WRITING COMPETITION ENTRY

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Toxic Torts and the Fear of Cancer:
Who Should be Compensated for Emotional Distress?
Toxic Torts and the Fear of Cancer: Who Should be Compensated for Emotional Distress?

_Dodge v. Cotter Corporation._

_By Susan Johnson_

**I. INTRODUCTION**

Determining when plaintiffs can recover monetarily for emotional distress has been a question nationwide. Recovery for emotional distress has been addressed in many situations for victims and bystanders. However, recovery for emotional distress has usually been linked to a physical manifestation or injury. Many courts have yet to address whether an individual suffering from the fear of contracting cancer can recover. New Mexico, unlike Colorado, has yet to encounter such a case.

Over the past five decades toxic contamination from chemical releases, whether negligent or intentional, has affected many people in numerous ways. Chemicals can migrate via water and air, contaminating soil, drinking water, and the air. The Love Canal is one of the first and one of

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1 In the late 1800's, W.T. Love excavated for a proposed hydroelectric power project, which was never implemented. The site of excavation became known as the Love Canal. In 1942, the Hooker Chemical Company, now Occidental Chemical Corporation (OCC), used the site as a landfill and dumped over 21,000 tons of chemical wastes in the landfill. The chemicals included pesticides and chlorobenzenes. In 1952, Hooker Chemical Company stopped using the site as a landfill. A year later the site was covered and the property deeded to the Niagara Falls Board of Education. The area was extensively developed. Approximately ten years later, the residents noticed odors and residues, the intensity of which increased by the 1970's. The toxic chemicals had migrated to the surrounding area and into the Niagara River. After two emergency declarations by President Carter, 950 families were evacuated from the area. The Federal Emergency Management Agency (FEMA) purchased the properties and oversaw the relocation activities. United States Environmental Protection Agency, Region 2 Superfund: Love Canal, available at http://www.epa.gov/region02/superfund/npl/0201290c.htm (last visited July 21, 2002). In 1979, the United States filed an action against OCC, the City of Niagara Falls, the Board of Education of the City of Niagara Falls, and the Niagara County Health Department to ensure complete relief.
the most infamous incidents of toxic contamination which brought to light the far-reaching impact chemical releases have on nearby communities. The Rocky Mountain States, and in particular, New Mexico, have had very few, if any, tort cases resulting from toxic pollutants. In New Mexico, the two most recent cases that have resulted from a toxic release, *Schwartzman Inc. v. Atchison, Topeka & S.F. Railway,* and *Hartman v. Texaco Inc.*, address the torts of trespass and nuisance, but not personal injury and the emotional distress the people living near the sites of chemical release can suffer from.

*Dodge v. Cotter Corp.*, is the most recent case in the Rocky Mountain States that addresses personal injuries resulting from a toxic chemical release. The Rocky Mountain States have a diverse climate that has attracted a wide variety of industries including the Waste Isolation Pilot Project, Los Alamos and Sandia National Laboratories, Intel, and other large manufacturers. These industries employ thousands of people who live, work, and vacation nearby. With the influx of these industries and people, it is reasonable to assume that we will see claims similar to those in *Dodge* filed and litigated in the New Mexico State and federal courts.


3 Dodge v. Cotter Corp., 203 F.3d 1190 (10th Cir. 2000).

4 The Waste Isolation Pilot Project, also known as WIPP, is an underground repository for transuranic radioactive waste. WIPP is located in Southeastern New Mexico, 26 miles Southeast of Carlsbad, New Mexico. United States Department of Energy, Carlsbad Field Office, *WIPP*, available at http://www.wipp.carlsbad.nm.us/index.htm (last visited May 29, 2002).
II. STATEMENT OF THE CASE

The Cotter Corporation operated a uranium mill near Canon City, Colorado from 1958 to 1987. The milling process extracted uranium from ore and produced two types of waste. The waste products from the Cotter mill were released into the groundwater and the atmosphere and eventually contaminated an area approximately four miles in radius from the mill site including the nearby town of Lincoln Park. Subsequently, the area was designated as a Superfund site. In 1983 the State of Colorado sued Cotter for continually violating the conditions of its operating license and for cleanup of the contamination. The State and Cotter entered into a consent decree. The decree established a panel to quantify exposures from the mill contaminants. The panel determined that possible health risks were low with the exception of exposure from the drinking water.

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6 *Dodge*, 203 F.3d at 1193.

7 The two types of waste were dust-like particulates of ore and liquid, which are recovered from the uranium extraction process. The liquid waste was stored in unlined ponds, which allowed the waste to leach into the groundwater. *Id.* at 1192.

8 Congress established “the Superfund Program in 1980 to locate, investigate, and clean up the worst [uncontrolled and hazardous waste] sites nationwide. The EPA administers the Superfund program in cooperation with individual states and tribal governments. The office that oversees management of the program is the Office of Emergency and Remedial Response (OERR).” United States Environmental Protection Agency, *Superfund, available at* http://www.epa.gov/superfund/about.htm (last visited March 27, 2002).


10 *Id.* at 1193.

11 *Id.* at 1193.
Approximately five hundred residents of Lincoln Park and three other nearby towns brought an action in 1989 against the Cotter Corporation. The plaintiffs asserted that negligent operation of the mill caused damage to their health, including a fear of contracting cancer, and property damage. The plaintiffs requested damages exceeding $350 million, injunctive relief and medical monitoring. The 1989 suit alleged violation of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Price Anderson Act, and Colorado law. Five hundred plaintiffs filed a class action suit, but were denied class status. A set of

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12 Id. at 1192. The plaintiffs list gout, bony growths, arthritis, cataracts, and genetic damage as some of the illnesses that they allege were caused by exposure to the radioactive contaminants from the mill. A 70% decrease in property value and a market value of zero is claimed by the plaintiffs. Appellee’s Answering Brief/Cross-Appellants’ Opening Brief at pg. 5.

