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Justified but Negligent Reliance: Hicks v. Eller Allows Comparative Negligence as a Defense to Negligent Misrepresentation Claims

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JUSTIFIED BUT NEGLIGENT RELIANCE: *HICKS V. ELLER* ALLOWS COMPARATIVE NEGLIGENCE AS A DEFENSE TO NEGLIGENT MISREPRESENTATION CLAIMS

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I. INTRODUCTION

In *Hicks v. Eller*,[1] the New Mexico Court of Appeals for the first time addressed whether comparative negligence[2] is a valid defense to a claim for negligent misrepresentation.[3] Noting a jurisdictional split on the issue,[4] *Hicks* adopted the majority rule that the doctrine of comparative fault[5] applies to negligent misrepresentation.[6] In so holding, the court of

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1. Hicks v. Eller, 2012-NMCA-061, 280 P.3d 304, *cert. denied*, No. 33,519 (May 8, 2012).

2. In *Scott v. Rizzo*, 1981-NMSC-021, 96 N.M. 682, 634 P.2d 1234, *superseded by statute*, NMSA 1978, § 41-3A-1 (1987), the New Mexico Supreme Court adopted the doctrine of comparative negligence. *Scott* abolished contributory negligence, which totally barred a negligent plaintiff from recovering against the defendant. Comparative negligence instead apportions fault between a negligent plaintiff and defendant when each contributes a percentage to the plaintiff's injury. *See also* Baxter v. Noce, 1988-NMSC-024, ¶ 12, 107 N.M. 48, 752 P.2d 240 ("In adopting the doctrine of comparative negligence, we supplanted the all-or-nothing bar of contributory negligence . . . it still exists to diminish or deny the claimant's recovery in proportion to his relative fault, and it is thus governed by the comparative negligence rule."). New Mexico is a "pure" comparative fault jurisdiction, which means that "the plaintiff's percentage of contributing fault will reduce his recovery of total damages suffered in an amount equal to his degree of fault, at the same time exposing him to liability to and recovery by defendant for injuries incurred by defendant as a result of plaintiff's proportionate negligence." *Scott*, 1981-NMSC-021, ¶ 27.

3. "Principles of negligence govern the law of negligent misrepresentation, also referred to as 'negligence by words.'" Saylor v. Valles, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152.

4. *Hicks*, 2012-NMCA-061, ¶ 30.

5. This case note will use the terms "comparative fault" and "comparative negligence" interchangeably as both refer to the same principle of apportioning fault be-

appeals affirmed New Mexico's adherence to the Second Restatement[7] to define negligent misrepresentation, and agreed with the majority of states that refuse to distinguish the tort from negligence causing physical harm when allowing comparative fault.[8]

While *Hicks* adopted the majority rule, the court provided no guidelines for applying comparative negligence to the tort of negligent misrepresentation in New Mexico. First, the court's reasoning raises more questions than it answers: Is the plaintiff still required to show "justified reliance" in order to state a claim sufficient to survive a motion to dismiss?[9] Or is justified reliance simply another way of saying the plaintiff was not negligent? Second, *Hicks* inadequately distinguished New Mexico precedent contrary to the court's holding. Third, the court did not consider the majority rule's policy effects on consumer protection and fair bargaining. These flaws diminish *Hicks*'s value as a guide for applying comparative fault principles to the tort of negligent misrepresentation.

Part II reviews the New Mexico Court of Appeals' rationale in *Hicks* and Judge Kennedy's dissent advocating for the minority rule. Part III examines the background and development of the tort of negligent misrepresentation in New Mexico, focusing on New Mexico's reliance on the Second Restatement to define the claim. Part IV of this case note explains the majority and minority rules in general and how various courts across the country have applied them. Finally, Part V of this note examines the critical shortcomings of the court of appeals' opinion in *Hicks* and concludes that the court should have provided a more thorough analytical framework to evaluate a comparative fault defense to negligent misrepresentation.

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tween the plaintiff and the defendant according to the percentage of negligence of each party. *See Scott,* 1981-NMSC-021, ¶ 27.

6. *Hicks*, 2012-NMCA-061, ¶ 34.

7. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

8. Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation*, 22 A.L.R. Fed. 464 (1994); *but see* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 1 (2000), which explains, "Causes of action other than those for death, personal injury, or physical damage to tangible property are not part of the core to which comparative responsibility is directed."

9. *See Hicks*, 2012-NMCA-061, ¶ 42 (Kennedy, J., dissenting). *See also* Estate of Braswell v. People's Credit Union, 602 A.2d 510, 515 (R.I. 1992) (discussing and adopting minority rule).

II. STATEMENT OF THE CASE

A. Facts and Background

Mary Jane Hicks was appointed personal representative of her late mother's estate in 2007.[10] The estate contained many pieces of artwork, including two paintings that Hicks located in the basement of her late mother's home.[11] Hicks knew nothing of the two paintings' origin or worth, so she contacted Peter Eller, a professional art appraiser and gallery owner, to help value them.[12] Hicks selected Eller to assist her because she had previously heard advertisements on a local radio station touting his expert appraisal services.[13]

Hicks and Eller met in person, and Eller explained the terms and costs associated with providing his appraisal services.[14] He contended that during the course of this meeting, it became apparent that Hicks was less interested in his professional appraisal services and was more interested in selling some of the items in her mother's estate.[15] Eller then offered to take a look at the artwork, and asked if he could make an offer to purchase any of the works of interest to him. Hicks agreed to Eller's proposed arrangement.

Hicks eventually showed Eller the two paintings she had found in storage, one of which was signed "Dunton." He took interest in these works, explaining to Hicks that the artist, William Herbert Dunton,[16] was a member of the Taos Society of Artists active in the 1920s and 1930s. The paintings were slightly damaged, but Eller nonetheless informed Hicks that he wished to purchase the paintings for $4,500. She asked Eller if this was a fair price, but Eller did not respond to the question. Instead, he simply asked her if the two "had a deal."[17] Hicks accepted, and Eller paid her $4,500 for both of the Dunton paintings.[18]

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10. *Hicks*, 2012-NMCA-061, ¶ 3.
11. *Id.* ¶ 6.
12. *Id.* ¶ 3.
13. *Id.*
14. Appellant's Brief-in-Chief at 1, Hicks v. Eller, 2012-NMCA-061 (No. 30,026).
15. *Hicks*, 2012-NMCA-061, ¶ 5.
16. William Herbert "Buck" Dunton (1878–1936) was born in Augusta, Maine. He journeyed to Montana in 1896, and for many years traveled throughout the Southwest, including New Mexico. He visited Taos, New Mexico for the first time in 1912 and permanently moved there in 1914 after falling in love with the "varieties of atmosphere" he found there. Dunton co-founded the Taos Society of Artists in 1915. He died in Taos at the age of 57. W. Herbert Dunton *Biographical Information*, http://www.dunton.org/whd_exhibit/whd_biography.htm (last visited May 14, 2014).
17. *Hicks*, 2012-NMCA-061, ¶ 8.
18. *Id.*

Several months later, Eller sold the Dunton paintings to a Santa Fe, New Mexico dealer for $35,000.[19] That dealer then sold the two Duntons to yet another dealer for $300,000.[20] Finally, in July of 2008 that dealer sold the paintings at the Couer d'Alene auction in Las Vegas, Nevada for a staggering $600,000.[21]

B. Procedural Posture from the Second Judicial District Court

Hicks found out about the auction sale and sued Eller for "fraud, dispossession and conversion, negligent misrepresentation, violation of the [Unfair Practices Act], and professional negligence."[22] In her complaint, Hicks requested $495,000 in actual damages, $500,000 in punitive damages, and $1,486,500 in treble damages, as well as attorney's fees and costs.[23]

On August 17, 2009, the matter proceeded to trial in the Second Judicial District Court in Bernalillo County, New Mexico.[24] The trial judge instructed the jury only on the misrepresentation claims.[25] Regarding those claims, and over Hicks's objection, Eller proposed a comparative negligence instruction to reduce Hicks's damages. Despite that Eller had not asserted the defense in his answer or in his pre-trial papers, the trial judge permitted a comparative negligence instruction, asserting that "any time you have negligence" the jury can enter into a comparative fault analysis.[26] Eller's comparative fault defense was based on evidence

19. *Id.* ¶ 12.

20. Appellant's Brief-In-Chief at 12.

21. *Hicks*, 2012-NMCA-061, ¶ 9; *see also* Appellant's Brief-In-Chief at 13 (explaining that the ultimate seller sold the works for $600,000 less 5 percent, receiving $575,000 for them). *See also* Scott Sandlin, *Jury Awards $15K in Art Sale Dispute*, ALBUQUERQUE J., Aug. 26, 2009, *available at* http://www.abqjournal.com/news/metro/26225982719newsmetro08-26-09.htm.

22. *Hicks*, 2012-NMCA-061, ¶ 9.

23. *Id.*

24. Appellant's Brief-In-Chief at 2.

25. *Id.* at 10. The judge did not instruct the jury on the Unfair Practices Act claim, finding that Hicks failed to establish an essential component of the claim—that she had acquired services from Eller. *Id.* Hicks also filed a motion for additur, which the court denied. *Hicks*, 2012-NMCA-061, ¶ 38. The motion for additur was based on expert testimony that the Dunton paintings were worth at least $405,000. *Id.* "Additur" is a trial court order "with the defendant's consent, that increases the jury's award of damages to avoid a new trial on grounds of inadequate damages. The term may also refer to the increase itself, the procedure, or the court's power to make the order." BLACK'S LAW DICTIONARY (9th ed. 2009).

