphasis added).

2. **Plaintiff's Claim is Consistent with the Public Policy Rationale Underlying the Negligent Entrustment Doctrine and the State's Public Policy Against Drunk Driving.**

Giant argues that there is no legal principal, legal precedent, or public policy that warrants imposing a duty of Giant to refrain from selling gasoline to an intoxicated customer. [Doc. 90 at pp 1, 6, 9, and 11]. This position completely ignores New Mexico's negligent entrustment jurisprudence and should be rejected. As this Court previously found, "[**a]n owner of chattel has a duty to others not to give control of a dangerous instrumentality to a person incapable of using it carefully**." *Morris v. Giant Four Corners, Inc.* 294 F. Supp. 3d 1207 (D.N.M. 2018) *citing to Casebolt v.* Cowan, 829 P. 2d 352,358 (Colo. 1992)(emphasis added). Colorado, like New Mexico, follows the Second Restatement of Torts and has expressly adopted the doctrine of negligent entrustment as a theory of liability, noting that the Restatement "provides a basis for resolving the issues of duty." *Id* at 356. As the Colorado Supreme Court noted *Casebolt*, the framers of Section 390 specifically envisioned its application to cases of intoxicated entrustees. *Id* at 358.

New Mexico has followed suit. Not only has the state adopted the doctrine as set forth in the Restatement, but also the jurisprudence has specifically coupled the legal principals at the root of the doctrine with the state's policy against drunk driving. In *Armenta*, 2015-NMCA-092, ¶ 12 (emphasis added; citations in original), the New Mexico Court of Appeals reviewed the legal principals and policies behind the doctrine, noting that the central legal principal behind the doctrine is the voluntary act of entrustment:

> In *Gabaldon*, this Court observed that an important aspect of Section 308 of the Restatement (Second) of Torts "is the idea that the 'third person is entitled to possess or use the thing or engage in the activity *only by the consent of the actor*, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.' *Gabaldon*, 1997-NMCA-120, ¶ 27 (quoting Section 308 cmt. a of the Restatement (Second) of Torts).

Despite the fact that there is no statute prohibiting the entrustment of a motor vehicle to an intoxicated driver, the New Mexico Courts have extended the doctrine to entrustors that provide chattel to intoxicated trustees based on the legal principal of the supplier's control over the chattel and the state's clear policy against drunk driving. *Armenta*, 2015-NMCA-092, ¶ 19 ("Thus, we hold that, provided 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. Such claims need not be founded on a showing of gross negligence and reckless disregard as in Sanchez.").

The state's public policy against drunk driving is compelling. *State v. Harrison,* 1992-NMCA-139, ¶ 19, 115 N.M. 73, 846 P.2d 1082 ("holding that "public's interest in deterring individuals from driving while intoxicated is compelling."). "This is due to the danger of the practice, not only to those who operate motor vehicles while under the influence, but also to those innocent individuals who are injured and killed as a result of DWI accidents." *Id.* In upholding a first-party negligent entrustment claim, the New Mexico court of appeals stated that:

> voluntary intoxication is socially undesirable conduct and that individual responsibility to refrain from such conduct should be promoted. These considerations, however, cannot be permitted to obscure the fact that a vehicle owner who has the right and the ability to control the use of the vehicle and takes no action to prevent the continued use by a borrower who the owner knows is likely to operate the vehicle while intoxicated is also engaged in morally reprehensible behavior that should be discouraged."

Armenta, 2015-NMCA-092, ¶ 19 (emphasis added).

Thus, while Giant attempts to make much of the fact that the legislator has not enacted legislation to prohibit the sale of gasoline to drunk drivers, the lack of legislation targeted to enstrustors has never been a barrier to imposing a duty on other entrustors to refrain from

negligently entrusting their chattel. In the absence of 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. This should come as no surprise given that the Restatement specifically provides that, "The rule stated applies to anyone who supplies a chattel for the use of another. It applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration. " Restat. 2d of Torts, § 390 (2nd 1979). As the New Mexico Supreme Court noted in *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 17, 326 P.3d 465, 472 , *citing* *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 14, 134 N.M. 43, 73 P.3d 181, silence on the part of the legislator "only means that the Legislature has not spoken."