13 The damages sought were for Cotter’s negligence, strict liability, nuisance, willful and wanton conduct, outrageous conduct, trespass, and absolute liability. Dodge, 203 F.3d 1194.

14 Id.

15 42 USC §§9601-9675 (2000). This law created a tax and broad authority for the federal government to respond to releases or threatened releases of hazardous substances from the chemical and petroleum industries that may endanger the environment or the public. It established requirements for waste sites, provided for liability, and established a trust fund when a responsible party could not be found. This law also provides for both short-term and long-term solutions to remediation of Superfund sites. See United States Environmental Protection Agency, Superfund CERCLA Overview, available at http://www.epa.gov/superfund/action/law/cercla.htm (last visited March 27, 2002).

16 42 USC §2210(n)(2). The Price-Anderson Act is an amendment to the 1946 Atomic Energy Act. This amendment limited the liability of the corporations licensed under the Atomic Energy Commission (established by the Atomic Energy Act) to the amount available from private sources. In Re TMI Litigation, 193 F.3d 613, 624 n.7.


18 The plaintiffs filed for class action status under Federal Rules of Civil Procedure 23, but were denied on three separate occasions. Id. at 828.

19 The trial judge did not address whether Rule 23(b)(1)(A) would apply, but ruled that the class did not prove that the plaintiffs would be satisfied from a limited fund under Rule 23(b)(1)(B).
bellwether plaintiffs was chosen and proceeded with the lawsuit knowing that the remaining individuals would follow with subsequent trials.20

Eight plaintiffs (Boughton plaintiffs) were selected for the first trial (Boughton v. Cotter Corp.21). The Boughton plaintiffs listed eleven negligent acts and/or omissions in the complaint.22 These plaintiffs did not have present personal injuries but sought damages in an action alleging negligence for medical monitoring, and damages for trespass and nuisance for failure to properly control/contain the hazardous materials from the mill.23 Cotter admitted that its operation caused some contamination in limited areas, but denied that it breached any legal standard of duty.24 The jury returned a special verdict form “for each plaintiff ... for medical monitoring, trespass, and nuisance.”25 The jury did not find that there was exposure to hazardous materials making it

The court also stated that it was not proper to certify the class under Rule 23(b)(2) because the relief sought was primarily monetary. Boughton, 65 F.3d at 827. The trial judge found that the plaintiffs’ action for damages failed to meet the statutory requirements under Rule 23(b)(3) because the individual issues predominated over the common issues. Boughton, 65 F.3d at 826. The individual issues included awareness of contamination, the extent and nature of their injuries, the amount of exposure, the amount of contamination and water right ownership. Id. The proposed class was defined by the geographic region in which the plaintiffs lived and worked during a specified time. Id. at 828. The district court judge stated class action status could not be maintained because “it could not be shown that the claims of the proposed class members were all based on one legal or remedial theory.” Id. at 826. On appeal of the denial of the class certification under Rule 23(b)(3), the Tenth Circuit affirmed the trial court’s denial of the request to certify the class. Boughton, 65 F.3d at 828.

20 Id. at 828.

21 65 F.3d 823 (10th Cir. 1995).

22 203 F.3d at 1196.

23 Id.

24 Id. at 1194.

25 The jury did not return a separate verdict form specifically stating what acts and/or omissions constituted Cotter’s were negligence. However, the special jury verdicts for medical monitoring
reasonable to award money damages for future medical monitoring. However, the jury did award
monetary damages to all eight Boughton plaintiffs; all eight prevailed on their claims of
negligence, six of the plaintiffs prevailed on claims of trespass, and three recovered on their claims
of nuisance.\textsuperscript{26}

After the Boughton trial, a second set of plaintiffs filed a separate lawsuit. These plaintiffs,
the Dodge plaintiffs, filed an amended complaint in the United States District Court for the
District of Colorado almost identical to that in the Boughton trial also asserting that Cotter
breached its duty to control the contaminants.\textsuperscript{27} The Dodge plaintiffs prevailed on their motion for
summary judgment on the issues of negligence, trespass, and nuisance.\textsuperscript{28} At the conclusion of the
Dodge trial, the jury returned verdicts in favor of the plaintiffs and awarded damages for physical
injuries and diminution in property value.\textsuperscript{29} On appeal, the Tenth Circuit reversed and remanded
the case for a new trial.\textsuperscript{30} On remand, the district court granted the defendant’s motion for

\textsuperscript{26}\textit{Boughton}, 65 F.3d at 825.

\textsuperscript{27}\textit{Dodge}, 203 F.3d at 1195.

\textsuperscript{28} Their motion was based on the jury verdict from the Boughton trial using the doctrine of non-
mutual, offensive collateral estoppel. \textit{Id.}

\textsuperscript{29} On appeal, the Tenth Circuit stated that it was not clear as a matter of law that the issues of the
Boughton and Dodge trials were the same. The Dodge plaintiffs’ complaint differed because it had
different dates of operation. Additionally, because there was no indication of what specific act
formed the basis for the general finding of negligence in Boughton, the court stated that the seven
claims pertaining to hazardous releases in Dodge did not “clearly encompass[]” the general finding
of negligence of the first trial. \textit{Id.} at 1198.