26. *Hicks*, 2012-NMCA-061, ¶ 24.

relating to Hicks' professional background as an electrical engineer.[27] At trial, Eller's attorney extensively cross-examined Hicks on her "experience in the use of computers" in order to portray her as equally intelligent and sophisticated as Eller, and therefore comparatively negligent in failing to learn the true value of the Dunton paintings.[28] Based on the comparative fault instruction, the jury found Hicks 27 percent at fault and Eller 73 percent at fault.[29] The jury awarded Hicks $20,000 and reduced it accordingly to a final judgment against Eller of $14,600.[30]

C. Rationale from the New Mexico Court of Appeals

On appeal, Hicks contended the district court erred in permitting Eller to raise a comparative fault defense to her negligent misrepresentation claim.[31] Hicks claimed that comparative negligence, as a matter of law, does not apply to negligent misrepresentation.[32] The appeals court noted it was dealing with a matter of first impression: whether the affirmative defense of comparative fault applies to a negligent misrepresentation cause of action.[33]

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27. Appellant's Brief-In-Chief at 11. Hicks objected to evidence introduced at trial regarding her background as a PhD in electrical engineering. *See* Appellee's Answer Brief at 7, Hicks v. Eller, 2012-NMCA-061 (No. 30,026). Eller contented that Hicks was comparably negligent because she was well educated in the sciences and experienced with computers, apparently based on the notion that she should have taken it upon herself to research the Dunton paintings before relying on Eller's professional representations. Appellee's Answer Brief at 7–8.

28. Appellant's Brief-in-Chief at 19.

29. *Hicks*, 2012-NMCA-061, ¶ 11. The jury instruction read:

> If you find [Hicks'] injury was caused by a combination of negligence of [Eller] and negligence of [Hicks], you must determine the amount of damages to be awarded as follows:
>
> First: In accordance with the damage instruction I have given you, determine the total amount of damages suffered by [Hicks].
>
> Second: Compare the negligence of [Hicks] and [Eller] and determine a percentage for each so that the total of the percentage equals 100%.

Id. ¶ 23 (alteration in original).

30. *Id.* ¶ 12.

31. *Id.* ¶ 28. Hicks further argued the trial court should have granted her motion for additur in light of the expert's testimony, and claimed that her UPA claim should have gone to the jury. The New Mexico Court of Appeals affirmed the trial court on these issues as well. *Id.* ¶ 2.

32. *Id.* ¶ 30. Another of Hicks' contentions on appeal was that because Eller failed to raise comparative fault before trial in his answer or the pre-trial order, he was precluded from claiming the defense at the end of trial. *Id.* ¶ 25. While the court of appeals ultimately disagreed with Hicks on that narrow point, an examination of the question is beyond the scope of this article. *See id.* ¶¶ 25–28.

33. *Id.* ¶ 30.

The court of appeals began its analysis by observing that comparative negligence principles apply unless inconsistent with New Mexico public policy concerns.[34] The court first noted that Hicks had not raised any public policy arguments in favor of her position that comparative fault does not apply to negligent misrepresentation.[35] The court then moved to distinguishing prior New Mexico appellate decisions that, while dealing with "closely related matters," were inapposite to the specific case at hand, which concerned only negligent misrepresentation and comparative fault as an affirmative defense.[36] The court discussed *Otero v. Jordan Restaurant Enterprises*,[37] where the New Mexico Supreme Court held that comparative negligence is never a defense to fraudulent misrepresentation.[38] The majority in *Hicks* noted the difference between fraudulent misrepresentation and negligent misrepresentation: fraudulent misrepresentation involves intentionally or recklessly misleading statements,[39] whereas negligent misrepresentation does not require knowledge or intent.[40] *Otero* relied primarily on public policy in prohibiting a comparative fault defense to fraudulent misrepresentation because a defendant "guilty of fraud cannot be allowed by operation of law to profit by that fraud."[41]

After distinguishing *Otero* because it dealt with fraudulent misrepresentation, the court of appeals turned to *Neff v. Bud Lewis Co.*,[42] a New Mexico Court of Appeals decision that dealt with a defendant's attempt to raise contributory negligence as a complete defense to the plaintiff's negligent misrepresentation claim.[43] *Neff* involved a negligent misrepresentation claim against a defendant who had a fiduciary relationship with the plaintiff.[44] *Neff* held that the defendant could not use contributory

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34. *Id.* ¶ 29 (citing Reichert v. Atler, 1994-NMSC-056, 117 N.M. 623, 875 P.2d 379).

35. *Id.*

36. *Id.* ¶ 30.

37. 1996-NMSC-047, 122 N.M. 187, 922 P.2d 569.

38. *Hicks*, 2012-NMCA-061, ¶ 30.

39. *Id.*; *see also* UJI 13-1633 NMRA.

40. *Id.*; *see also* UJI 13-1632 NMRA ("A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true."); WILLIAM L. PROSSER, LAW OF TORTS, § 107, at 704 (4th ed. 1971) ("When the representation is made directly to the plaintiff, in the course of his dealings with the defendant, or is exhibited to him by the defendant with knowledge that he intends to rely upon it . . . there has been no difficulty in finding a duty of reasonable care.").

41. *Otero*, 1996-NMSC-047, ¶ 17.

42. 1976-NMCA-029, 89 N.M. 145, 548 P.2d 107.

43. *Neff*, 1975-NMCA-029, ¶ 17.

44. *Id.* ¶ 4.

negligence as a total bar to the plaintiff's recovery.[45] In distinguishing *Neff*, *Hicks* emphasized that the defendant in *Neff* was a fiduciary and that the case was decided under the rubric of contributory negligence.[46]

After distinguishing *Otero* and *Neff*, the *Hicks* court turned to other jurisdictions' decisions on whether comparative fault applies to negligent misrepresentation, noting a jurisdictional split.[47] First, *Hicks* explained the majority rule, which applies comparative fault to negligent misrepresentation because it is not meaningfully distinguishable from negligence in general.[48] Majority rule jurisdictions hold that comparative fault is a convenient way to apportion liability when the misrepresentation is "only negligent."[49] These courts determine that the majority rule is consistent with the principles outlined in the Restatement, principles that "have been widely accepted" in New Mexico.[50]

The majority in *Hicks* then considered the minority rule, which holds that principles of comparative fault have "no place" in business transactions and that any risk of making false statements should be fully borne by the party making them.[51] The *Hicks* majority rejected the minority rule.[52] It found no reason why applying comparative fault to negligent misrepresentation would be contrary to public policy in New Mexico.[53] Instead, the appeals court explained that comparative fault would be a "simple" way to apportion fault between a negligent defendant and a negligent plaintiff, even in the context of everyday business exchanges where individuals rely upon information provided by experts and professionals.[54]

The majority concluded by stating that, because principles governing negligence set forth in the Restatement apply to all torts in New Mexico, those principles support applying comparative fault to negligent misrepresentation. It held that the trial court had not erred in permitting Eller's comparative fault jury instruction.[55]

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45. *Id.* ¶ 22.
46. Hicks v. Eller, 2012-NMCA-061, ¶ 30.
47. *Id.* ¶ 31.
48. *Id.*
49. *Id.* (citing Estate of Braswell v. People's Credit Union, 602 A.2d 510, 513 (R.I. 1992)).
50. *Id.* ¶ 33.
51. *Id.* ¶ 32 (citing *Braswell*, 602 A.2d at 514 and *Carroll v. Gava*, 98 Cal. App. 3d 892, 897 (Cal. Ct. App. 1977)).
52. *Id.* ¶ 33.
53. *See* Reichert v. Atler, 1994-NMSC-056, ¶ 8, 117 N.M. 623, 875 P.2d 379.
54. *Hicks*, 2012-NMCA-061, ¶ 33.
55. *Id.* ¶ 34.

Judge Kennedy dissented, vigorously advocating for the minority rule.[56] He explained that because justified reliance is an element of negligent misrepresentation claims, comparative negligence should not enter into the analysis.[57] He reasoned:

> I was persuaded by these cases that the analysis of negligent misrepresentation requires two components, only one of which—the negligence of the representation—involves negligence. The other element of justified reliance on the misrepresentation by the misrepresentation's recipient is an element requiring an assessment not of negligence in reliance, but justification. The 'minority view' holds that to compare negligence in reliance negates the requirement of 'justified' reliance entirely, a point with which I agree. Justification is therefore not to be graded on a sliding scale or 'the curve.' A recipient of a misrepresentation, to my mind, is either 'justified' in her reliance or is not.[58]

Judge Kennedy pointed out that Hicks was completely justified in her reliance on Eller's skill and expertise regarding accurately appraising works of art. Judge Kennedy concluded that he would have regarded the jury's comparative fault instruction as error, and would have awarded Hicks all that she was entitled to without reduction based on her own negligence.[59]

III. BACKGROUND ON NEGLIGENT MISREPRESENTATION LAW IN NEW MEXICO

New Mexico recognized negligent misrepresentation later than most other jurisdictions. By the late 1800s, many states recognized that individuals should be liable for failing to exercise a reasonable degree of care in information exchanges, even without intent to deceive.[60] These early

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56. *Id.* ¶ 42 (Kennedy, J., dissenting). Judge Kennedy noted the "moral repugnancy" of the defendant's behavior, noting that had it not been for Eller presenting himself as an expert art appraiser, he would not have gained access to Hicks' late mother's home in the first place. *Id.*

57. *Id.*

58. *Id.* (internal quotation marks omitted).

