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Tort Law - Chavez v. Torres: New Mexico Premises Liability Reform: Two Steps Forward, One Step Back

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TORT LAW—*Chavez v. Torres*: New Mexico Premises Liability Reform: Two Steps Forward, One Step Back

I. INTRODUCTION

In 1994, the New Mexico Supreme Court took definitive steps toward modernizing New Mexico law on premises liability.¹ The traditional rules protecting landowners² were dramatically changed in *Reichert v. Adler*,³ when the New Mexico Supreme Court recognized the importance of a premises owner's duty to prevent harmful conduct of a third party on the owner's land.⁴ A landowner's protections were further diminished when the supreme court abolished the common law distinction of land entrants as invitees or licensees⁵ that had served to limit a landowner's duty to lawful visitors. In *Ford v. Board of County Commissioners of the County of Doña Ana*,⁶ the court established a single duty standard of reasonable care under the circumstances for all visitors other than trespassers.⁷ In abrogating the common law classifications, the court attempted to adhere to modern social mores and humanitarian values.⁸ No longer would a landowner be functionally shielded from immunity simply because of the status of the visitor, nor would a person's "life or limb...become...less worthy of compensation under the law because he has come upon the land of another...with permission but without a business purpose."⁹

1. The liability of a property owner or occupant to one injured on the property was historically treated as a branch of tort law, specifically in the context of negligence. As the amount of litigation involving "slip-and-fall" and other injuries arising from the condition of property increased, a separate branch of the law sometimes referred to as "premises liability" developed. 62 AM. JUR. 2D *Premises Liability* § 1 (1990).

2. See Patricia H. Nunley, *An Analysis of Premises Liability of Property Owners in Texas for Third-Party Criminal Acts: An Accomplice to the Crime or Another Victim?*, 27 REAL EST. L.J. 118, 122 (1998) (explaining the traditional English common law rule that owners and occupiers of land enjoyed a privileged position under the law compared to those who enter onto the property); See also *Ford v. Bd. of County Comm'rs of the County of Doña Ana*, 118 N.M. 134, 879 P.2d 766 (1994) (abrogating the common law distinctions between land entrants as licensees or invitees in determining a landowner's duty). The term "landowner" as used in this Note refers to the party liable for injuries to visitors.

3. 117 N.M. 623, 879 P.2d 379 (1994).

4. *Id.* at 626, 879 P.2d at 382 (recognizing also the harshness of holding the premises owner of a business fully liable for this conduct). See also Pamela J. Sewell, *Tort Law—New Mexico Examines the Doctrine of Comparative Fault in the Context of Premises Liability: Reichert v. Adler*, 25 N.M. L. REV. 353, 359 (1995) (stating that the *Reichert* court recognized the importance of the premises owner's duty to prevent harmful conduct of a third party as well as the harshness of holding the premises owner fully liable for this conduct). A jury instruction codifying the premises owner's duty to use ordinary care to keep the premises safe for a visitor now incorporates the supreme court's opinion. *Chavez v. Torres*, 128 N.M. 171, 174, 991 P.2d 1, 4 (Ct. App. 1999). See also N.M. U.J.I. CIV. 13-1320 (defining the standard to be used when an owner or occupier of property breaches the duty to use ordinary care to keep the premises safe for use by a visitor in apportioning fault).

5. See *infra* notes 59 and 60 for definitions of invitees and licensees.

6. 118 N.M. 134, 879 P.2d 766 (1994).

7. See *id.* at 139, 879 P.2d at 771. The duty of care owed a trespasser remains as stated in N.M. U.J.I. CIV. 13-1305 to 13-1307 (1991). *Id.* at 139 n.4, 879 P.2d at 771 n.4. Under these rules, the landowner has a duty of ordinary care to warn a trespasser or avoid injury to a trespasser only if the owner creates or maintains an artificial condition on the land or is engaged in activities that involve an unreasonable risk of death or great bodily harm to persons coming onto the land. In those circumstances, the duty extends to the landowner if he or she knows or should know that the trespasser is on the property or will come on the property or has reason to believe the trespasser will not discover the condition or realize the risk involved. See N.M. U.J.I. CIV. 13-1305 to 13-1307. The *Ford* court feared abandonment of the limited-duty rules for trespassers could place an unfair burden on a landowner who has no reason to expect a trespasser's presence. See *Ford*, 118 N.M. at 138, 879 P.2d at 770.

8. See *Ford*, 118 N.M. at 137-38, 879 P.2d at 769-70 (adopting California's rationale expressed in *Rowland v. Christian*, 443 P.2d 561 (1968) that to focus upon the status of the injured party to determine the extent of a landowner's duty of care is contrary to our modern social mores and humanitarian values).

9. *Id.* at 138, 879 P.2d at 770.

Notwithstanding the supreme court's attempt to eliminate the distinction between business invitees and other visitors, the New Mexico Court of Appeals in *Chavez v. Torres* found the plaintiff unworthy of compensation because she came on defendant's property without a business purpose.¹⁰ Plaintiff attempted to show a duty owed to her by a homeowner under several different theories, including the general duty owed to a visitor under the New Mexico Uniform Jury Instructions.¹¹ The court of appeals rejected plaintiff's claim, limiting a landowner's duty with respect to a visitor injured by a third party, contrary to the spirit and purpose of *Reichert and Ford*.

This Note explores the *Chavez* court's treatment of the general rules of premises liability. It gives a brief history of premises liability and recent developments in New Mexico before examining the rationale behind the *Chavez* decision. The significance of the court's position is also addressed.