\textsuperscript{30} The court stated the district court misapplied the doctrine of collateral estoppel because the
issues in the two cases were not identical. The court additionally stated that even if the issues were
identical, the Boughton verdict would not bind the Dodge plaintiffs because the parties had not
agreed to be bound by the bellwether trial results before trial. \textit{Id.}
summary judgment regarding the plaintiff's claim for damages based on emotional distress caused by the increased fear of cancer. The Tenth Circuit reviewed this order and agreed that the Dodge plaintiffs did not meet their burden of proof to permit their recovery for emotional distress damages. Emotional distress claims related to the fear of cancer caused by emissions of toxic chemicals are the focus of this paper. Lost chance and enhanced risk will not be addressed.

III. BACKGROUND

Fear of cancer is an emotional distress claim "generally used to describe present anxiety over developing cancer in the future." A claim for fear of cancer is most closely related to a claim for negligent infliction of emotional distress (NIED).

Originally, only intentional infliction of emotional distress, and not NIED, was a compensable cause of action. Even though NIED is a recognized cause of action, courts are still reluctant to award emotional damages because they are too speculative in nature. Additionally, the courts fear that allowing recovery may allow for an increase in the number of fraudulent claims and allow claims with virtually no evidence to proceed.

i. Colorado progression of Fear of Cancer Claims

31 Id. at 1200.
32 Id. at 1200-02.
34 See generally id.
37 Id. at 1164.
In Colorado, three cases show the progression in the law regarding emotional distress. In *Towns v. Anderson*, the court abolished the impact requirement for cases of negligent infliction of emotional distress. In that case, the mother brought an action to recover on behalf of her son for emotional, psychological, and psychiatric injuries resulting from the destruction of the family's home. The son was standing away from the house when a gas explosion lifted the house off its foundation and caught fire. The son heard the screams of his sister who was inside the house at the time of the explosion. The son was not physically injured, but suffered from numerous physical problems including sleepwalking, nightmares, and nervousness. The trial court dismissed the action because the son did not exhibit any physical impact or manifestation at the scene of the accident. The court of appeals reversed the decision of the trial court and adopted the Restatement approach stating that there have been medical advances allowing for a more accurate diagnosis of emotional and mental injuries creating sufficiently reliable information on which to base a decision.

The second case cited by the Colorado court more closely resembles the facts of *Dodge*. In *Potter v. Firestone Tire and Rubber Company*, the court held that the plaintiffs could not recover

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38 579 P.2d 1163 (Colo. 1978).

39 *Id.* at 1163.

40 *Id.*

41 Restatement (Second) of Torts §436A. If the negligence of one, the tortfeasor, creates an unreasonable risk of causing bodily harm or emotional distress to another, but does not manifest itself in a physical injury or other compensable damage, the tortfeasor is not liable for the emotional distress. Physical injury can be manifested by prolonged headaches, repeated hysterical attacks, and nausea. If however, there is an immediate emotional response to the negligent conduct, not manifested by a physical condition, the tortfeasor is not protected from liability.

42 *Id.*

43 863 P.2d 795 (CA 1993).
for emotional distress caused by fear of cancer. The plaintiffs were four landowners who lived next to a landfill where the defendant had a practice of disposing toxic wastes. The toxins eventually contaminated the plaintiffs' water wells. None of the plaintiffs were suffering from cancer or a precancerous condition, but all had an increased and unquantified risk of developing cancer from the exposure to the toxins in the landfill. The court addressed immune system impairment and/or cellular damage as a parasitic claim as well as the non-parasitic emotional distress. The court stated that absent an express exception, damages for fear of cancer might be recovered if the plaintiff proves that:

1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and 2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.

Under this rule, knowledge of possible exposure and a significant increased risk of cancer are insufficient to support a claim of emotional distress. Plaintiffs must show, corroborated by either

44 Potter, 863 P.2d at 816.
45 Id. at 801.
46 The toxins included benzene, toluene, chloroform, 1,1-dichloroethene, methylene chloride, tetrachloroethene, 1,1,1-trichloroethane, trichloroethene, and vinyl chloride. All are suspected carcinogens, but vinyl chloride and benzene are known carcinogens. Potter, 863 P.2d at 801-02.
47 Id. at 801.
48 Id. at 801.
49 Id. at 806-07. A parasitic emotional distress claim is one that is attached to a physical injury.
50 Id. at 807-17. A non-parasitic emotional distress claim is one that is not attached to a physical injury.
51 Id. at 816.
52 Potter, 863 P.2d at 816.
scientific or medical opinion, that they harbor a serious fear that the exposure of a toxin "was of such magnitude and proportion" that there is a "significant chance" they will develop cancer in the future. The court provided multiple policy reasons for limiting the availability of recovery for fear of cancer. First, the court stated everyone is exposed to carcinogens every day and is a potential fear-of-cancer plaintiff, potentially creating huge class actions that could put a tremendous burden on society. Second, it could have a detrimental impact on the health care field because access to prescription drugs would be impeded. Third, the recovery for fear of cancer could impede recovery of those that do sustain physical injury. The plaintiffs with a physical injury may not recover completely because defendants and insurers may not have adequate resources. Fourth, requiring a higher threshold would encourage more consistent verdicts.

53 Id.

54 While the language of "significant chance" used to clarify the standard by the court is inconsistent with the "more likely than not" standard enumerated by the court, there is no indication that the court intended two tests. Id.