59. *Id.*

60. *See, e.g.*, Chatham Furnace Co. v. Moffatt, 18 N.E. 168, 169–70 (Mass. 1888) (defendant falsely represented information in a land survey but honestly believed it to be true, and the court held the defendant could still be liable for the misrepresentation despite no intent to deceive); Int'l Products Co. v. Erie R. Co., 155 N.E. 662, 663 (N.Y. 1927) (discussing "liability for negligent language" stating, "[i]n some cases a negligent statement may be the basis for a recovery of damages"). *See also* Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building*

cases noted a departure from the narrow English rule that there was no valid claim at law to recover damages for negligent words, even when individuals acted on those words to their financial detriment.[61] The tort deals with negligent information causing economic harm to the plaintiff.[62] In adopting the cause of action in New Mexico, courts accepted the definition of negligent misrepresentation[63] set forth in the Second Restatement:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[64]

While New Mexico follows the Restatement to define the elements a plaintiff must prove to establish a defendant's liability, courts also look

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on Cardozo and Coase, 66 WASH. L. REV. 937, 948 (1991) (explaining that the cause of action arose from a number of New York decisions in the early 1900s); *see also* RESTATEMENT (FIRST) OF TORTS § 552 (1938) (liability when defendant does not "exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting").

61. *See, e.g.*, *Int'l Products Co.*, 155 N.E. at 663 (discussing iterations of the early English rule prohibiting recovery for negligent words).

62. However, some New Mexico opinions have dealt with negligent misrepresentation involving physical, as opposed to strictly economic harm. Davis v. Board of County Comm'rs of Doña Ana County, 1999-NMCA-110, ¶¶ 18–19, 127 N.M. 785, 987 P.2d 1172 (discussing negligent misrepresentation involving risk of physical harm).

63. "The law of negligent misrepresentation is governed by negligence principles." Ruiz v. Garcia, 1993-NMSC-009, ¶ 26, 115 N.M. 269, 850 P.2d 972 (citing Peck, Inc. v. Liberty Fed. Sav. Bank, 1988-NMCA-111, ¶ 10, 108 N.M. 84, 766 P.2d 928). "The issue in a negligence action is always one of reasonableness. The reasonableness or unreasonableness of anything is ordinarily a mixed question of law and fact which should be determined by a jury." W. States Mech. Contractors, Inc. v. Sandia Corp., 1990-NMCA-094, ¶ 14, 110 N.M. 676, 798 P.2d 1062.

64. Stotlar v. Hester, 1978-NMCA-067, ¶ 12, 92 N.M. 26, 582 P.2d 403 (citing RESTATEMENT (SECOND) OF TORTS § 552(1) (1977)). Essentially, the speaker has absolutely no reasonable basis for believing the statement that he made was true. *See Sandia Corp.*, 1990-NMCA-094, ¶¶ 12–14. The elements of negligent misrepresentation should not be confused with those required to establish fraudulent misrepresentation: "[F]raudulent misrepresentation requires the defendant to make the statement recklessly or with knowledge that it is false, while negligent misrepresentation only requires a failure to exercise ordinary care in obtaining or communicating the statement . . . ." Eckhardt v. Charter Hosp. of Albuquerque, Inc., 1998-NMCA-017, ¶ 55, 124 N.M. 549, 953 P.2d 722.

to New Mexico's Uniform Jury Instruction (UJI) on negligent misrepresentation:

> A party is liable for damages caused by his negligent and material misrepresentation.
> A material misrepresentation is an untrue statement which a party intends the other party to rely on and upon which the other party did in fact rely.
> A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true.[65]

A. Early Case Law: Plaintiff Must Prove Fraud or Rescind a Contract, Otherwise No Recovery

Following early English case law, New Mexico courts initially required a plaintiff to pursue an equitable cause of action to rescind a contract, or to satisfy the high burden of proving fraud, in order to establish liability for false representations resulting in pecuniary harm.[66] Before recognizing negligent misrepresentation as a viable claim, early New Mexico cases recognized a similar cause of action, sometimes called constructive fraud[67] (with rescission[68] as the equitable remedy),[69] when a plaintiff could not establish the defendant's fraudulent state of mind. The supreme court once defined constructive fraud as

> [A] breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private

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65. UJI 13-1632 NMRA.

66. *See* Maxey v. Quintana, 1972-NMCA-069, ¶ 15, 84 N.M. 38, 499 P.2d 356 (citing Peek v. Derry, [1887] 37 Ch. 541, 14 App. Cas. 337 (Eng.)).

67. Constructive fraud is "a breach of a legal or equitable duty irrespective of the moral guilt of the fraud feasor, and it is not necessary that actual dishonesty of purpose nor intent to deceive exist." Snell v. Cornehl, 1970-NMSC-029, ¶ 8, 81 N.M. 248, 466 P.2d 94.

68. Rescission, an equitable remedy, is "[a] party's unilateral unmaking of a contract for a legally sufficient reason, such as the other partys material breach, or a judgment rescinding the contract." BLACK'S LAW DICTIONARY (9th ed. 2009).

69. *Snell*, 1970-NMSC-029, ¶ 11. Courts used the term "rescission" to describe the cause of action itself, or to describe the equitable remedy available under constructive fraud. Either way, a contract had to exist to rescind upon. As *Snell* stated, the common view was that a plaintiff's only recovery apart from proving fraud and suing for money damages was to "declare a rescission and sue to recover consideration already paid" or "sue to rescind the contract and for restoration of the status quo ante . . . " *Id.*

> confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.[70]

Rescission was an independent cause of action from fraud or deceit because in the former the defendant's state of mind did not matter.[71] But rescission was not an action for money damages, so it required a contract that the parties could rescind. [72] Foreshadowing negligent misrepresentation, rescission was articulated in terms of justifiable reliance by the plaintiff. The rule was that "irrespective of the good faith with which a misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission of the contract, such rescission should be allowed."[73] On the other hand, unlike the equitable cause of action for rescission, "[t]o recover damages for fraud or deceit, the misrepresentation must be knowingly or recklessly made with intent to deceive."[74]

In *Prudential Insurance Co. of America v. Anaya*,[75] five years before a New Mexico court recognized negligent misrepresentation as a valid claim, the New Mexico Supreme Court clarified the principles governing rescission. Our supreme court stated that "rescission is allowed where there has been a misrepresentation of a material fact, the misrepresentation was made to be relied on, and has in fact been relied on. Again generally speaking, the good faith with which the misrepresentation is made is immaterial."[76] *Anaya* thus established that for a plaintiff to proceed in rescission, there had to be a contract. Despite the defendant's good faith, the plaintiff could rescind the contract based on the defendant's misrepresentation, but could not recover money damages.

Four years after *Anaya*, in *Hockett v. Winks*,[77] the New Mexico Supreme Court further articulated the distinction between rescission of a contract, an exclusively equitable remedy, and the necessary proof to obtain money damages at law for misrepresentations. Importantly, *Hockett* noted that plaintiffs could not conflate the two separate causes of action by relying on rescission principles of good faith misrepresentations in or-

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70. Scudder v. Hart, 1941-NMSC-004, ¶ 16, 45 N.M. 76, 110 P.2d 536 (emphasis removed) (citation omitted) (internal quotation marks omitted).

71. *Maxey*, 1972-NMCA-069, ¶ 9.

72. *Snell*, 1970-NMSC-029, ¶ 11 (explaining that a plaintiff could either receive back any consideration already paid, or to restore the "status quo ante").

73. Jones v. Friedman, 1953-NMSC-051, ¶ 22, 57 N.M. 361, 258 P.2d 1131.

74. *Maxey*, 1972-NMCA-069, ¶ 9 (citing Sauter v. St. Michael's College, 1962-NMSC-107, ¶ 9, 70 N.M. 380, 374 P.2d 134).

75. 1967-NMSC-132, 78 N.M. 101, 428 P.2d 640.

76. *Id.* ¶ 8.