II. STATEMENT OF THE CASE

On May 14, 1996, Michael Anderson took Cynthia Chavez forcibly to the home owned by Anderson's mother, Isabel Torres.¹² Anderson, who had been drinking, entered the home with a key given to him by Torres¹³ and held Chavez hostage there, assaulting her repeatedly.¹⁴ Torres was not at home during this time but was alerted to the situation when she spoke with Anderson and Chavez twice over the phone.¹⁵ Nevertheless, Torres did not go home and called a family member to go by the house, rather than law enforcement officials.¹⁶ Instead of actually visiting the house, the family member telephoned and was told everything was all right.¹⁷ Hours later, Anderson passed out and Chavez was able to escape.¹⁸

Chavez's assault occurred after an apparently extended and intimate relationship with Anderson. Chavez lived with Anderson in Torres's home for several months.¹⁹ Both Chavez and Torres were aware that Anderson had a drinking problem.²⁰ The incident of May 14, 1996, occurred after Anderson and Chavez moved out of Torres's home,²¹ but several incidents of property damage had occurred as a result of Anderson's excessive and violent behavior while Anderson was living with Torres.²² On one occasion, Torres called the police because Anderson was damaging

10. See *Chavez*, 128 N.M. at 174, 991 P.2d at 4 (refusing to extend to Torres the general duty of care owed by a landowner to a visitor indicated in N.M. U.J.I. CIV. 13-1309 or N.M. U.J.I. CIV. 13-1320 absent New Mexico case law indicating the duty applies in a non-commercial setting).

11. See generally *id.*

12. *Id.* at 172, 991 P.2d at 2.

13. *Id.* at 171, 991 P.2d at 1.

14. *Id.* at 172, 991 P.2d at 2.

15. *Id.*

16. *Chavez*, 128 N.M. at 174, 991 P.2d at 4.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 171-72, 991 P.2d at 2.

21. See *id.* at 172, 991 P.2d at 2.

22. *Chavez*, 128 N.M. at 174, 991 P.2d at 4.

property in her home.²³ Chavez and Torres together convinced Anderson to seek help at one point.²⁴

Based on Torres's knowledge of Anderson's conduct, Chavez sued Torres for the injuries she sustained at the hands of Anderson in Torres's home.²⁵ At trial, Chavez claimed Torres was liable for negligently entrusting²⁶ her home to Anderson by providing him with a key and unlimited, unsupervised access to the home.²⁷ Additionally, Chavez argued that Torres owed a duty as a homeowner to exercise reasonable care for Chavez's protection while she was Anderson's guest in Torres's home.²⁸ According to Chavez, Torres breached that duty because it was foreseeable²⁹ that Anderson would harm Chavez on the premises, given what Torres knew about Anderson's propensity for alcohol abuse and violence.³⁰ Chavez further argued that Torres's duty was even more acute once she became aware that the assault was occurring.³¹

Torres filed a motion for summary judgment,³² alleging she owed no legal duty to Chavez to control the conduct of a third party on her property.³³ The trial court originally denied Torres's motion but reheard arguments and granted summary judgment in favor of Torres.³⁴ The New Mexico Court of Appeals accepted an interlocutory appeal³⁵ of the summary judgment to determine if Chavez should be allowed to proceed against Torres on these theories along with her other claims.³⁶

23. *Id.*

24. *Id.*

25. *Id.* Chavez also sued Anderson for the assaults. At the time the court of appeals' opinion was written, her claims against Anderson were still pending. *Id.*

26. See *infra* note 38 for a general explanation of the doctrine of negligent entrustment.

27. *Chavez*, 128 N.M. at 171, 991 P.2d at 2.

28. *Id.* at 173, 991 P.2d at 3.

29. Foreseeability, the primary factor weighed by courts in determining the existence of a duty, is not merely what might conceivably occur, but that which is objectively reasonable to expect. *Madsen v. Scott*, 128 N.M. 255, 260, 992 P.2d 268, 273 (1999); see also *Nunley*, *supra* note 2, at 121 (explaining that the evidence must establish only that the defendant knew or should have known that injury would occur to the victim, not that the defendant knew the exact events that would cause the danger).

30. *Chavez*, 128 N.M. at 174, 991 P.2d at 4.

31. *Id.*

32. Summary judgment is a procedural device available for disposition of a controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only a question of law is involved. BLACK'S LAW DICTIONARY (7th ed. 1999). A party to a civil action may move for a summary judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. N.M. R. CIV. P. 1-056. An award of summary judgment is only proper if there are no genuine issues of material fact or the moving party is entitled to judgment as a matter of law. *Carmona v. Hagerman Irrigation Co.*, 125 N.M. 59, 61, 957 P.2d 44, 46 (1998).

33. *Chavez*, 128 N.M. at 173, 991 P.2d at 2.

34. *Id.*

35. An interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. BLACK'S LAW DICTIONARY (7th ed. 1999). An interlocutory appeal is initiated by filing an application with the appellate court within fifteen days after the entry of an interlocutory order in the district court. If the application is granted, the proceedings in the district court are automatically stayed unless otherwise ordered by the appellate court. N.M. R. CIV. P. 12-203(A)(E).

36. *Chavez*, 128 N.M. at 173, 991 P.2d at 2. Chavez's other claims, argued in the context of Torres's negligence, included a willful, wanton, and reckless disregard for Chavez (Appellant's Brief in Chief at 2, *Chavez v. Torres*, 128 N.M. 171, 991 P.2d 1 (1999) (Ct. App. 1998) (No. 19,818) and that Torres's negligence should be compared with the negligence of the other parties in the case (Appellant's Brief in Chief at 6).