55 Id.

56 Potter, 863 P.2d at 812.

57 Id.

58 Id. The amicus curiae California Medical Association stated that thousands of drugs having no known side effects are being used and the harmful effects of these drugs may not be known for years. If there were harmful effects, the numerous lawsuits, which could result, would be unlimited. Id.

59 Potter, 863 P.2d at 813.

60 Id.

61 Id. at 814.
The final case the Colorado courts used in developing the standard for fear of cancer was, *Boryla v. Pash.*\(^62\) In that case, the plaintiff suffered from invasive breast cancer. The plaintiff had extensive surgery and had not had a reoccurrence of cancer since the operation. The plaintiff sued the doctor for negligent diagnosis and stated the delay in diagnosing her condition resulted in an increased amount of cancer cells in her body; she was allowed to recover for her fear of cancer.\(^63\)

This was not a case about an increased risk of cancer, but a claim for emotional distress including a fear of reoccurrence of cancer.\(^64\) This court did not adopt the "more probable than not" standard set forth in *Potter.*\(^65\) The court stated that when a physical injury already exists, the standard does not apply because the damages are not purely emotional in nature.\(^66\) This case is unlike a toxic tort case and thus the rationales are not the same. A toxic tort case rationale is not present because the class of plaintiffs is limited to the parties in dispute and by not adopting the standard annunciated in *Potter,* it would not equate to inconsistent jury verdicts.

The Tenth Circuit in *Dodge* did not expand emotional distress recovery to include fear of cancer resulting from exposure to toxins.\(^67\) The first step in the court's analysis was to determine whether the plaintiffs met the threshold requirement set forth in *Towns* by showing that they were subjected to an unreasonable risk of bodily harm due to Cot ters negligence.\(^68\) The court then

\(^ {62}\) 960 P.2d 123 (Colo. 1998).
\(^ {63}\) Id. at 125.
\(^ {64}\) Id. at 127.
\(^ {65}\) Id. at 128.
\(^ {66}\) Id. at 128.
\(^ {67}\) Dodge, 203 F.3d at 1202.
\(^ {68}\) Id. at 1201.
addressed whether the plaintiffs, like Boryla, suffered from a chronic and continuing physical manifestation.\textsuperscript{69} The court stated the evidence failed to show either of these requirements.\textsuperscript{70} The Tenth Circuit stated there was no indication by the Colorado Supreme Court that they would equate the traditional negligence principles used in Boryla, to encompass fear of cancer outside of a medical malpractice claim.\textsuperscript{71} Even if the court were to expand recovery for emotional distress to encompass toxic tort cases, the Dodge plaintiffs failed to produce evidence demonstrating they suffered from a "chronic objective condition caused by their increased risk of developing cancer."\textsuperscript{72} The distinguishing characteristic for the court seemed to be the fact that the Dodge plaintiffs suffered only from acute physical manifestations whereas the plaintiff in Boryla suffered from a permanent and objective injury "leading to an increased risk of cancer."\textsuperscript{73}

\textbf{ii. New Mexico Progression of Fear of Cancer Claims}

\textit{Dodge} can be helpful to New Mexico courts when confronted with similar cases which may originate in New Mexico because of WIPP, Los Alamos and Sandia National Laboratories, Intel or from mining and oil production in the Northeastern area of the state.

\begin{itemize}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} \textit{Dodge, 203 F.3d at 1202.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id.} Even though the Colorado Supreme Court stated in \textit{Boryla} that it was not an "increased risk of cancer case," the Tenth Circuit seems to narrow the Colorado Supreme Court's holding to allow only those that have had cancer in the past and might have cancer in the future to recover for emotional distress. \textit{Id.}
\end{itemize}
The first reported case of emotional distress in New Mexico is *Curry v. Journal Pub. Co.*\(^74\)
The case analyzed two issues: 1) Does a cause of action exist from negligently spoken words resulting in damages? and 2) Can damages be recovered for grief resulting in physical injury?\(^75\)
English common law stated that there was no liability for negligence by spoken words but only for intentional falsehoods.\(^76\) However, the trend in American courts at the time was to allow a cause of action if the defendant had an obligation to the plaintiff to use care in making statements of fact, on which the plaintiff might rely.\(^77\) Two considerations from the leading cases in America\(^78\) guided the *Curry* court in the decision of this case. First, the court stated that a fine line separates moral obligation from a legal duty.\(^79\) Legal duties are when the court could find liability for emotional distress for breach of contract, libel, or slander.\(^80\) Generally speaking, a moral obligation crosses over to equate to a legal duty when one individual owes a duty to the other.\(^81\)

\(^74\) 41 N.M. 318, 68 P.2d 168 (1937). The Albuquerque Journal falsely published an obituary of the former territorial governor and ex-congressman, George Curry; he was alive and well. When Curry's son read the obituary, it caused him to have a heart attack resulting in permanent impairment. The daughter-in-law had a similar reaction to the false obituary. She suffered permanent impairment to her health. The child the daughter-in-law was pregnant with at the time was also permanently impaired due to the daughter-in-law's shock. *Id.* at 169.

\(^75\) *Id.* at 169.

\(^76\) *Id.* at 170-71.

\(^77\) *Id.* at 171.


\(^79\) *Curry*, 68 P.2d at 169-70.