Because gasoline vendors control an instrumentality necessary to operate a vehicle, they have been held accountable for the injuries caused by intoxicated driver once they have entrusted that property to an intoxicated driver. For example, the Tennessee Supreme Court held that selling gasoline to an intoxicated driver meets the elements of negligent entrustment. *West v. East Tennessee Pioneer Oil Company*, 172 S.W.3d 545 (Tenn. 2005). In reversing the summary judgment, the court held that to prevail on a negligent entrustment claim requires the plaintiff to prove that "a chattel entrusted to one incompetent to use it with knowledge of the incompetence and that its use was the proximate cause of injury or damage to another. *West*, 172 S.W.3d 545, 552. "A negligent entrustment is committed at the moment when control of a chattel is relinquished by an entrustor to an incompetent user." *Id*. at 555. Therefore, the act of supplying gasoline to a driver whom the defendant knew or should have known set forth a claim for negligent

entrustment. A California court likened supplying gasoline to a drunk driver to supplying the car key to a drunk driver. *O'Toole v. Carlsbad Shell Service Station*, 247 Cal. Rptr. 663 (Cal. 4th App District 1988) (unpublished) (stating that the chattel of gasoline "may be factual equivalent of the key to the car, or repairing of the car with a needed part to put the drunk back on the road."). The same result is warranted here.

In this case, Giant, through its agent Gloria Pine, knew that both Mr. Denny and his companion, Cecilia Yazzie were intoxicated and could not operate their vehicle because they had run out of gas. Ms. Pine acknowledged that she knew how to identify signs of intoxication in customers and that she had control over the sale and relinquishment of chattel at Giant, admitting she could refuse to sell to individuals because they were intoxicated. *See* Exhibit D attached to Plaintiff's Motion for Summary Judgment filed on 11/24/15 at 29:12-16; 28:12-29:8. Ms. Pine informed Mr. Denny and Ms. Yazzie that she would not sell *anything* to them because they were intoxicated. *See* Exhibit B at 58:14-15 Attached to Plaintiff's Motion for Partial Summary Judgment filed on 11/24/15. Ms. Pine acknowledged that she **knew** of the harm that would result from entrusting gasoline to an intoxicated individual stating it was dangerous because "they might run off the road and crash into somebody." Exhibit D to Plaintiff's Motion filed 11/24/15 at 38:13-14. Yet despite her initial refusal and her own acknowledgement of Mr. Denny's intoxication based on her training, Ms. Pine agreed to release control over the chattel when she decided to sell approximately ten gallons of gas to an intoxicated Mr. Denny, giving him the necessary part to get him back on the road. *Id* at 25:6-8, 60:20-61:5, 29:5-14. Moreover, Ms. Pine chose to sell gallons of gasoline to an intoxicated Denny knowing the risk that he could run someone off the road and crash into them, which is exactly what Mr. Denny did do. As such, Ms. Pine herself

establishes that Giant was negligent in their entrustment of gasoline to an intoxicated Denny, in violation of the duty to refrain from negligently entrusting chattel to an incompetent (i.e. intoxicated) person established by Section 390. Defendant's contention that Giant owed no duty and that Plaintiff has thus failed to state a claim is without merit. Plaintiff meets each necessary element of the tort and the fact pattern clearly fits within the formulation of the duty in New Mexico's negligent entrustment jurisprudence.

B. THIS CASE HAS NOTHING TO DO WITH DUTY TO TAKE AFFIRMATIVE ACTION OR RENDER AID

Rather than deal with the legal principals at the root of the negligent entrustment doctrine or New Mexico's negligent entrustment jurisprudence, Giant asks the Court to apply the law concerning the affirmative duty to render aid or protect another. Under the Restatement, that is a separate type of negligent act, one that has nothing to do with the duties of those whom control and supply chattel.

The duty to take affirmative action is dealt with under Topic 7 (Duties of Affirmative Action) under the Restatement, which makes clear that liability for such failures stems from the ability of the actor to control the conduct of a third person, hence the requirement of a special relationship between the actor and third party. *See* Restat 2d of Torts, §§ 314 and 315 (2nd 1979)**.** Conversely**,** the duties of those that allow their property to be used in a particular manner is dealt with under the heading "Permitting Improper Peron's to Use thing or Engage in Activities", which focuses on the actor's control over, or relationship to, the property at issue. Restat 2d of Torts, § 308 (2nd 1979). Section 390 then outlines the special application of §308 to the suppliers of chattel, again noting that the essential element of liability is the supplier's willingness to allow his

own property to be used in a manner that presents an unreasonable risk of harm or death, which the Restatement illustrates as follows:

> A, who makes a business of letting out boats for hire, rents his boat to B and C, who are obviously so intoxicated as to make it likely that they will mismanage the boat so as to capsize it or to collide with other boats. B and C by their drunken mismanagement collide with the boat of D, upsetting both boats. B, C, and D are drowned. A is subject to liability to the estates of B, C, and D under the death statute, although the estates of B and C may also be liable for the death of D.