The appellate court affirmed entry of summary judgment in favor of Torres against Chavez³⁷ after addressing two questions: first, whether the theory of negligent entrustment³⁸ applied to this case;³⁹ and, second, whether, and under what circumstances, an owner or possessor of land has a duty to exercise reasonable care to control criminal conduct by a third party on her land, thereby protecting visitors to her property.⁴⁰

On the first issue, the court of appeals agreed with the trial court that negligent entrustment does not apply to the facts in this case as a matter of law.⁴¹ To answer the second question, the court looked at the New Mexico Uniform Jury Instructions to determine the general duty owed by a landowner to visitors.⁴² Because the court found no case law indicating this duty has been extended to the owners of non-commercial, private property or to homeowners,⁴³ the court next measured the facts of this case against section 318 of the *Restatement (Second) of Torts*.⁴⁴ Ultimately, the court determined that Chavez did not set forth sufficient factual allegations to create a genuine issue of material fact under section 318.⁴⁵ The court was unable to decide if this case fit within the narrow scope of situations under section 318 in which a homeowner might have a duty of reasonable care to control tortious conduct within the home, even if the homeowner is not physically present.⁴⁶ Therefore, the court affirmed the summary judgment granted by the district court.⁴⁷

III. BACKGROUND

The tort of negligence consists of four elements: duty, breach, proximate causation, and damages.⁴⁸ The threshold inquiry is duty.⁴⁹ To successfully establish liability in a tort case, a plaintiff must prove the existence and violation of a duty

37. *Id.* at 175, 991 P.2d at 6.

38. The general theory of negligent entrustment is that it is negligence to permit a third person to use a thing or to engage in an activity that is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. RESTATEMENT (SECOND) OF TORTS § 308 (1965).

39. *Chavez*, 128 N.M. at 72, P.2d at 2.

40. *Id.*

41. *Id.* at 172, 991 P.2d at 3.

42. *Id.* at 174, 991 P.2d at 4 (citing N.M. U.J.I. Civ. 13-1320 and 13-1309, which state, "[u]nder New Mexico's Uniform Jury Instructions, owners and occupiers of land who fail to exercise ordinary care for the safety of their visitors may be liable for injuries proximately caused, and that duty of care includes 'a foreseeable risk that a third person will injure a visitor'").

43. *Id.*

44. *See id.* Under section 318, the duty of a landowner to control the conduct of a third-party visitor applies to injuries caused by the third party on the premises. A duty is created if the actor permits a third person to use land in his possession otherwise than as a servant, if the actor knows or should know that the actor has the ability to control the third party, and that there is a necessity and opportunity for exercising control. RESTATEMENT (SECOND) OF TORTS § 318 (1965) (hereinafter section 318).

45. *Chavez*, 128 N.M. at 171, 991 P.2d at 1.

46. *See id.* at 176, 991 P.2d at 6 (referring to a caveat inserted by the American Law Institute in drafting section 318 indicating the possibility of a duty where the owner is not present but is in the vicinity, is informed of the necessity and opportunity of exercising control, and can easily do so).

47. *Id.*

48. *See Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 650, 905 P.2d 185, 190 (1995); *See also Tafoya v. Seay Bros.*, 119 N.M. 350, 352, 890 P.2d 803, 805 (1995); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143 (1971); Nunley, *supra* note 2, at 119.

49. *Lopez v. Maez*, 98 N.M. 625, 630, 651 P.2d 1269, 1275 (1982); *see also* Nunley, *supra* note 2, at 119.

owed to him or her by the defendant.⁵⁰ Duty in negligence cases is an obligation recognized by the law to conform to a particular standard of conduct toward another.⁵¹

Generally, the duty of an owner or occupier of a premises does not extend to an injury caused by the act of a third person over whom the owner or occupant had no control, and for whose acts the owner is not responsible.⁵² A landowner is simply required to act as a reasonable person. This includes maintaining the property in a reasonably safe condition in view of the circumstances.⁵³ The circumstances considered include the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.⁵⁴

There are exceptions to the general rule that a landowner has no duty to protect visitors by controlling the actions of a third party on the landowner's property, however.⁵⁵ Chavez brought this suit under two such exceptions: the theory of negligent entrustment,⁵⁶ and, alternatively, liability based on section 318.⁵⁷ Chavez also asserted that Torres's general duty as a landowner encompassed a duty to protect Chavez from the known danger Anderson posed to Chavez on the land.⁵⁸

A. Landowner's General Duty to Visitor

In early common law, a landowner's duty to visitors was based on the visitor's status as either an invitee,⁵⁹ licensee,⁶⁰ or trespasser.⁶¹ Landowners generally had no

50. *Nunley*, *supra* note 2, at 119.

51. *Coleman*, 120 N.M. at 650, 905 P.2d at 190.

52. 62 AM. JUR. 2D *Premises Liability* § 6 (1990); *see also* *Davis v. Bd. of County Comm'rs of the County of Doña Ana*, 127 N.M. 785, 790, 987 P.2d 1172, 1177 (1999) (affirming the accepted legal proposition that generally there is no affirmative duty to prevent criminal acts by a third party in the absence of some special relationship or statutory duty).

53. *Ford v. Bd. of County Comm'rs of the County of Doña Ana*, 118 N.M. 131, 139, 879 P.2d 766, 771 (1994).

54. *Id.*

55. Exceptions include where liability can be predicated on the public nuisance theory, where negligent conduct of a third person creates a dangerous condition that the landowner should have discovered and taken reasonable precautions to alleviate, or where landowner should have anticipated the misconduct of a third person and negligently fails to take reasonable precautions to protect the injured person from the harm. 62 AM. JUR. 2D *Premises Liability* § 43. There were many exceptions to the general rule regarding a landowner's duty to trespassers and licensees, including the duty to refrain from injuring a trespasser or licensee by willful or wanton conduct, the duty to exercise reasonable care once the trespasser's presence was known, and special rules regarding a landowner's duty to child trespassers. *See generally id.* § 59. A duty of protection against a criminal act of a third person is assumed by an express agreement where the relationship of common carrier or passenger exists, or where the owner or occupant of the premises should have foreseen or anticipated that criminal assaults were likely to occur on the premises. *Id.* § 46.