\(^80\) *Id.*

\(^81\) *Id.*
Second, without a physical injury it was not possible to know how to compensate the victim. The court stepped away from the blanket assertion of not allowing NIED and used the two principles discussed in the two leading cases in America. In other words, for a plaintiff to prevail on a claim for emotional distress, the plaintiff must show: 1) that the defendant should have realized his/her conduct would have created an unreasonable risk of causing emotional distress, thus showing a duty between the plaintiff and defendant and 2) that bodily injury or illness is probable. The Curry court did not intend the principles it set forth to apply generally to all circumstances and limited their decision to the facts of that case. The court used these principles in addition to the standard elements of a claim for negligence. Requiring the plaintiff to prove the standard elements of a negligence cause of action will eliminate or "weed out" the cases where the defendant did not owe the plaintiff a duty. If the court had focused on proximate cause instead of the duty owed to the plaintiff, it would have resulted in a flood of litigation because everyone reading the newspaper on that day could have filed a cause of action for emotional distress.

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83 Curry, 68 P.2d at 171.
84 Id. at 171 - 72.
85 Id. at 173.
86 Id.
87 Id. at 174 ("Not every negligent act that results in damage to some one is actionable. There must be a duty owing to the injured by the person whose negligent act inflicts the injury, and such duty does not extend to the protection of third persons not directly involved...." citations omitted.).
88 Id. at 173.
Ramirez v. Armstrong, expressly overruled Curry, and was the first case that addressed whether bystanders could recover for emotional distress in New Mexico. Prior case law had only addressed intentional infliction of emotional distress and negligent infliction of emotional distress tangentially. The discussion centered on the following rules from three other jurisdictions in an attempt to define liability to bystanders: 1) the "impact rule," 2) the "zone of danger" rule, and 3) the Dillon rule. The first two rules focus on the foreseeability of harm and the duty of

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89 100 N.M. 538, 673 P.2d 822 (1983), overruled in part by Folz v. State, 110 N.M 457, 797 P.2d 246 (1990). Three children witnessed the death of Santana Ramirez; two were Mr. Ramirez's children and one was a family friend. Mr. Ramirez's third child heard about the accident. The court addressed which if any of the children could recover for emotional distress. Id. at 538, 673 P.2d at 822. All four children claim that they suffer from both physical and mental injury. Id. at 540, 673 P.2d at 824. The court only allowed the two children who actually witnessed the accident to recover for emotional distress based on the analysis under the Dillon rule. See infra n.85.

90 Id. at 540, 673 P.2d at 824.

91 Id. at 538, 673 P.2d at 822.

92 Id. at 540, 673 P.2d at 824.

93 Ramirez, 100 N.M. at 540, 673 P.2d at 824.

94 The "impact rule" restricts claims for emotional injuries to those plaintiffs who show they suffered from a physical injury. See Pittsburgh C.C. & St. L. Ry. Co. v. Story, 63 Ill. App. 239 (1896).

95 The "zone of danger rule" allows recovery for those who are threatened with physical injuries, which is similar to the discussion in Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928). See Ramirez, 100 N.M. at 541, 673 P.2d at 825.

96 Dillon v. Legg, 72, 441 P.2d 912 (1968). The Dillon court was one of the first courts to recognize a cause of action for bystanders who suffered emotional distress from seeing an accident that caused severe injury to a loved one. Id. at 915, 920. In Dillon, the court was faced with determining if both the mother and sister of a child could recover for emotional distress when the child was killed by a negligent driver. Id at 915. Under the zone of danger rule, the court would come to a "somewhat revolting" result only allowing the sister to recover and not the mother. Id. at 919 n.4. The Dillon court adopted to use general principles of negligence and looked to whether there was a duty between the plaintiff and the defendant. If a duty existed, determined by foreseeability, then the plaintiff could recover for emotional distress. Id. at 920.
care and deny recovery to bystanders not physically injured.97 The Dillon rule98 focuses on the legally protected interest, which is the knowledge that loved ones are safe.99 NIED is a tort against the integrity of the family.100 By adopting a modified version of the Dillon rule,101 the courts have guaranteed recovery for some claimants and at the same time limited the liability of the defendant.102 The modified version of Dillon that was adopted in Ramirez requires that:

1) There be a marital, or intimate familial relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister, and to these persons who occupy a legitimate position in loco parentis; 2) The shock to the plaintiff must be severe, and result from a direct emotional impact upon the plaintiff caused by the contemporaneous sensory perception of the accident, as contrasted with learning of the accident by means other than contemporaneous sensory perception, or by learning of the accident after its occurrence; 3) There must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury; and 4) The accident must result in physical injury or death to the victim.103

97 Ramirez, 100 N.M. at 541, 673 P.2d at 825.

98 The Dillon rule sets forth the following elements in addition to the standard elements of negligence. First, there must be an intimate marital or familial relationship between the victim and the plaintiff. Second, the shock to the plaintiff must be severe resulting in a direct emotional impact on the plaintiff. Additionally, the plaintiff must have a contemporaneous sensory perception of the accident (not learned of by other means or after the occurrence of the accident). Id. at 541-42, 673 P.2d at 825-26.

99 Id.

100 Id.

101 New Mexico's criteria were much more detailed than the general guidelines originally set forth by the Dillon court. The court articulated specific relationships between the victim and the plaintiff that would allow for bystander recovery of NIED. The Ramirez court also stated that there must be a physical manifestation of emotional distress or a physical injury to the plaintiff and the accident must result in a physical injury or death to the victim. Ramirez, 100 N.M. at 541-542, 673 P.2d at 825-826. The New Mexico Supreme Court later eliminated the requirement that there be a physical manifestation of the emotional distress in Folz v. State, 110 N.M 457, 797 P.2d 246 (1990).