77. 1971-NMSC-059, 82 N.M. 597, 485 P.2d 353.

der to recover damages.[78] *Hockett* held that the equitable principles applicable to a rescission claim were not applicable to a claim for fraud or deceit; there could be no "new tort" which combined these separate causes of action.[79]

This early case law established that if the plaintiff could not prove fraud or could not rescind on a contract, she or he would be without a remedy for a defendant's negligent misrepresentations.[80]

B. Maxey v. Quintana*: the New Mexico Supreme Court Recognizes Negligent Misrepresentation*

In 1972, only one year after the New Mexico Supreme Court in *Hockett* disavowed the notion that a plaintiff could recover money damages for misrepresentations not involving fraudulent intent, the New Mexico Court of Appeals in *Maxey v. Quintana* recognized that negligent misrepresentation was a valid cause of action wholly apart from rescission or fraud.[81]

In *Maxey*, the defendants sold real property to the plaintiff but misrepresented essential information regarding the property's mortgage.[82] The plaintiff incurred substantial mortgage costs in light of the defendants' misrepresentations.[83] The plaintiff appealed the lower court's dismissal of the negligent misrepresentation claim, and the defendants contended that negligent misrepresentation was not a viable cause of action in New Mexico.[84] Specifically, they argued that a plaintiff could either recover for fraudulent misrepresentation, or under the equitable claim of rescission, or not at all.[85] The court of appeals rejected the defendants' assertion and noted that it was dealing with situation apart from fraud and apart from rescission; specifically, "the claim that misrepresentations occurred and that the misrepresentations were negligently made to plaintiffs' damage."[86] *Maxey* did what earlier cases had been unwilling to do—it recognized that certain situations involve "neither rescission nor

78. *Id.* ¶ 6.
79. *Id.*
80. *See Maxey*, 1972-NMCA-069, ¶ 16 (explaining the old view that because negligent misrepresentation did not fall under fraud or deceit, "no other action was available and that the wrong of negligent misrepresentation was without a remedy").
81. *Id.* ¶ 14.
82. *Id.* ¶¶ 3–4.
83. *Id.* ¶ 2. The plaintiff also asserted fraudulent misrepresentation. *Id.*
84. *Id.* ¶ 8.
85. *Id.* ¶¶ 15–16.
86. *Id.* ¶ 14.

the tort of fraud," but still should give rise to a plaintiff's right to damages.[87]

First, the court of appeals acknowledged the early doctrine requiring a plaintiff to prove fraud or rescission, without which the plaintiff would have no remedy at law.[88] The court then confronted the question directly: "Where a plaintiff is so circumstanced that he cannot or does not wish to rescind, and cannot meet the proof required for the tort of fraud or deceit, is he without a remedy for damages cause by a misrepresentation short of fraud?"[89] This question set up the framework for *Maxey* to recognize the new tort of negligent misrepresentation.[90] In holding that a negligence action could be based upon loss causing only pecuniary harm,[91] the court reasoned that the essential basis of tort liability could be transferred to injuries causing only economic loss.[92] It further explained that the tort of negligent misrepresentation was informed by general negligence principles and that it was wholly separate from fraud.[93] Lastly, the court in *Maxey* noted that its adoption of negligent misrepresentation was not only compatible with the Restatement, but also recent New Mexico precedent.[94] *Maxey* concluded that despite no contractual relationship between two parties and no fraud by the defendant, a plaintiff could go forward with a claim for money damages under the tort of negligent misrepresentation.[95]

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87. *Id.*

88. *Id.* ¶ 9.

89. *Id.* ¶ 15.

90. *Id.* ¶ 17.

91. *Id. Maxey* explained that neither fraud nor rescission were at issue, just that "misrepresentations occurred and that the misrepresentations were negligently made to plaintiffs' damage." The court thus distinguished claims for fraud or "constructive fraud/rescission" in laying the foundation to allow the plaintiff to recover for negligent misrepresentation. *Id.* ¶ 14.

92. *Id.* ¶ 16 (citing WILLIAM L. PROSSER, LAW OF TORTS § 102, at 720 (3d ed. 1964) ("This position has prevailed, and the negligence action is now generally allowed for negligent misrepresentation, even though it causes only pecuniary harm . . . .")).

93. *Maxey*, 1972-NMCA-069, ¶ 17.

94. *Id.* (explaining that "it was not necessary that actual dishonesty of purpose or intent to deceive exist," only that there was "breach of a legal duty" (citing *Snell v.* Cornehl, 1970-NMSC-029, ¶ 8)).

95. *Id.* ¶ 17.

C. Clarifying the Tort: Stotlar v. Hester *Rejects the Privity Requirement and Adopts the Restatement Approach*

In 1977, the Restatement (Second) of Torts was published. The following year the New Mexico Court of Appeals in *Stotlar v. Hester*[96] concluded that the Restatement would define negligent misrepresentation in New Mexico.[97] The plaintiff in *Stotlar* asserted that he was entitled to recover damages despite the fact that there was no privity[98] of contract between the parties.[99] Because there was no privity, the defendant contended that he was not liable to plaintiffs.[100] He argued that to succeed the plaintiff would either have to prove fraud or would have to show privity between the plaintiff and the defendant. *Stotlar* rejected this argument, noting that privity of contract was no longer required when considering liability for negligence.[101]

The defendant's assertion that negligence causing financial harm was not actionable arose from a line of early New Mexico cases requiring privity between parties to establish liability for negligent words.[102] The leading case articulating this principle was *Ultramares Corp. v. Touche*. [103] There, Justice Cardozo explained that the potential class of plaintiffs would be unreasonably large if a plaintiff unconstrained by privity of contract could recover for negligent statements made by anyone else; therefore, a contractual relationship was required for a plaintiff to sue for misrepresentations causing economic injury.[104]

In 1943, in *Fidelity & Deposit Co. v. Atherton*, the New Mexico Supreme Court adopted the *Ultramares* rule requiring the plaintiff to show privity with the defendant to recover for negligent words.[105] Three years

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96. 1978-NMCA-067, 92 N.M. 26, 582 P.2d 403.

97. *Id.* ¶ 13.

98. "A person in privity with another is a person so identified in interest with another that he represents the same legal right." Lewis v. City of Santa Fe, 2005-NMCA-032, ¶ 15, 137 N.M. 152, 108 P.3d 558 (citation omitted) (internal quotation marks omitted).

99. *Stotlar*, 1978-NMCA-067, ¶ 5. A third party, the seller of the real estate at issue, had arranged for the defendant to appraise their property, which is why there was not privity of contract between plaintiff and defendant. *Id.*

100. *Id.* ¶ 6.

101. *Id.* ¶ 11.

102. *Id.* ¶ 9.

103. 174 N.E. 441 (N.Y. 1931).

104. *Id.* at 444. The court later explained: "the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made." *Id.* at 448.

105. 1943-NMSC-046, 47 N.M. 443, 144 P.2d 157. This case did not mention a tort of negligent misrepresentation but instead dealt with the equitable remedy of "subrogration." *Id.* ¶ 9. It is notable for the proposition that absent fraud, courts required

later, in *Valdez v. Gonzales*,[106] the court returned to the privity issue in the context of a plaintiff's claim that negligent information caused him economic harm.[107] The court reiterated its commitment to the *Ultramares* holding.[108]

Atherton and *Valdez* supported the defendant's claim in *Stotlar* that based on the lack of privity, the plaintiff could not recover for negligent words causing pecuniary harm.[109] However the *Stotlar* court distinguished *Atherton* and *Valdez* as having been implicitly rejected by the supreme court when it held that the existence of privity had no relevance in determining liability for negligence.[110] The court further noted, "[a]bsent fraud, the tort requires a duty on the part of the person furnishing the information and requires the person receiving the information have a right to rely on it."[111] The court reiterated the principles it had recently articulated in *Maxey* and held that the Second Restatement of Torts would define negligent misrepresentation in New Mexico.[112]

"contractual duty to make [reports], under the terms of their contract, with the care and caution required of experts." *Id.* ¶ 10.

106. 1946-NMSC-044, 50 N.M. 281, 176 P.2d 173.

107. *Id.* ¶ 16.

108. *Id.* ¶ 14 (citing *Ultramares*, 174 N.E. at 441) (internal quotation marks omitted).

109. *Stotlar*, 1978-NMCA-067, ¶ 7.

110. *Id.* ¶ 9 (citing Steinberg v. Coda Roberson Const. Co., 1968-NMSC-055, 79 N.M. 123, 440 P.2d 798).

111. *Id.*

112. *Id.* ¶ 13. After *Stotlar* officially adopted the Restatement to define negligent misrepresentation, New Mexico appellate courts continued to recognize claims for negligence by words causing pecuniary harm. *See* First Interstate Bank of Gallup v. Foutz, 1988-NMSC-087, ¶ 8, 107 N.M. 749, 764 P.2d 1307 (affirming New Mexico's adoption of the Restatement and focusing on measuring damages pursuant to the Restatement). But despite the clarity with which *Stotlar* adopted the Restatement, some of the courts unfortunately defined negligent misrepresentation in a manner that departed from the Restatement entirely by conflating the elements required to prove fraudulent misrepresentation with those required to establish negligent misrepresentation. *See* Saylor v. Valles, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152 (explaining that the court of appeals had framed the issue as one of recklessness instead of reasonableness; the New Mexico Court of Appeals reasoned that the defendant must have made the false representation knowing it was false, or must have "made it recklessly" *id.* ¶ 17 (citing *Parker v. E.I. DuPont de Nemours & Co., Inc.*, 1995-NMCA-086, ¶ 44, 121 N.M. 120, 909 P.2d 1)). The court of appeals issued a similar decision in *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶ 30, 138 N.M. 70, 16 P.3d 861, where it required a defendant to know its statement was false, or to make it recklessly.