56. *Chavez v. Torres*, 128 N.M. 171, 172, 991 P.2d 1, 2 (Ct. App. 1999). *See supra* note 38, defining "negligent entrustment." *See also infra* text accompanying notes 86-92 for a discussion of the doctrine.

57. *Chavez*, 128 N.M. at 173, 991 P.2d at 4.

58. *Id.*

59. "Invitees" were visitors on the premises for a purpose connected with the landowner's business, such as patrons of a store. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 62 at 419 (5th ed. 1984). Many modern courts have redefined invitees to include visitors whose presence conferred any economic benefit upon the landowner, and "public invitees," such as visitors, using public lands. *Id.* § 61 at 420, 422. Invitees are also called "business visitors." *Id.* § 61 at 419.

60. "Licensees" are visitors who enter a landowner's premises with permission, either express or implied, but who do not fall into the category of invitees. *Id.* § 60 at 412-13.

61. A trespasser is a visitor who enters land in possession of another without the possessor's consent. *Id.* § 58 at 393.

duty to licensees or trespassers,⁶² and invitees were owed the general duty of reasonable care by landowners.⁶³ An owner or operator of a place of business only had a particular duty to prevent the harmful conduct of a third party on the premises that might threaten the safety of a business invitee.⁶⁴

This classification scheme was followed until the late 1950s,⁶⁵ when England became the first to abolish the distinctions between persons who enter a landowner's premises.⁶⁶ In 1968, California became the first of many U.S. jurisdictions to do away with the common law classifications.⁶⁷ Other jurisdictions followed, some completely eliminating the distinctions among licensee, invitee, and trespasser.⁶⁸ Some jurisdictions, including New Mexico, repudiated only the distinction between licensees and invitees, maintaining the limited-duty rules for trespassers.⁶⁹

Before abolishing these classifications of land entrants, New Mexico delineated the common law duty of a property owner to prevent the harmful conduct of a third party in *Reichert v. Atler*.⁷⁰ *Reichert* was a wrongful death action arising from the death of a bar patron at the hands of another customer.⁷¹ The *Reichert* court confirmed the duty of the owner or operator of a place of business to prevent the harmful conduct of a third party,⁷² while limiting the bar owner's liability to their percentage of fault compared to the assailant's misconduct.⁷³ A jury instruction covering the matter was also proposed.⁷⁴ The supreme court subsequently adopted N.M. U.J.I. Civ. 13-1320, which reflects the ruling in *Reichert*.

After *Reichert* came *Ford v. Board of County Commissioners of the County of Doña Ana*.⁷⁵ In *Ford*, the New Mexico Supreme Court abrogated the common law distinctions between licensees and invitees in determining landowners' liability.⁷⁶ No longer, the court said, would the status of a visitor be the determinative factor in assessing the landowner's or occupier's liability.⁷⁷ After *Ford*, ordinary principles of negligence would be used to govern a landowner's conduct as to all persons on the land with permission.⁷⁸

62. *Id.* § 60 at 415.

63. *Id.* § 61 at 419.

64. *Reichert v. Atler*, 117 N.M. 623, 626, 875 P.2d 379, 382 (1994).

65. Samuel E. Tuma, *Tort Law—Occupiers of Land Must Exercise Reasonable Care for all Lawful Visitors: Ford v. Board of County Commissioners of the County of Doña Ana*, 25 N.M. L. REV. 373, 375 (1995).

66. Michael Sears, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. KAN. L. REV. 175, 181 (1995); see also *Ford v. Bd. of County Comm'rs of the County of Doña Ana*, 118 N.M. 134, 137, 879 P.2d 766, 769 (1994) (noting that the first jurisdiction to abandon the common law categories was Great Britain in 1957).

67. *Ford*, 118 N.M. at 137, 879 P.2d at 769.

68. *Id.* at 138, 879 P.2d at 770.

69. *Id.* See *supra* note 7 (defining the duties owed to a trespasser).

70. 117 N.M. 623, 875 P.2d 379 (1994).

71. See *id.*

72. *Id.* at 626, 875 P.2d at 382.

73. *Id.* at 623-24, 875 P.2d at 379-82.

74. *Id.* at 626, 875 P.2d at 382 (suggesting an instruction to be given as part of N.M. U.J.I. Civ. 13-1309, or separately, stating, in part, that in apportioning fault of the owner or operator of a place of business, if found that his, her, or its duty was breached, the jury should find that the owner's duty to protect visitors arises from the likelihood that a third party will injure a visitor).

75. 118 N.M. 134, 879 P.2d 766 (1994).

76. See generally *id.*

77. *Id.* at 139, 879 P.2d at 771.

78. *Id.* The court limited its holding to licensees and invitees, reasoning that abandonment of the status of

N.M. U.J.I. Civ. 13-1309 and 13-1320 codify the New Mexico landowner's post-*Ford* duty to visitors regarding acts of third persons. A landowner owes a duty to use ordinary care to keep the premises safe for use by a visitor.⁷⁹ N.M. U.J.I. Civ. 13-1320 extends this protection to visitors from dangers presented by the acts of a third person, including a foreseeable risk that a third person will injure a visitor.⁸⁰ Failure to exercise ordinary care may result in the landowner's liability for injuries to the visitor.⁸¹ These principles have been extended to owners and operators of businesses but have not been extended to owners of non-commercial, private property or to homeowners.⁸² Notably, however, the language of the New Mexico jury instructions embodying the landowner's duty to protect visitors from third parties⁸³ is not restricted to a business or commercial context.⁸⁴ Moreover, the modification of N.M. U.J.I. Civ. 13-1309 mandated by *Ford* specifically eliminated the word "business" preceding "visitors" from the instructions.⁸⁵