102 Ramirez, 100 N.M. at 541, 673 P.2d at 825.

103 Id. at 542, 573 P.2d at 826.
Ramirez has since been overruled and New Mexico no longer requires the plaintiff to meet the threshold requirement severe emotional trauma resulting in a physical injury or illness.

Seven years after Ramirez, bystander recovery was addressed again in Folz v. State\textsuperscript{104} and the New Mexico Supreme Court abandoned the impact portion of the modified Dillon rule previously adopted.\textsuperscript{105} Mrs. Folz not only suffered from multiple injuries, but also witnessed her husband die at the accident and heard the screams of her son asking his father not to die.\textsuperscript{106} A runaway truck collided with the Folz vehicle killing the husband and son of Dorothy Folz. Mrs. Folz claimed that negligent traffic control associated with the road construction was the cause of the accident.\textsuperscript{107}

In some cases, the requirement of physical injury is over-inclusive and in others, under-inclusive.\textsuperscript{108} This case, unlike the children in Ramirez, Folz was a direct victim of the negligent tortfeasors and suffered physical injuries; she could have recovered for emotional distress under the impact requirement articulated in Ramirez.\textsuperscript{109} Although the “impact” requirement was not the controlling issue in Folz, and was eliminated.\textsuperscript{110} It was more important to preserve the basic principles of tort law; the reasonable reactions of real people should not automatically preclude a

\textsuperscript{104} 110 N.M. 456, 797 P.2d 246 (1990).
\textsuperscript{105} Id. at 457, 797 P.2d 246.
\textsuperscript{106} Id. at 468, 797 P.2d at 257.
\textsuperscript{107} Id. at 460-61, 797 P.2d at 249-50.
\textsuperscript{108} Id. at 470, 797 P.2d at 259.
\textsuperscript{109} Folz, 110 N.M. 456, 471, 797 P.2d 246, 260.
\textsuperscript{110} Id. at 456, 797 P.2d at 246.
cause of action. The genuineness of a claim for emotional distress would not be measured by a physical manifestation.

Curry, Ramirez, and Folz, however, do not address emotional distress caused by the fear of contracting a disease. The fear of disease is emotional distress of the person the originating injury and not that of a bystander. In Madrid v. Lincoln County Medical Center, the court held that public policy supports formulating a cause of action for emotional distress damages for fear that another’s negligence has caused “him or her to contract HIV through a medically sound channel of transmission.” It is not necessary that the plaintiff actually contract the disease, so long as the plaintiff has a fear of contraction for a period of time. Sonia Madrid was transporting medical samples of blood when one leaked during transport and she was splashed with the contents. Her hands, which were exposed to the contents, had multiple unhealed paper cuts. Medical professionals told her that she should be tested for the HIV virus several times over the next

111 Id. at 274-75, 923 P.2d at 1159-60.
112 Id. at 269, 923 P.2d at 1154.
113 Madrid v. Lincoln County Medical Center, 122 N.M. 269, 271, 923 P.2d 1154, 1157 (1996).
115 Id. at 278, 923 P.2d at 1163.
116 122 N.M. at 274, 923 P.2d at 1159 (1996), citing Williamson v. Waldman, 291 N.J.Super. 600, 677 A.2d 1179, 1180-81 (Ct. App. Div. 1996). The court stated, “where a defendant’s negligent act or omission provides an occasion from which a reasonable apprehension of contracting deadly disease may eventuate, and where the quality of the conduct is such to create a presumption of exposure, the resulting claim for damages by reason of emotional injury may not be dismissed on summary judgment.”
117 Madrid, 122 N.M. at 270, 923 P.2d at 1155.
118 Id.
year. The court stated that it was irrelevant that she was not actually exposed to the virus or that she actually contracted the virus. The Medical Center relied on the Potter court's rationale and stated that allowing recovery in this case would increase the number of plaintiffs, increase liability insurance premiums, increase the cost of malpractice insurance, and will create inconsistent results and discourage settlements. The court rejected this rationale because, unlike carcinogens, not everyone is exposed to AIDS every day. Additionally, the period in which infection of the AIDS virus can be detected is a finite period. Therefore, the period in which someone will have a fear of contracting the disease is also a finite period. Allowing recovery in this case would not cause a flood of litigation because plaintiffs must still prove all of the elements of an ordinary negligence case and there must be proof of a medically sound method of transmission. The requirements of negligence and duty would reduce the number of incidents. More importantly, sound public policy supports allowing claims of emotional distress founded on the fear of disease. One of the functions of the tort

\[119\] Id.

\[120\] Madrid, 122 N.M. at 270, 923 P.2d at 1155.

\[121\] Id. at 269, 923 P.2d at 1154.

\[122\] Id. at 275, 923 P.2d at 1169.

\[123\] Id. at 277, 923 P.2d at 1162.

\[124\] Id.

\[125\] Id.

\[126\] Madrid, 122 N.M. at 277, 923 P.2d at 1162.

\[127\] Id. at 278, 932 P.2d at 1163.
systems is to deter unreasonable conduct. The imposition of liability deters others from repeating negligent conduct.²⁸

Even though Madrid addresses the fear of disease, namely AIDS, the New Mexico Supreme Court indicated that it is reluctant to recognize an emotional distress claim based on the fear of cancer.²⁹ Additionally, a uniform jury instruction has not been drafted because there is insufficient case law.³⁰ Unlike AIDS, the fear of cancer can continue for an indefinite period.³¹ Fear of cancer is a special category of emotional distress because there is not a defined period after exposure to a toxin that a medical professional can determine with absolute certainty that the person has or will contract cancer. The court stated that potential class size and the underlying policy would determine whether a cause of action for NIED for fear of cancer would be acknowledged in New Mexico.³²

Both New Mexico and Colorado use Potter as precedent to determine whether to award damages for fear of disease. One of the requirements in Potter was that the plaintiff had knowledge of a reasonable likelihood, supported by medical proof, they would contract a disease.³³ In other words, there must be a medical probability that the plaintiff would contract a disease.