Restat. 2d of Torts, § 390 (2nd 1979). Thus, it is Giant's control over its own property and its consent to allowing someone to use it in a dangerous manner that triggers liability. This case is not about whether Giant had an affirmative duty to render aid or prevent harm by controlling the conduct of Denny. In fact, had Giant done nothing, no liability would have attached.

In short, the duty analysis in this case is properly analyzed under the negligent entrustment jurisprudence, not the law that controls when a person has a duty to take an affirmative action. Giant's reliance on the latter is misplaced and should be rejected. Its duty is consistent with the mandates and purpose of Section 390 and New Mexico's negligent entrustment case law.

C. THERE IS NOTHING TO DEFENDANT'S PARADE OF HORRIBLES ARGUMENT

There is no reason to believe that imposing a duty on Giant to refrain from selling gasoline to an intoxicated driver would open the floodgates of litigation as suggested by Giant. As noted in the Introduction, negligent entrustment doctrine, including the portion that applies the doctrine to all suppliers of chattel, has been part of Second Restatement since 1965, California applied to doctrine to sale of gasoline twenty (20) years ago, Tennessee ten (10) years ago, and New Mexico and Colorado have applied the doctrine to intoxicated entrustees more than twenty (20) years ago.

Additionally, the doctrine has been applied numerous types of chattel, including brooms[1], fireworks[2], firearms[3], horses[4], and personal watercraft[5]. Yet, despite the availability of the cause of action, there has not been a flood of litigation for commercial vendors. There are several reasons for this.

To start, New Mexico is a pure comparative fault state. Thus, the intoxicated entrustee will undoubtedly share in significant portion of the fault caused by his or her own conduct. As the *Armenta* court noted, "Given that New Mexico adheres to pure comparative negligence principles, we agree with the court in *Casebolt* that "[c]omparative negligence provides the appropriate framework for examining any negligence on the part of the individual who drives after consuming alcoholic beverages. *Armenta*, 2015-NMCA-092, ¶ 19, 356 P.3d 17, 25 (citation in original). This regime will limit potential entrustees liability and deter claimants from bringing suit against the entrustees in many cases.

Moreover, although Giant is able to rattle off a host of vendors it believes could be liable for selling products that could distract drivers-- *e.g.*, cell phone suppliers, drive-thru fast food restaurants, hot beverage suppliers, make up suppliers – each of its hypotheticals are incomplete. What Giant refuses to recognize is that a supplier of cell phones or fast food would not be liable for its failure to control the driver from driving distracted under the principals of negligent entrustment. The supplier would only be held liable if it knew or had reason to know that the entrustee was, in fact, incompetent *(e.g., inexperience or otherwise)* and due to that incompetency

[1] *Louisius v. Fla. Dept. of Corr.*, 2015 U.S. Dist. LEXIS 18767 (M.D. Fla., 2015) (applying Florida law).
[2] *Collins v. Ark. Cement Co.*, 453 F.2d 512 (8th Cir. 1972) (applying Arkansas law).
[3] *Ireland v. Jefferson County Sheriff's Department*, 193 F.Supp.2d 1201, 1229 (D.Colo. 1999) (applying Colorado law).
[4] *Dee v. Parish*, 327 S.W.2d 449 (Tex. 1959).
[5] *Gozleveli v. Kohake*, 573 Fed. Appx. 883 (11th Cir. 2014) (unpublished) (applying Florida law).

would use the cell phone or fast food in a dangerous manner and nonetheless still agree to supply that property. In a typical commercial transaction, including in Giant's hypotheticals, a vendor has no reason to know that the person is incompetent and that due to that incompetency the driver is likely to use chattel in a manner involving an unreasonable risk of injury. *See, e.g., Armenta,* 2015-NMCA-092, ¶ 19 ("we hold that, **provided 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 the injury"). Thus, there is no reason to believe that imposing a duty on Giant would lead to a flood of litigation.

CONCLUSION

Defendant ignores the fact that New Mexico has adopted The Restatement (Second) of Torts, and along with it, Section 390 and the legal principals and policies at the heart of these precedents. Defendant's Motion should therefore be denied as a matter of law.

WHEREFORE, Plaintiff prays that this Court deny Defendant's Motion for Judgment on the Pleadings, and for any other relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 1-005(E) and Rule 1-005.2(C), I hereby certify that the foregoing document was served through the Court's EFS system on this 10th day of July 2018 to all counsel of record.

DAVIS KELIN LAW FIRM, LLC

Gina Downes