B. Negligent Entrustment

The basic premise for the common law doctrine of negligent entrustment is that there are times when one may not assume that other people will conduct themselves properly.⁸⁶ If the defendant knows, or should know, of facts that would lead a reasonable person to believe a third party is unlikely to conduct himself properly, the defendant must exercise ordinary care in considering whether to entrust property to the potentially negligent third person.⁸⁷ In other words, it is negligent to make an entrustment that creates a foreseeable substantial risk of harm.⁸⁸

Liability for negligent entrustment is not dependent on the defendant's failure to actually control the actions of the third party tortfeasor, but, rather, on allowing the tortfeasor access to the offending instrumentality.⁸⁹ Alternatively, liability might be incurred by allowing the tortfeasor to undertake an activity that causes harm in circumstances where the defendant knew or should have known of the tortfeasor's incompetence to perform the activity.⁹⁰ In addition to the elements of ordinary negligence,⁹¹ a successful plaintiff must establish (1) that the defendant entrusted the offending instrumentality to trustee or permitted trustee to engage in an activity,

trespasser might place an unfair burden on a landowner who has no reason to expect a trespasser's presence. *Id.* at 138, 879 P.2d at 770.

79. N.M. U.J.I. Civ. 13-1309.

80. N.M. U.J.I. Civ. 13-1320.

81. *Id.*; see also N.M. U.J.I. Civ. 13-1309.

82. *Chavez v. Torres*, 128 N.M. 171, 173, 991 P.2d 1, 4 (Ct. App. 1999).

83. See N.M. U.J.I. Civ. 13-1320; see also N.M. U.J.I. Civ. 13-1309.

84. *Chavez*, 128 N.M. at 173, 991 P.2d at 4.

85. See *Tuma*, *supra* note 65, at 379-80.

86. *Gabaldon v. Erisa Mortgage Co.*, 124 N.M. 296, 306, 949 P.2d 1193, 1203 (Ct. App. 1997), *aff'd in part and rev'd in part* 128 N.M. 84, 990 P.2d 197 (1999).

87. *Id.* at 305, 949 P.2d at 1202.

88. *McCarson v. Foreman*, 102 N.M. 151, 156, 692 P.2d 537, 542 (Ct. App. 1984).

89. *Gabaldon*, 124 N.M. at 306, 949 P.2d at 1203 (citing *Syah v. Johnson*, 55 Cal. Rptr. 741, 744-45 (1966)); see also RESTATEMENT (SECOND) OF TORTS §§ 302 cmt. g, 302A, 308, 390 (1965).

90. *Gabaldon*, 124 N.M. at 306, 949 P.2d at 1203.

91. See *supra* text accompanying note 48, setting out the general elements of negligence; see also *McCarson*, 102 N.M. at 155, 692 P.2d at 541 (holding that general principles of negligence are relevant to the determination of negligent entrustment).

(2) defendant knew or should have known that entrustee was incompetent, and (3) entrustee's incompetent use of the instrumentality or conduct of the activity caused the injury.⁹²

Application of this theory has been addressed infrequently in New Mexico, and almost exclusively in chattel entrustments, usually automobiles.⁹³ A recent exception was *Gabaldon v. Erisa Mortgage Co.*,⁹⁴ where the New Mexico Court of Appeals attempted to expand the theory of negligent entrustment to apply to real estate.⁹⁵ The appellate court applied negligent entrustment principles to leases of real property in order to increase protection of entrants on leased premises.⁹⁶ On appeal, the New Mexico Supreme Court did not disagree in principle with the proposed expansion of the negligent entrustment doctrine,⁹⁷ but specifically disagreed with the holding on several grounds.⁹⁸ The supreme court ultimately refused to create a new cause of action by expanding the doctrine of negligent entrustment to apply to real estate.⁹⁹

C. Liability under Restatement (Second) of Torts Section 318

An affirmative duty to control the conduct of third persons to prevent danger to others on the land may be imposed where a special relationship is shown to exist, giving rise to a duty of a landowner to protect against a third person's criminal conduct.¹⁰⁰ The special relationship may be between the landowner and the third person, giving the landowner the ability to control the third person's behavior.¹⁰¹ Or, the special relationship may be between the landowner and the person threatened with injury, giving that person an entitlement to protection.¹⁰² A special relationship may arise under section 318 when a landowner knew or should have known of his

92. See *Gabaldon*, 128 N.M. at 90, 990 P.2d at 203; see also *DeMatteo v. Simon*, 112 N.M. 112, 114, 812 P.2d 361, 364 (1991); *McCarson*, 102 N.M. at 155, 692 P.2d at 541.

93. *Chavez*, 128 N.M. at 172, 991 P.2d at 3. See *Hermosillo v. Leadingham*, 129 N.M. 721, 13 P.3d 79 (2000) (addressing liability to the victim of an automobile collision on the theory of negligent entrustment). See also *Sanchez v. San Juan Concrete Co.*, 123 N.M. 537, 943 P.2d 571 (1997); *Tafoya v. W. Farm Bureau Ins. Co.*, 117 N.M. 385, 872 P.2d 358 (1994); *Spencer v. Gamboa*, 102 N.M. 692, 699 P.2d 623 (1985); *Romero v. Ole Tires, Inc.*, 101 N.M. 759, 688 P.2d 1263 (1984); *Equitable Gen. Ins. Co. v. Silva*, 99 N.M. 371, 658 P.2d 446 (1983); *Bryant v. Gilmer*, 97 N.M. 358, 639 P.2d 1212 (1982); *DeMatteo v. Simon*, 112 N.M. 112, 812 P.2d 361 (Ct. App. 1991); *McCarson*, 102 N.M. 151, 692 P.2d 537 (Ct. App. 1984). But see *Shea v. H.S. Pickrell*, 106 N.M. 683, 748 P.2d 980 (1987) (defining the scope of a construction lender's duty to protect a third-party purchaser in connection with a claim of negligent entrustment of money).