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²⁸ Id. at 277, 923 P.2d at 1162.
²⁹ Id.
³¹ Madrid, 122 N.M. 277, 923 P.2d at 1162.
³² Id.
³³ See supra n.51.
Unlike *Boryla* where the plaintiff had already contracted cancer and there was a medical probability, but not a certainty, that she would contract cancer again,\(^{134}\) the *Dodge* court did not allow recovery for the fear of cancer. There was insufficient scientific and medical evidence to support a finding that the plaintiffs would eventually contract cancer. The *Madrid* court stated it would be reluctant to award damages for fear of cancer\(^{135}\) for reasons similar to those reasons in *Dodge*. The medical probability in *Boryla* can be equated to the medical probability of contracting HIV through a sound method of transmission in *Madrid*. By equating "medical probability" to "sound method of transmission," it is reasonable that the New Mexico courts would allow for fear of cancer claims if the plaintiff was in remission.

Even with the possibility that New Mexico courts would allow for fear of cancer claims in some cases, it is unlikely that the courts would allow claims for fear of cancer from toxic exposure. Like *Dodge*, without significant evidence showing that there is a probability that plaintiffs will contract cancer, the court indicates that fears from toxic exposure are too speculative.

### IV. ANALYSIS & IMPLICATIONS

By abolishing the impact requirement of the *Dillon* rule, like the Colorado courts, the New Mexico courts have opened the door for more claims for negligent infliction of emotional distress. However, this does not automatically open the door to recovery for all fear of cancer claims.

The potential for a large number of victims is a deterrent in allowing recover for emotional distress caused by the fear of disease. In order to limit the class size, the New Mexico courts have

\(^{134}\) *See supra* n.73.

\(^{135}\) *See supra* n.128.
stated that it will look to the method of transmission. Unlike HIV, there is not one channel of transmission for cancer. Numerous causes of cancer are still unknown and therefore this method of limiting class size probably will most likely eliminate all claims for fear of cancer. The "method of transmission" for the previously mentioned chemicals can be inhalation, ingestion, or exposure to the chemical by absorption through the skin. Cancer is a disease of the blood or tissue that usually manifests itself in a genetic mutation of the cellular structure and is not passed from one individual to another. However, if "medical probability" can be equated to "method of transmission" some plaintiffs would be allowed to recover, but the potential class size would be limited. In a case of toxic exposure, the medical probability decreases as the distance increases from the contamination site to the location of the plaintiff. Therefore, the possible class size could be limited by geographic area.

The Madrid court required that the plaintiffs prove all elements of an ordinary negligence case. In this case, the plaintiff must prove that the toxin was negligently released by the defendant, the toxin is a known carcinogen, and that the release of the toxin caused the fear of cancer. Causation and duty are obstacles that the plaintiff must overcome. The plaintiff must be aware that the toxin was released, show that the toxin is a cause of cancer, and prove that he/she had an actual


137 In addition to the chemicals previously noted, see supra n.38, uranium is another known cause of cancer. Recently, Congress has passed legislation, the Radiation Exposure Compensation Act of 1990, to compensate individuals and their families who worked in uranium mines and uranium processing plants. The United States government either failed to inform the workers of the risk of working with uranium or failed to protect the workers from the hazardous materials. While the compensation has benefited many, the scope of the compensation act leaves numerous families and workers without any compensation. This act has since been amended and now includes a larger group. Southwest Research and Information Center, available at http://www.sric.org/mining/docs/RECA.html (last visited June 3, 2002).

fear and that the toxin was the cause of the fear. The proof of negligence in such a case will rely heavily on scientific experts. However, as the *Dodge* and *Boughton* courts have stated, that even with expert testimony, the actual amount of exposure cannot be conclusively stated or even estimated with reasonable certainty. Additionally, the amount of exposure has different effects on different people depending on many variables including age and the initial health of the person. The requirement that the plaintiff must meet all of the negligence criteria taking into account these variables will limit the class size.

By requiring the plaintiff to prove the ordinary elements of negligence, the number of emotional distress cases brought which have resulted from a toxic chemical release would be limited. Negligence is one of the most developed areas of law in New Mexico and provides options for the plaintiff when proving the elements of negligence. For example, the causation requirement can be changed from a "but for" analysis to a "substantial factor" analysis. Another possibility is to change the theory from fear of cancer to alteration of the cellular structure of the plaintiff: "flipping of switches." While this may be harder to prove, it allows the plaintiff to show an actual injury. Although no longer required by the court to recover for emotional distress, it provides evidence showing the extent of emotional distress.