D. The Second Restatement of Torts' Definition of Negligent Misrepresentation

The Restatement does not require that the person making the misrepresentation know the individual with whom he or she is communicating.[113] The defendant only needs to be reasonably aware that the individual will use that information for guidance in his or her own business transactions.[114] As the Connecticut Supreme Court has explained, liability is not limited to business exchanges in which the information itself is the subject of the exchange; rather, it includes representations made as part of ones' employment or expertise.[115]

The Restatement outlines the elements a plaintiff must prove to establish a claim for negligent misrepresentation and adds, "[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying."[116] It further explains:

> [W]hen the misrepresentation is not fraudulent but only negligent, the action is founded solely upon negligence, and the ordinary rules as to negligence liability apply. Therefore the contributory negligence of the plaintiff in relying upon the misrepresentation will bar his recovery.[117]

While the Restatement does not require that the parties to an exchange know one another, it does not permit simply anyone to recover damages for the negligent words of anyone else.[118] The Restatement states:

> [L]iability for negligent misrepresentation is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance defendant intends to supply information or knows that recipient intends to supply it; and (b) through reliance upon information in a transaction that he intends the information to influence or knows that the recipient so intends, or in a substantially similar transaction.[119]

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113. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).
114. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).
115. *Williams Ford, Inc. v. Hartford Courant Co.*, 657 A.2d 212, 221 (Conn. 1995).
116. RESTATEMENT (SECOND) OF TORTS, § 552A (1977).
117. RESTATEMENT (SECOND) OF TORTS, § 552A cmt. a (1977).
118. *See* Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH L. REV. 845, 852 (2008).
119. RESTATEMENT (SECOND) OF TORTS, § 552(2) (1977).

Comment A to the Restatement explains that negligent misrepresentation is less objectionable than fraudulent misrepresentation, which is why liability is more restricted under the former.[120] Thus "[w]hen there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences."[121]

E. New Mexico's Uniform Jury Instruction on Negligent Misrepresentation and the Restatement

At first glance New Mexico's Uniform Jury Instruction (UJI)[122] seems to vary from the Restatement definition of negligent misrepresentation. Unlike the Restatement, the UJI does not explicitly require a plaintiff to show "justified reliance." The UJI refers the reader to the Restatement for further guidance, and arguably this reference implicitly incorporates the Restatement's "justified reliance" element.[123] There are no New Mexico appellate court decisions to the contrary.

The UJI first states, "[a] negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true."[124] This framework does not clearly require the plaintiff's reliance to be "justified," but the committee commentary recognizes that New Mexico has adopted negligent misrepresentation as defined by the Restatement. It specifically directs the reader to the Restatement, and notes that there are "a number of elements that must be proved to establish the claim."[125] The commentary further explains that to "avoid overburdening the jury, other elements are not included in the instruction unless they are actually at issue in the case."[126] Because New Mexico courts since *Stotlar* have continued to endorse the Restatement and the UJI's commentary points to the Restatement for a fuller definition of the tort, it is safe to assume that the UJI like the Restatement requires justified reliance in order to succeed in a negligent misrepresentation claim.

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120. RESTATEMENT (SECOND) OF TORTS, § 552(2) cmt. a (1977).
121. *Id.*
122. UJI 13-1632 NMRA.
123. *Id.*
124. *Id.*
125. UJI 13-1632 NMRA, cmt.
126. *Id.* The United States District Court for the District of New Mexico has referenced both the UJI and the Restatement, and harmonized the two definitions on a number of opinions. *See, e.g.*, Sawyer v. USAA Ins. Co., 912 F. Supp. 2d 1118, 1147 (D.N.M. 2012); Carroll v. Los Alamos Nat. Sec., LLC, 704 F. Supp. 2d 1200, 1213 (D.N.M. 2010) (treating the UJI and Restatement as containing the same requirements).

F. Neff v. Bud Lewis*: The Rejection of Contributory Negligence as a Defense to Negligent Misrepresentation*

Neff v. Bud Lewis Co. was the first case in New Mexico to address whether contributory negligence is a valid defense to negligent misrepresentation.[127] *Neff* was decided in 1976, five years before New Mexico abolished the doctrine of contributory negligence in favor of comparative fault.[128] In *Neff*, the plaintiff sued a real estate broker as well as the individual who sold him a building for misrepresenting facts related to the building's condition.[129] The defendants represented that the building's heating and cooling system was in good working order prior to the sale, but the plaintiff later learned of substantial problems with the system, which required over $30,000 in repairs.[130]

The court of appeals first explained that because the defendants were real estate brokers, they owed the plaintiff a specific duty to disclose all material facts known about the condition of the building prior to selling it.[131] The court next reasoned that the plaintiff reasonably relied on the defendants' material misrepresentations.[132] Tracking the Restatement's language, the court in *Neff* affirmed the trial court's finding that the plaintiff had justifiably relied on the defendants' misrepresentations.[133] The court distinguished the plaintiff's reliance in terms of justification, not negligence: "The issue is not that plaintiff had a duty to exercise reasonable care in making a determination whether to rely on defendants' negligent representation."[134] The court emphasized that when a plaintiff's reliance on the expertise of the defendant is justified, the defendant cannot later succeed in claiming the plaintiff's reliance was negligent.

The defendants in *Neff* argued that if they were negligent, "the plaintiff was guilty of contributory negligence" and that this contributory

127. 1976-NMCA-029, 89 N.M. 145, 548 P.2d 107.

128. *See* Scott v. Rizzo*,* 1981-NMSC-021, ¶ 27.

129. *Neff*, 1976-NMCA-029, ¶ 4.

130. *Id.* ¶ 5.

131. *Id.* ¶ 14. The court explained that the defendants were fiduciaries and as brokers were "under a legal obligation to make a full, fair and prompt disclosure to his employer of all facts within his knowledge which are or may be material, or which might affect his principal's rights and interest or influence his action relative to the disposition of the property." *Id.* (internal quotation marks omitted) (citing Iriart v. Johnson, 1965-NMSC-147, 75 N.M. 745, 411 P.2d 226).

132. *Id.* ¶ 16.

133. *Id.* ¶ 21.

134. *Id.* ¶ 20 (emphasis removed).

negligence "was a proximate cause of plaintiff's damage."[135] The court of appeals rejected this argument:

> The Restatement language means that a defendant who supplies information is subject to liability in tort for negligent misrepresentation if he fails to exercise that care and competence in obtaining and communicating information which the plaintiff is justified in expecting, if the plaintiff relies on the negligent misrepresentation in a transaction. *This rule does not speak in terms of contributory negligence as a defense*. The issue is not that plaintiff had a duty to exercise reasonable care in making a determination whether to rely on defendants' negligent representation . . . . Justifiable reliance by plaintiff is the issue . . . .[136]

Neff held that the affirmative defense of contributory negligence did not apply to the negligent misrepresentation claim.[137] *Neff* emphasized that the defendant was a fiduciary, which went towards the plaintiff's justification in relying on the fiduciary's representation. The court's explanation in *Neff* indicated that the Restatement would not permit contributory negligence to apply as an affirmative defense. Rather, the court affirmed that justifiable reliance is a core issue in a negligent misrepresentation claim. As such, the tort could not be simultaneously analyzed in terms of the plaintiff's justified reliance and negligence in reliance because the two inquiries are essentially the same.

IV. THE MAJORITY RULE AND THE MINORITY RULE: DOES COMPARATIVE FAULT PROVIDE A DEFENSE TO NEGLIGENT MISREPRESENTATION?

There is currently a split among courts that permit a defendant in a negligent misrepresentation claim to raise comparative fault as an affirmative defense and those that prohibit it.[138] This section provides an overview of both the majority rule and the minority rule, emphasizing the minority jurisdiction's focus on the element of "justifiable reliance"[139] in

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135. *Id.* ¶ 17.

136. *Id.* ¶¶ 20–21 (emphasis added).

137. *Id.* ¶ 22.

138. *See* Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation*, 22 A.L.R. FED. 464 (1994) ("Although many states have adopted the doctrine of comparative negligence, jurisdictions remain divided over whether it should apply to cases of negligent misrepresentation.").

139. *See* RESTATEMENT (SECOND) OF TORTS § 552.

holding that the defense is ill-suited to apportion fault in a negligent misrepresentation cause of action.

A. Majority Rule: Comparative Fault Applies to Negligent Misrepresentation

The majority of courts that have dealt with whether comparative fault applies to negligent misrepresentation note that because the tort is grounded in negligence, the standard rules governing comparative fault "should apply."[140] *Hicks* cited a case from the Supreme Court of Minnesota, *Florenzano v. Olsen*,[141] to illustrate this principle.[142] In *Florenzano*, the defendant insurance agent misrepresented pertinent information regarding the plaintiff's social security benefits, rendering her ineligible to receive those benefits.[143] The court held that the plaintiff had established a claim for negligent misrepresentation, but that it would permit the defendant to compare the plaintiff's own negligence in determining liability. In so holding, the court explained that it could not discern any reason to distinguish negligent misrepresentation from any other type of negligence, and that comparative negligence was a "long favored" way to apportion liability in tort claims.[144] The court finally noted that it had previously "applied [comparative fault] expansively, even extending it to many causes of action not traditionally within the scope of negligence," and therefore it was logical to extend it to negligent misrepresentation as well.[145]

Another majority rule decision *Hicks* cited was *Gilchrist Timber Co. v. ITT Rayonier, Inc.*[146] In *Gilchrist*, the supreme court of Florida held that the doctrine of comparative fault statute applied to negligent misrepresentation.[147] The defendant had sold a tract of land to the plaintiff and supplied a false property appraisal. The appraisal stated the land was zoned to permit residential usage, but it was actually zoned as preservation land that prohibited residential use.[148] *Gilchrist* relied on the Restatement's definition of negligent misrepresentation for guidance, explaining,

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140. Larsen, *supra* note 138, at § 2(a).
141. 387 N.W.2d 168 (Minn. 1986).
142. *Hicks*, 2012-NMCA-061, ¶ 31.
143. *Florenzano*, 387 N.W.2d at 172.
144. *Id.* at 176.
145. *Id.* The court also agreed with the idea that there is no compelling reason to treat negligent misrepresentation differently from any other form of negligence when applying comparative fault. *Id.* (citing WILLIAM L. PROSSER, LAW OF TORTS § 107, at 706 (4th ed. 1971)).
146. 696 So.2d 334 (Fla. 1997).
147. *Id.* at 335.
148. *Id.* at 336.