94. 124 N.M. 296, 949 P.2d 1193 (Ct. App. 1997), *aff'd in part and rev'd in part*, 128 N.M. 84, 990 P.2d 197 (1999).

95. See *id.* at 309, 949 P.2d at 1206 (holding that a landlord has a duty to exercise ordinary care in the selection of a tenant).

96. *Id.* at 307, 949 P.2d at 1204.

97. *Gabaldon v. Erisa Mortgage Co.*, 128 N.M. 84, 90, 990 P.2d 197, 203 (1999).

98. *Id.* at 91, 990 P.2d at 203 (finding inadequate basis in either law or fact for extending the theory of negligent entrustment to real property leases).

99. *Id.* at 92, 990 P.2d at 205.

100. *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct. App. 1993).

101. *Fowler V. Harper and Posey M. Kime, The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 893-904 (1934).

102. *Id.* See also *Rummel*, 116 N.M. at 26, 859 P.2d at 494 (finding within the ambit of commonly recognized special relationships those between innkeepers and guests, business establishments and their customers, and, under certain circumstances, landlords and their tenants); see also *Warren v. City of Indianapolis*, 375 N.E.2d 1163 (1978) (recognizing that certain relationships impose a duty to act, such as a carrier to a passenger, an innkeeper to a guest, a ship owner to a seaman, and an employer to an employee).

or her ability to control persons who might injure a visitor and the necessity and opportunity to exercise such control.¹⁰³ Under those circumstances, the possessor has a duty to exercise reasonable care to prevent injury to the visitor at the hands of a third person.¹⁰⁴

No New Mexico case has directly considered section 318, but it was recently briefly and favorably addressed by the court of appeals in *Gabaldon*.¹⁰⁵ In discussing the duty of a non-possessory landlord in selecting a tenant, the court of appeals indicated that section 318 stands for the proposition that a landlord can be required to guard visitors from a tenant's incompetence.¹⁰⁶ Nonetheless, the court of appeals ruled that section 318 was inapplicable in the context of Gabaldon's negligent entrustment claim.¹⁰⁷ Section 318 indicates a landlord can be required to guard against the acts of others on the property.¹⁰⁸ Negligent entrustment, on the other hand, concerns itself with the defendant's actions prior to entrustment of the property, rather than its subsequent actions.¹⁰⁹ *Gabaldon* was not concerned with the actions of the defendant prior to the lease of the property, but her actions subsequent to the lease.¹¹⁰

The New Mexico Supreme Court took a less expansive view of section 318 on appeal. The New Mexico Court of Appeals interpreted section 318 as giving a landlord a broad duty to guard against acts of others on the property.¹¹¹ While not disagreeing with the court of appeals' observation, the supreme court pointed out that the landlord must be a possessor to have some duty to control the conduct of a licensee.¹¹² There was no evidence that Erisa controlled or managed the property, nor was there any evidence that defendant leased the property in an unsafe condition, or had reason to believe that the tenant would admit the public to unsafe premises.¹¹³ The supreme court found no basis in section 318 for expanding non-possessory landlords' duties.¹¹⁴

IV. RATIONALE OF THE CHAVEZ COURT

In *Chavez*, the New Mexico Court of Appeals considered a landowner's duty to protect visitors of a third party on her land by exercising reasonable care to control the third party's criminal conduct. Chavez attempted to show a duty existed through three theories. Chavez claimed Torres owed her a general duty of care as a landowner to protect her from foreseeable harm by a third party on Torres's

103. *Chavez v. Torres*, 128 N.M. 171, 174, 991 P.2d 1, 4 (Ct. App. 1999).

104. *See id.*

105. *Id. See Gabaldon v. Erisa Mortgage Co.*, 124 N.M. 296, 307, 949 P.2d 1193, 1204 (Ct. App. 1997), *aff'd in part and rev'd in part*, 128 N.M. 84, 990 P.2d 197 (1999).

106. *Gabaldon*, 124 N.M. at 307, 949 P.2d at 1204; *see also Gabaldon v. Erisa Mortgage Co.*, 128 N.M. 84, 91, 990 P.2d 197, 204 (1999).

107. *See Gabaldon*, 124 N.M. at 307, 949 P.2d at 1204.

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Gabaldon v. Erisa Mortgage Company*, 128 N.M. 84, 91, 990 P.2d 197, 204 (1999).

113. *Id.*

114. *Id.*

property.¹¹⁵ She also claimed liability based on the theory of negligent entrustment.¹¹⁶ Finally, she claimed the existence of a duty under *Restatement (Second) of Torts* Section 318.¹¹⁷ Ultimately, the court addressed two questions: (1) whether negligent entrustment applied, and (2) whether, and under what circumstances, an owner or possessor of land has a general duty to exercise reasonable care to control criminal conduct by a third party on her land and thereby protect visitors to her property.¹¹⁸

A. Negligent Entrustment of Real Estate

The court first addressed Chavez's theory of liability based on the common law doctrine of negligent entrustment. The argument was that Torres negligently entrusted her house to Anderson by providing him with a key and unlimited, unsupervised access to her home.¹¹⁹ Further, Chavez alleged that Torres knew, or should have known, that Anderson was dangerous, given her knowledge of his previous conduct and the specific knowledge she received from her telephone conversations with Chavez.¹²⁰ The court reasoned that negligent entrustment has been applied in New Mexico to real estate in only one instance,¹²¹ and the holding in that case specifically limited the duty in a manner that made it inapplicable to the Chavez case.¹²²

Gabalton was a suit against the owner of commercial property for negligently entrusting operation of an existing water park to the lessee-operator.¹²³ Plaintiff, who was injured in a near-drowning incident in a wave machine at the waterpark,¹²⁴ asserted that defendant-lessor breached his duty to select a competent, careful lessee to operate the waterpark.¹²⁵ Acknowledging modern trends toward protecting persons injured on leased premises¹²⁶ and narrowing the immunity of landlords by

115. Chavez v. Torres, 128 N.M. 171, 173, 991 P.2d 1, 4 (Ct. App. 1999).

116. *Id.* at 172, 991 P.2d at 2. See *supra* note 38 for a definition of the doctrine of negligent entrustment.