An alternative to failing under the speculative fear of cancer claim for the plaintiff is to wait and see if cancer develops and then bring the law suit. The problem with this method is the statute of limitations. When does it start? How long is it? Can it be tolled? How do you stop it? The statute of limitations is four years in New Mexico for a negligence cause of action. However, it is hard to state when the statute of limitation begins. Does the statute of limitations begin when the release actually happened, when the plaintiff was exposed to the chemical, when the plaintiff realized they were exposed to the chemical, or when they developed the fear of cancer?
Another possibility is to bring two lawsuits: one for medical surveillance, negligent release of toxins, etc. and a second when the cancer actual manifests. The statute of limitations is also a consideration in this scenario. If the plaintiff can get around the statute of limitations, the main problem is whether the second lawsuit will be precluded by one of the preclusion doctrines, specifically issue and claim preclusion. *Res judicata*, or claim preclusion, can prevent the second cause of action if the plaintiff loses their claim in the first action.139 *Collateral estoppel*, or issue preclusion, can also prevent a second cause of action.140 For example, if a single plaintiff files suit and does not recover for negligent infliction of cancer or the fear of cancer and then a second plaintiff develops cancer and tries to bring a suit, the second plaintiff's suit against the same defendant will be precluded. *Dodge* plaintiffs were made abundantly clear of the possibility of preclusion because the Tenth Circuit found that in addition to meeting the requirements for the application of collateral estoppel the *Dodge* plaintiffs would not be bound by the previous results.

139 The traditional requirements of *res judicata* are 1) there must have been prior litigation in which “identical” claims were raise or could have been raised, 2) the parties in the second litigation must be in privity, 3) there must be a final judgment, and 4) the judgment must be on the merits. In determining whether the claim is identical, the court looks to the time, origin, motivation, and geographic space in which the claim arises from. Steven Baicker-McKee, William M. Janssen, & John B. Corr, *A Student's Guide to the Federal Rules of Civil Procedure* 80-1 (3rd ed. 2000).

140 The traditional requirements of collateral estoppel are 1) the parties are the same or are in privity with the original parties (mutuality), 2) the cause of action is different, 3) the issue or fact was actually litigated140, and 4) the issue was necessarily determined on the merits. The requirement of mutuality requires that the parties in the first lawsuit be the same as or in privity with the parties in the second lawsuit in order for collateral estoppel to apply. Additionally, collateral estoppel initially was only available to defendants as a defensive tactic. Some courts, including the federal courts and New Mexico courts, have switched from the traditional collateral estoppel to a modern approach, which no longer requires the element of mutuality. The modern rule now states that not all of the parties need to be the same in the two lawsuits as long as the party against whom collateral estoppel is to be used was a party or was in privity with the party in the first lawsuit and had a full and fair opportunity to litigate the issue in the first lawsuit. Restatements (Second) Judgments §27 (1982); See Silva v. State, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987).
unless they had agreed to be bound prior to the bellwether trial. The Tenth Circuit stated, "[i]f the parties intended to bind subsequent litigation with the results of prior test trials, the record must clearly memorialize that agreement. Their failure to do that here leaves important substantive rights at the mercy of trial tactics."

The most important analysis for acknowledging an emotional distress cause of action is public policy. Madrid stated that the requirement of negligence would reduce the number of claims and reduce the incidents of negligent behavior. By allocating economic losses, allowing for recovery for emotional distress, courts will be deterring companies and individuals from negligently disposing of waste products. Society through incentives and disincentives encourages reasonable conduct to limit public exposure from harm and disincentives promote public health.

Looking to the type of behavior society should promote based on the industries in New Mexico, the courts should not follow the results from Dodge. Public policy would indicate that if the elements of negligence are met and there is evidence that the plaintiffs were exposed to a level of toxins known to cause cancer or other disease, the plaintiffs should recover for fear of cancer. Allowing for fear of cancer caused by the exposure to toxins would be a liberal reading of the Madrid opinion and would equate "medical probability" to "method of transmission."

V. CONCLUSIONS

141 Dodge, 203 F.3d at 1200.

142 Id.

143 Madrid, 122 N.M. at 277, 923 P.2d at 1162.

144 Id.
The United States has seen relatively few toxic tort cases, but will most likely be seeing more in the future with increasing industry, experimentation and discovery of Superfund sites around the United States. In New Mexico, there is a great chance of widespread fear from chemical exposure due to WIPP, two national laboratories, and multiple industries relying on very toxic chemicals for the manufacturing of their products.

The trend in New Mexico is heading toward allowing fear of cancer causes of action, but not for toxic exposure. The first case brought for a fear of a disease not caused by a defined method of transmission like AIDS will set the pace for other emotional distress claims for fear of disease. That case will be a giant step in the development in tort law because it will have to address the possibility of a large number of plaintiffs and the skepticism involved with awarding damages to an injury which may not have any concrete evidence of its existence. The possible class size, while administratively hard to deal with, can be managed through the rules of civil procedure. Medical diagnosis has improved significantly which will aid with proving the plaintiff had a reasonable fear. However, the availability of scientific proof on how cancer is transmitted and what level of exposure is required to cause cancer, is imprecise at best. Dose calculations and calculations to determine the amount of chemical emissions are educated guesses. It is possible given the imprecise and invasive nature of contraction of cancer, there is a great possibility for large monetary verdicts. Because of this possibility, the legislature should consider putting a cap on the available damages like medical malpractice or the Tort Claims Act. If Dodge is not followed and without a cap on damages, there is a possibility of bankrupting New Mexico industries.

New Mexico courts should not follow the results of Dodge and should read Madrid liberally to allow for fear of cancer caused by toxic exposure but at the same time limit the amount
of damages. By doing this, it will encourage defendants to be careful in the use and disposal of chemicals at the same time protecting defendants from economic harm.