"a misrepresenter is liable only if the recipient of the information justifiably relied on the erroneous information."[149]

The court in *Gilchrist* reasoned that negligence is more tolerable than fraud because the state of mind involved is less culpable.[150] Accordingly, the same prohibition on comparative fault in fraudulent torts would not apply to negligent torts, which is why the court found it appropriate to extend the comparative fault statute to negligent misrepresentation.[151]

The court also explained that it did not foresee that a "parade of horribles" would result from allowing comparative fault to apply to a claim for negligent misrepresentation.[152] It justified a tolerable burden on future plaintiffs by reasoning that "a recipient of information will not have to investigate every piece of information furnished; a recipient will only be responsible for investigating information that a reasonable person in the position of the recipient would be expected to investigate."[153]

In sum, the majority rule holds that comparative negligence applies to negligent misrepresentation claims as it would to any other negligence tort. The majority rule courts that have adopted the Restatement have not discussed the element of justified reliance and the tensions that arise when subjecting the justified reliance element to a simultaneous consideration of the plaintiff's negligence in relying.

B. Minority Rule: Comparative Fault Does Not Apply to Negligent Misrepresentation

Estate of Braswell v. People's Credit Union is the seminal case adopting and explaining the minority rule.[154] In that case, the plaintiffs took out a loan from the defendant's credit union and were told the loan was insured when it actually was not. The plaintiff had taken out ten similar loans in the preceding decades from the defendant and each time the defendant sent them a document entitled "Certificate of Insurance" and told them the loans were insured. The court in *Braswell* looked to the Restatement in determining the scope of the defendant's liability for negligent misrepresentation, but the court rejected the proposition that the Restatement contained a built-in affirmative defense of contributory negligence.[155]

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149. *Id.* at 337.
150. *Id.*
151. *Id.* at 338.
152. *Id.* at 339.
153. *Id.*
154. Estate of Braswell v. People's Credit Union, 602 A.2d 510 (R.I. 1992).
155. *Id.* at 515.

Braswell focused on policy concerns, reasoning that it would be improper to allow comparative fault principles to apply to negligent misrepresentation claims because defendants acting with expert knowledge (or as fiduciaries) should be held to a higher responsibility in communicating information that others might rely on.[156] The court focused on the relative expertise of each party and stated "[t]he imposition of a higher duty on such defendants is apparently aimed at correcting disparate bargaining power and protecting unknowledgeable or innocent consumers."[157] *Braswell* recognized the critical "need to protect consumers, to remedy disparate bargaining power, and to prevent unfair business practices"[158] which would be undermined by permitting the defendant to avoid full liability with a comparative fault defense. The court also cited the related state interest in "protect[ing] unknowledgeable or innocent consumers."[159]

Another decision cited by *Hicks* that emphasized policy considerations in adopting the minority rule was *Carroll v. Gava*.[160] In *Carroll*, the plaintiffs purchased a mobile home park site from the defendants, and the defendants misrepresented the site's zoning requirements.[161] On appeal, the defendants urged the court to apply a comparative fault analysis, which the court rejected. Discussing the justification of the plaintiffs' reliance, the court emphasized that the defendants were "in the mobile home park business," were experienced real estate sellers, and had previously sold a similar site to another party.[162] The court held that comparative fault should not apply to claims for negligent misrepresentation because a contrary rule would "create unnecessary confusion and complexity" and reduce the "essential predictability . . . of everyday [business] exchanges . . . ."[163]

Other minority decisions similarly focused on the Restatement's element of "justified reliance" in holding that element is not subject to a

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156. *Id.* However, it is important to consider the counter-argument to the minority rule's rationale that experts should not be able to hide behind the plaintiff's negligence when the expert's negligence causes the damages: an expert in a given field is more likely to know the truth, which would give the plaintiff a likely claim for fraud against the expert, and comparative fault is an invalid defense to fraudulent misrepresentation. *See* Otero v. Jordan Rest. Enter., 1996-NMSC-047, ¶ 17 (rejecting comparative fault in fraud context and holding that a defendant "guilty of fraud cannot be allowed by operation of law to profit by that fraud").

157. *Braswell*, 602 A.2d at 513.

158. *Id.* at 515.

159. *Id.* at 513.

160. 98 Cal. App. 3d 892 (Cal. Ct. App. 1979).

161. *Id.* at 894.

162. *Id.* at 896.

163. *Id.* at 897.

comparative fault analysis. In *McNeil v. Nofal*,[164] the Tennessee Court of Appeals held it is illogical to apply comparative negligence when an element of the tort is the plaintiff's justified reliance. Because the plaintiff has to show she or he reasonably relied on the defendant's representations to make a prima facie case, the element cannot later be tempered by "a comparative fault analysis."[165] Citing the Restatement, the court reasoned:

> A successful claim for negligent misrepresentation requires justifiable reliance. To establish a *prima facie* case for negligent misrepresentation, the plaintiff . . . must show that he justifiably relied upon a material misrepresentation made by an individual under a duty to properly inform as to the material facts. Justifiable reliance in this context is *not* blind faith.[166]

The New Mexico Supreme Court has used unjustified reliance to limit the plaintiff's recovery in the past, holding that unless the plaintiff makes some affirmative showing that his or her reliance on the defendant's statement(s) was justified, there is no negligent misrepresentation claim at all.[167] Viewed this way, a plaintiff's unreasonableness in relying precludes recovery and disposes of meritless negligent misrepresentation claims. The minority rule suggests that a plaintiff is either justified or was not, and the task of apportioning fault does not need to come into the analysis at all.[168]

Most courts following the minority rule similarly view "justifiable reliance" as equivalent to a plaintiff's lack of negligence. These cases question the logic of holding that a plaintiff justifiably relied on a negligent misrepresentation but was also negligent for so relying.[169] In other

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164. 185 S.W.3d 402 (Tenn. Ct. App. 2006).

165. *Id.* at 409.

166. *Id.* at 408 (citations omitted) (emphasis in original).

167. Ruiz v. Garcia, 1993-NMSC-009, ¶ 27.

168. *See* Lawyers Title Ins. Corp. v. Baik, 55 P.3d 619, 627 (Wash. 2002) ("We see no clear-cut way to distinguish between a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages."); Honolulu Disposal Serv., Inc. v. Am. Ben. Plan Adm'rs, Inc., 433 F. Supp. 2d 1181, 1193 (D.Haw. 2006) ("[J]ustifiable reliance *is* an element of the tort of negligent misrepresentation; merging justifiable reliance and comparative negligence would eliminate the requirement of justifiable reliance altogether.").

169. In re Brownsville Property Corp., Inc., No. 10–21959–TPA, 2013 WL 4010308 at *19 (Bankr. W.D. Penn. Aug. 1, 2013); *see also* Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 222 (Conn. 1995) ("Although we conclude that no special relationship is required to state a claim of negligent misrepresentation, the plaintiff must allege and prove that the reliance on the misstatement was justified or reasonable.").

words, because a plaintiff cannot make a claim at all if her reliance was not justified, "unreasonable reliance already limits the plaintiff's recovery."[170] In *Condor Enterprises, Inc. v. Boise Cascade Corporation*,[171] the court reasoned that the Restatement "equates justifiable reliance with a lack of contributory negligence."[172] *Condor* held that under the Restatement, if the plaintiff is not justified in relying on a representation, he or she recovers nothing because he or she cannot state a claim. Equating justified reliance with a lack of contributory negligence means that merging justified reliance with comparative fault essentially eliminates the element altogether.[173]

The minority rule therefore emphasizes that those with superior knowledge in a particular field should be held to a higher standard of care than the less-knowledgeable party.[174] In business exchanges where one party usually possesses inferior expertise, the individual with superior knowledge in the field in which the two parties are dealing should be wholly responsible for misrepresentations causing economic harm.[175] Moreover, the minority rule holds that the purpose of comparative fault, which is to deal with the catastrophic consequences of physical injury, does not apply to negligent misrepresentation claims where only commercial losses are sustained.[176]

V. ANALYSIS AND IMPLICATIONS

The *Hicks* court's reasoning is flawed in three ways. First, *Hicks* failed to reconcile the conflict between requiring that a plaintiff prove justifiable reliance and determining that the plaintiff was comparatively negligent. Unlike the minority rule, which emphasizes the plaintiff's justified reliance, the decision in *Hicks* gave it cursory attention. Second, *Hicks* inadequately distinguished *Neff*, which stood for the proposition that the defendant may not lay fault upon the plaintiff after the plaintiff establishes justified reliance. Third, the court did not consider the public

170. Larsen, *supra* note 138, at § 2(a).

171. 856 P.2d 713 (1993).

172. *Condor* at 715; *see also* RESTATEMENT (SECOND) OF TORTS § 552 cmt. a. (1977).