117. See generally Chavez v. Torres, 128 N.M. 171, 991 P.2d 1 (Ct. App. 1999).

118. *Id.* at 172, 991 P.2d at 2.

119. *Id.*

120. *Id.*

121. *Id.* (referring to the holding in *Gabalton v. Erisa Mortgage Co.*, 124 N.M. 296, 306, 949 P.2d 1193, 1202 (Ct. App. 1997), *aff'd in part and rev'd in part*, 128 N.M. 84, 990 P.2d 197 (1999) (recognizing a lessor's responsibility to exercise care in selecting a competent tenant to operate a water park replete with foreseeable risks to visitors).

122. See *id.* at 173, 991 P.2d at 3 (noting that the circumstances giving rise to a legal claim under the expanded theory of negligent entrustment of real estate were limited to those incidents where a landlord is allowing another to undertake an activity with known potential hazards for the landlord's economic benefit). See also *Gabalton*, 124 N.M. at 309, 949 P.2d at 1206 (emphasizing that the duty of care under the theory of negligent entrustment of real estate is not intended to be applied broadly, but, rather, only in cases involving highly dangerous potentialities with a substantial risk to the general public that may be foreseen by the lessor).

123. *Gabalton*, 124 N.M. at 300, 949 P.2d at 1197.

124. *Id.* at 299-300, 949 P.2d at 1196-97.

125. *Id.* at 303, 949 P.2d at 1200.

126. See *id.* at 307, 949 P.2d at 1204 (reasoning that exceptions to the general rule of non-liability for landlords such as (1) when the landlord knows of a hidden defect and fails to inform the tenant; (2) when the landlord is obligated by covenant to repair; (3) when the landlord retains control of a part of the premises for common use; (4) when persons off the premises are injured as a result of the landlord's negligence; and (5) when the land is leased for purposes involving admission of the public, indicate a trend toward narrowing the scope of the traditional immunity).

imposing a duty to guard against the actions of third persons,¹²⁷ the *Gabaldon* court imposed on the landlord an obligation to exercise reasonable care in selecting a tenant.¹²⁸ The duty defined by the court of appeals, however, was not intended to be applied broadly.¹²⁹ Rather, the duty was limited to those cases where the property is designed, intended, and required to be used for a particular purpose involving a foreseeable and substantial risk of danger to the general public.¹³⁰

The *Chavez* court noted that the Torres home did not involve such "dangerous potentialities."¹³¹ Furthermore, the court reasoned, use of Torres's house did not cause injury to Chavez in the same way the use of a dangerous water park injured the plaintiff in *Gabaldon* or use of an automobile by a drunk driver causes injury in traditional negligent entrustment cases.¹³² The court found the theory of negligent entrustment, even as recently expanded in *Gabaldon*, did not fit the facts alleged in *Chavez*.¹³³

Nor did the court find it appropriate to extend to Torres the duty of care of a homeowner espoused in *Madsen v. Scott*,¹³⁴ upon which Chavez relied.¹³⁵ In *Madsen*, a housesitter with an interest in guns was authorized by the homeowner to invite guests to the premises, with specific instructions not to engage in wild parties.¹³⁶ Friends were invited over and one visitor accidentally shot to death another while playing with a gun.¹³⁷ The New Mexico Court of Appeals held that the employment relationship between the parties created the homeowner's duty to the guests of the housesitter under a theory of respondeat superior, not the doctrine of negligent entrustment.¹³⁸ The *Chavez* court declined to broaden the scope of *Madsen* to encompass negligent entrustment.¹³⁹

127. *Id.* (citing *Ciup v. Chevron USA, Inc.*, 122 N.M. 537, 539, 928 P.2d 263, 265 (1996) and *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct. App. 1993)).

128. *Id.* On appeal, the supreme court opined that the holding by the court of appeals was not supported by legal authority and irreconcilable with its other holding regarding inherently dangerous activities. Further, the new cause of action for negligent entrustment of real property, together with the duty to investigate the ability of a potential lessor to safely operate the leased premises, does not offer parties, attorneys, and courts guidance in similar situations. *Gabaldon*, 128 N.M. 84, 90, 990 P.2d at 203.

129. *Gabaldon*, 124 N.M. at 309, 949 P.2d at 1206.

130. *Chavez v. Torres*, 128 N.M. 171, 173, 991 P.2d 1, 4 (Ct. App. 1999). After *Chavez* was decided, the supreme court issued an opinion disagreeing with the court of appeals' establishment of a new cause of action for negligent entrustment of real property by a non-possessory landlord. See *Gabaldon*, 128 N.M. at 90, 990 P.2d at 203. See *infra* text accompanying notes 196-201 for a discussion of the supreme court's decision.

131. *Chavez*, 128 N.M. at 173, 991 P.2d at 3.