173. Lawyers Title Ins. Corp. v. Baik, 55 P.3d 619, 627 (Wash. 2002) (explaining the problem with distinguishing "a plaintiff's reasonableness in relying on a misrepresentation and a plaintiff's culpability in causing his or her own damages").

174. *See* Christine E. Carlstrom, *Tort Law-Consumers' Contributory Negligence Will Not Bar or Reduce Recovery in Negligent Misrepresentation Actions*, 27 SUFFOLK U. L. REV. 576, 579–80 (1993).

175. *See Estate of Braswell v. People's Credit Union*, 602 A.2d 510, 514 (R.I. 1992).

176. Carroll v. Gava, 98 Cal. App. 3d 892, 897 (Cal. Ct. App. 1979).

policy repercussions that the minority rule warns of. Had the court of appeals more fully examined these issues, *Hicks* would have provided more comprehensive guidance for future practitioners in harmonizing comparative fault with the nature of a negligent misrepresentation claim.

A. Tension Between Justified Reliance and Apportioning Fault on the Justified Plaintiff

In New Mexico, a plaintiff must establish justified reliance to proceed with a claim for negligent misrepresentation.[177] But in *Hicks*, the court did not consider the Restatement's element of justified reliance at all, nor did it examine the element's diminished meaning under a comparative fault analysis. This cursory treatment of the Restatement is puzzling because the opinion in *Hicks* affirms New Mexico's adherence to the Restatement.[178] A fuller analysis of justified reliance in light of a comparative fault defense would have helped clear up the confusion that results from applying comparative negligence to a claim for negligent misrepresentation, namely because New Mexico law requires justifiable reliance as an element of a prima facie claim, which already limits the ability of a negligent plaintiff to recover. Furthermore, a brief discussion of New Mexico's Several Liability Act[179] would have been helpful for future courts and practitioners, because under the majority rule adopted in *Hicks*, the Act now applies to negligent misrepresentation claims.

1. Justified Reliance as an Element of the Claim is Equated with No Negligence by Plaintiff

While *Hicks* is in harmony with New Mexico negligence law in general that favors apportioning fault to the plaintiff when it is due,[180] the court neglected to carefully analyze why justified reliance could now be considered in light of comparative fault when it had been more commonly viewed as a lack of negligence by the plaintiff.[181] As New Mexico

177. Ruiz v. Garcia, 1993-NMSC-009, ¶ 27 (holding that the plaintiff's negligent misrepresentation claim failed because she had not satisfied "the element of justifiable reliance as a matter of law").

178. Hicks v. Eller, 2012-NMCA-061, ¶ 33.

179. NMSA 1978, § 41-3A-1 (1987).

180. Since the adoption of comparative fault, New Mexico law favors holding all parties, not just the defendant, responsible for their own respective acts to the degree those acts have caused harm. Scott v. Rizzo, 1981-NMSC-021, ¶ 29. The underpinnings of this doctrine are based on fairness. *Id.* ¶¶ 27–28.

181. *See* Ruiz v. Garcia, 1993-NMSC-009, ¶ 27. *See also* Larsen, *supra* note 138, at § 2(a) ("[W]here the plaintiff's unjustifiable reliance does not allow the plaintiff to make a prima facie case for negligent misrepresentation, unreasonable reliance would already serve to limit the plaintiff's recovery.").

law requires, the plaintiff's ability to state a claim for negligent misrepresentation in the first place depends on establishing justified reliance.[182] When the plaintiff is negligent in relying on the defendant's representation, the plaintiff fails to assert a prima facie case of negligent misrepresentation and is barred at the threshold from recovering from the defendant. By establishing that the plaintiff's reliance on the defendant's representations was justified, the plaintiff has shown that she or he was not negligent in relying; indeed, that the reliance was reasonable.

Hicks made no effort to reconcile the potential inconsistency of requiring a plaintiff to justifiably rely on a defendant's words while allowing the defendant to offset practically all of its liability by showing that the plaintiff negligently relied on defendant's representations. In choosing the majority rule, *Hicks* failed to deal with the confusion in the overlap between justified reliance as an element of and comparative negligence as a defense to negligent misrepresentation.[183]

2. Possible Solutions to the Tension Between Justified Reliance and Comparative Fault

To dissipate the confusion that results from considering a plaintiff's negligence when the plaintiff has already established justifiable reliance,[184] *Hicks* could have explained that justifiable reliance should no longer be considered a required element of the plaintiff's claim, but should instead be viewed only as the plaintiff's general right to recover.[185] Comparative negligence would then apply to determine "the proper amount of recovery."[186] Understood this way, the doctrine of comparative fault applies only after the plaintiff established his or her reasonableness in relying on the defendant's representations given the circumstances; it would have no bearing on the plaintiff's lack of negligence. Such reasoning would be compatible with New Mexico's preference for comparative

182. *Ruiz*, 1993-NMSC-009, ¶ 27.

183. *See* McNeil v. Nofal, 185 S.W.3d 402, 409 (Tenn. Ct. App. 2006).

184. *See supra* note 168 and accompanying text.

185. *See* M.E. Occhialino, *Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability–Part One*, 33 N.M. L. REV. 1, 12 (2003) ("[T]he current requirement that plaintiff prove justifiable reliance as an element of a negligent misrepresentation case may be incompatible with comparative negligence principles and perhaps should be transformed from an element of plaintiff's case to the affirmative defense of comparative negligence.").

186. ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651, 655 (Wash. 1998) (en banc) (discussing tension between finding justifiable reliance on one hand, and comparative fault on the other;the court explained that comparative fault principles can apply to other aspects of the plaintiff's behavior that proximately caused the plaintiff's harm, apart from the reliance element).

negligence.[187] Furthermore, analyzing justified reliance in terms of the plaintiff's right to recover, instead of as an element equivalent to a plaintiff's non-negligence, is harmonious with the UJI, which does not explicitly require justified reliance.[188] Indeed, the UJI's description of negligent misrepresentation is arguably better suited to an application of comparative fault *because* it does not strictly require justified reliance as an element equal to non-negligence.[189]

Alternatively, New Mexico courts could permit the justified reliance element to operate as a form of the old doctrine of contributory negligence, which would act as a total-bar defense to a plaintiff's claim if the defendant could establish that the plaintiff was not justified in relying on the representation. This way, plaintiffs would not have to guess as to what degree their own negligence could factor in to reducing a damage award. Rather, plaintiffs would understand that if more damages were caused by their own fault rather than the defendant's representations, they would recover nothing at all.

3. New Mexico's Several Liability Act Now Applies to Negligent Misrepresentation

Because the court in *Hicks* held that comparative negligence is a valid defense to a negligent misrepresentation claim, it should have clarified its holding by explaining that New Mexico's Several Liability Act[190] now applies to the tort as an additional method of apportioning fault to

187. *See* Scott v. Rizzo, 1981-NMSC-021, ¶ 27.

188. Instead, the UJI simply requires that the defendant had "no reasonable ground for believing that the statement made was true" and that the plaintiff did in fact rely on it. UJI 13-1632 NMRA.

189. For example, the court in *Staggs v. Sells*, 86 S.W.3d 219, 224 (Tenn. Ct. App. 2001) explained that a plaintiff could have justifiably relied *and* "contributed to the amount of damage suffered. Justifiable reliance is one of the elements that must be established to the satisfaction of the trial judge by a preponderance of the evidence before the tort of negligent misrepresentation can be established by a plaintiff. Such a finding is not inconsistent with comparative fault on the part of the plaintiff." *Id.* The court in *Hicks* made no similar effort to clarify its interpretation of justified reliance in this manner.

190. NMSA 1978, § 41-3A-1(A) (1987). The Several Liability Act requires the jury to account for all parties who contributed to the plaintiff's injury in apportioning damages in any claim where comparative fault applies. *See Gulf Ins. Co. v. Cottone*, 2006-NMCA-150, ¶ 20, 140 N.M. 728, 148 P.3d 814 (explaining "the general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault for that injury") (internal citations omitted); for a comprehensive overview and analysis of New Mexico's Several Liability Act and related cases, see Megan P. Duffy, *Multiple Tortfeasors Defined by the Injury: Successive Tortfeasor Liability After Payne v. Hall*, 37 N.M. L. Rev. 603 (2007).

others. The Act allows a defendant to allocate fault to individuals other than the plaintiff in any cause of action where comparative fault would apply. Thus, under the rule established in *Hicks*, not only can the plaintiff's negligence be considered, but also the negligence of additional parties that contributed to the plaintiff's economic injury.[191] If the Several Liability Act now applies, carrying with it sweeping implications with regards to the additional parties now potentially liable for negligent misrepresentation, a brief discussion of the Act in *Hicks* would have been useful for future litigants.

B. The Court of Appeals Inadequately Distinguished Neff

Related to its failure to analyze the "justified reliance" element of a negligent misrepresentation claim, *Hicks* failed to fully distinguish *Neff*, where the court of appeals focused exclusively on the plaintiff's right to rely on the defendant's representations, not whether the plaintiff exercised due care in such reliance.[192] By refusing to allow the defendant to assert the plaintiff's negligence as an affirmative defense, the court did not consider the plaintiff's negligence because he had already established justified reliance. The thrust of the court's argument in *Neff* was that the defendant, acting in the scope of his expertise, failed to disclose known facts to the plaintiff. Similarly in *Hicks*, the defendant was acting within the scope of his profession and comparably failed to disclose facts he should have known to the plaintiff. *Neff* emphasized that a negligent misrepresentation claim solely concerned the defendant's negligence once the plaintiff succeeded in establishing justified reliance. But in *Hicks*, the court skipped the justified reliance analysis altogether. This is alarming because at the time *Hicks* was decided, *Neff* meant that justified reliance equaled a lack of contributory negligence. *Hicks* did not consider why justified reliance would no longer be viewed this way.

Instead, *Hicks* quickly dismissed *Neff* without really considering its rationale. While it is true that comparative negligence was not at issue in *Neff*, this is because *Neff* was decided five years before New Mexico adopted comparative fault.[193] *Hicks* should have focused on the court's emphasis in *Neff* that negligent misrepresentation "does not speak in terms of contributory negligence *as a defense*" and that "[t]he issue is not

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191. Occhialino, *supra* note 185, at 11–12 (footnotes omitted). Professor Occhialino explained that if justified reliance were "transformed from an element of plaintiff's case to the affirmative defense of comparative negligence. The Several Liability Act and the doctrine of several liability would then apply to claims for negligent misrepresentation." *Id.* at 12.

192. *Neff v. Bud Lewis Co.*, 1976-NMCA-029, ¶¶ 20–21.

193. *See* Scott *v. Rizzo,* 1981-NMSC-021.

that plaintiff had a duty to exercise reasonable care in making a determination whether to rely on defendants' negligent representation."[194] Under *Neff*, the justifiably reliant plaintiff's own negligence cannot be used to reduce the defendant's liability. *Hicks* should have more carefully distinguished it's holding in light of the *Neff* opinion, which explained that negligent misrepresentation afforded no such defense.[195]

By the time *Hicks* was decided, some courts had interpreted *Neff* as standing for the proposition that someone owing an elevated duty, in that case a fiduciary, should not be permitted to raise comparative fault to defend against negligent misrepresentation. *Braswell* analyzed *Neff* similarly, explaining, "*when the defendant is acting with expert knowledge* or pursuant to a fiduciary relationship," placing "a higher duty on such defendants is apparently aimed at correcting disparate bargaining power and protecting unknowledgeable or innocent consumers."[196] It is puzzling that the court in *Hicks* cited to *Braswell* but did not distinguish that court's interpretation of *Neff*.[197] Moreover, like *Braswell*, the court in *Neff* seemed concerned with the policy consequences of permitting a fiduciary to lay off fault on the plaintiff due to the fiduciary's elevated duty of care.

C. The Court Failed to Address the Public Policy Implications of the Majority Rule

Hicks did not address the worrisome public policy repercussions of permitting comparative fault in the negligent misrepresentation context. Despite citing to several minority rule cases that espoused those concerns, *Hicks* made no effort to show why they would not be problematic in New Mexico. This perfunctory treatment of policy indicates a lesser concern for protecting innocent consumers, fair bargaining, and reliability in business exchanges. The court attempted to justify its decision not to engage in a policy discussion by asserting that the plaintiff made no policy arguments in favor of the minority rule.[198] Contrary to the court's conten-

194. *Neff*, 1976-NMCA-029, ¶ 20 (emphasis added).

195. *Id.* ¶¶ 21–22; *see also* Occhialino, *supra* note 185, at 11. Occhialino notes that it might be appropriate to transform justified reliance from an element of a prima facie case to an affirmative defense of comparative negligence, but prior to the decision in *Hicks* that was not the requirement in New Mexico; the requirement was that justified reliance was an element of the cause of action. *Id.* at 11–12. In analyzing *Neff*, Professor Occhialino explained, "[o]ne might expect that the comparative negligence defense would apply in an action for negligent misrepresentation, but New Mexico law is to the contrary." *Id.*

196. Estate of Braswell v. People's Credit Union, 602 A.2d 510, 513 (R.I. 1992) (emphasis added).

197. *Hicks*, 2012-NMCA-061, ¶ 32.

198. *Id.* ¶ 29.

tion, the plaintiff did urge the court of appeals to consider the worrisome policy considerations emphasized by the minority rule,[199] such as the need to protect less knowledgeable consumers.[200] *Hicks* chose not to explain why similar needs were not important in New Mexico.[201]

In neglecting to analyze these principles, *Hicks* chose the majority rule, which alleviates the defendant's burden to use the utmost care in making representations because the defendant can assert that the plaintiff should have also investigated, even when the plaintiff does not have the same level of expertise. *Hicks* might have imposed a restriction against professionals or experts being permitted to raise comparative negligence, as the minority rule opinions do. Such a limitation would protect even-bargaining power as well as innocent consumers and would only apply to situations involving financial injury in the limited scope of business transactions.[202]

Furthermore, in New Mexico comparative fault applies only unless contrary to public policy.[203] While *Hicks* cited this proposition,[204] its policy discussion ended there. In *Hicks*, there were compelling policy arguments in favor of prohibiting comparative fault. But in failing to address them, the court failed to recognize that allowing comparative fault in a negligent misrepresentation claim might be contrary to the interests New Mexico hopes to promote. Under *Hicks*, defendants like the art dealer in that case are now arguably less responsible for their careless representations because they can successfully apportion fault to others.

Lastly, permitting comparative fault in negligent misrepresentation claims undermines the policy underpinnings of the tort itself. The reason multiple types of tort claims exist in the first instance is because "various torts raise different policy concerns."[205] The minority rule is therefore in accordance with the notion that policy can justify a rule of law.[206] Unlike *Hicks*, the minority rule refuses to allow comparative negligence mostly because of state concerns such as inadequate consumer protection and

199. Appellant's Brief-in-Chief at 25 ("The actions and attitude of Peter Eller in his dealings with Mary Jane Hicks, are not actions that the courts of this state should support or encourage. This court should adopt a policy that comparative fault has no place in the context of ordinary business transactions . . . .").

200. *Braswell*, 602 A.2d at 514–15.

201. *See Hicks*, 2012-NMCA-061, ¶ 32.

202. Appellant's Brief-in-Chief at 25.

203. Reichert v. Atler, 1994-NMSC-056, ¶ 8.

204. *Hicks*, 2012-NMCA-061, ¶ 33 (citing *Reichert*, 1994-NMSC-056, ¶ 8).

205. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 1 cmt. a (2000).

206. *Id.* (explaining the "intellectual underpinning" of tort law is based on the notion that multiple torts exist because each one raises varying policy considerations).

promoting unfair bargaining. These concerns are important enough to merit more consideration than *Hicks* gave them. In simply finding the majority rule more persuasive, *Hicks* missed an opportunity to address the strong repercussions in favor of the minority rule, which hinge upon the nature of the tort itself as unlike other types of negligence. The reason the tort of negligent misrepresentation developed in the first place was to remedy the narrow problem of negligently spoken words that resulted only in financial instead of physical injury.[207] As the minority rule emphasizes, and *Hicks* ignored, policy considerations should enter the analysis when evaluating the propriety of comparative fault applying to certain torts.[208] Policy implications can render comparative fault inappropriate in certain causes of action.

Because *Hicks* declined to discuss these policy implications, future litigants and courts dealing with comparative negligence in the negligent misrepresentation context should take care to address them.[209] Moreover, future decisions will likely need to address just how much independent investigation into representations made by experts and professionals will now be required in New Mexico. After *Hicks*, it remains unclear exactly when a consumer can safely rely on information given by an expert, and when the consumer will face an obligation to investigate further.

VI. CONCLUSION

The New Mexico Court of Appeals in *Hicks* held that comparative fault applies to negligent misrepresentation claims and refused to distinguish the tort from any other tort grounded in negligence. *Hicks* was likely attempting to make New Mexico law on negligent misrepresentation congruent with negligence law in general by refusing to distinguish negligent misrepresentation from other torts. However, *Hicks* failed to comprehensively examine "justified reliance" and the element's diminished meaning under a comparative fault analysis. *Hicks* provides a

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207. *See* Maxey v. Quintana, 1972-NMCA-069, ¶ 16 (explaining the old view that because negligent misrepresentation did not fall under fraud or deceit, "no other action was available and that the wrong of negligent misrepresentation was without a remedy").

208. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 1 cmt. d (2000) (noting that "specific policies embodied in a particular cause of action" can mean that applying comparative fault to the cause of action should be precluded).

209. "Courts should not merely rely on ease of administration, in the sense of judicial time and effort, to disregard important policy differences among different torts." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 1 reporter's note (2000).

weak guide for applying comparative fault principles to negligent misrepresentation.

Overall, the opinion in *Hicks* failed to reconcile the conclusion that a plaintiff could negligently but justifiably rely on a representation. While it seems difficult to harmonize a plaintiff's justified—or reasonable—reliance on information with a simultaneous determination that the plaintiff was also negligent, the court was unwilling to further analyze this tension. *Hicks* did not provide a clear framework for reconciling justified reliance as a requisite element of a negligent misrepresentation claim with a jury finding that the plaintiff was also unreasonable in relying. The opinion offers little guidance for future practitioners dealing with the tension in applying comparative fault to a negligent misrepresentation claim. Under *Hicks*, a negligent misrepresentation plaintiff can have justifiably relied to the degree necessary to state a claim, but that justified reliance can later be subject to an analysis of the plaintiff's negligent reliance. After *Hicks*, it remains unclear the degree to which a plaintiff can rely on a professional or expert negligent representation without any risk of being held comparatively responsible for the resulting economic harm.