132. *Id.* Chavez described the Torres home as an "offending instrumentality" because Anderson "used appliances in the home, the walls, floors and doors of the house as weapons during his assault." Appellant's Brief in Chief at 12, *Chavez v. Torres*, 128 N.M. 171, 991 P.2d 1 (Ct. App. 1998) (No. 19,818).

133. *Chavez*, 128 N.M. at 172, 991 P.2d at 2.

134. 125 N.M. 475, 963 P.2d 552 (Ct. App. 1998), *rev'd*, 128 N.M. 255, 992 P.2d 268 (1999).

135. *Chavez*, 128 N.M. at 173, 991 P.2d at 3.

136. *Madsen*, 128 N.M. at 256, 992 P.2d at 269.

137. *Id.*

138. See generally *id.*; *Chavez*, 128 N.M. at 172, 991 P.2d at 2. The supreme court subsequently reversed the decision of the court of appeals in *Madsen* and held that there was no employer-employee relationship because there was no nexus between the housesitter's safeguarding of homeowner's guns and one guest shooting the other with his own gun and ammunition. See *Madsen* at 260-61, 992 P.2d at 273-74.

139. *Chavez*, 128 N.M. at 173, 991 P.2d at 3.

B. Torres's General Duty of Care as a Landowner

Chavez argued that Torres, as a landowner, owed a duty of care to Chavez because it was foreseeable that Anderson would harm Chavez on the premises, given what Torres knew about Anderson's propensity for alcohol abuse and violence.¹⁴⁰ Addressing Chavez's argument, the court of appeals examined the general duty of a landowner as defined in New Mexico's Uniform Jury Instructions.¹⁴¹ The court observed that the duty of a landowner to keep a premises safe for a visitor includes protecting visitors from dangers presented by the acts of a third person.¹⁴² Although applied to the owner and operator of a business who fails to exercise reasonable care to protect a patron from the violence of another patron,¹⁴³ no New Mexico case has yet extended the duty to owners of non-commercial private property or homeowners.¹⁴⁴ The court looked elsewhere for guidance as to whether this general duty should apply to homeowners like Torres, even though the language of the uniform jury instructions is not confined to a business or commercial setting.¹⁴⁵

C. Chavez's Duty under Section 318 of the Restatement (Second) of Torts.

The court next turned to the *Restatement* for guidance.¹⁴⁶ The court noted that under section 318, a possessor of property may be under a duty to control, or attempt to control, the activities of persons using its lands.¹⁴⁷ It further observed that this duty applies to injury caused by a third party on the property.¹⁴⁸ The duty arises by virtue of the special relationship between the possessor of land and the person allowed on the land when the landowner knew or should have known of the ability and necessity to control persons causing injury to a visitor and who had the opportunity to exercise such control.¹⁴⁹

Based on authority from other jurisdictions¹⁵⁰ and secondary sources,¹⁵¹ as well

140. *Id.* at 174, 991 P.2d at 4.

141. *See id.*

142. *Id.*; N.M. U.J.I. Civ. 13-1309; N.M. U.J.I. Civ. 13-1320.

143. *Chavez*, 128 N.M. at 174, 991 P.2d at 4 (referring to *Reichert v. Adler*, 117 N.M. 623, 875 P.2d 379 (1994)).

144. *Id.*

145. *Id.* *See* N.M. U.J.I. Civ. 13-1309; *see also* N.M. U.J.I. Civ. 13-1320.

146. *Chavez*, 128 N.M. at 174, 991 P.2d at 4.

147. *See id.* (quoting RESTATEMENT (SECOND) OF TORTS § 318 (1965)).

148. *Id.*

149. *Morgan v. Perlowski*, 508 N.W.2d 724, 728 (Ia. 1993) *abrogated on other grounds by* *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 603-04 (Ia. 1998); *Chavez*, 128 N.M. at 175, 991 P.2d at 5.

150. *Chavez*, 128 N.M. at 174-75, 991 P.2d at 4-5. The court relied on *Morgan* (applying section 318 to a homeowner to control the conduct of visitors in order to prevent harm to other visitors in the house); *Kinsey v. Bray*, 596 N.E.2d 938, 940 (Ind. Ct. App. 1992) (recognizing a homeowner's duty to exercise reasonable care to protect guests on the property from reasonably foreseeable violent acts of a third party); *Youngblood v. Shireman*, 765 P.2d 1312, 1317-18 (Wash. 1988) (recognizing a homeowner's duty to control the conduct of a third party, but finding sleeping homeowners not present because they were unaware of the danger).

151. *Chavez*, 128 N.M. at 175, 991 P.2d at 5 (citing *Fowler V. Harper & Posey M. Kime, The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 893-904 (1934) (discussing special relationships that may give rise to the duty to control the conduct of another in chattel entrustment, parent-child relationships, joint enterprises, persons under protection of the defendant, carrier-passenger relations, use of land by business visitors, and other situations); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 57 at 392 (5th ed. 1984) (discussing section 318 and the power of control a property owner has by reason of his occupation of the premises over the conduct of a third person to prevent injury to the visitor).

as the opinion of the court of appeals in *Gabaldon*,¹⁵² the *Chavez* court viewed section 318 with favor.¹⁵³ The court recognized the duty of a landowner to anticipate trouble where the owner knows or should know of the necessity, ability, and opportunity to control the third party's dangerous activities on her land, and to take reasonable measures to control the third party in reliance on the owner's knowledge.¹⁵⁴ A critical inquiry under section 318 became notice.¹⁵⁵

The court concluded that Chavez created a genuine issue of material fact sufficient to defeat summary judgment on the issue of notice.¹⁵⁶ The telephone conversation alerting Torres that Anderson and Chavez were present in her home, that Chavez needed help, and that Anderson had a gun, together with everything else Torres knew about her son, could have created knowledge to meet the first element of duty on the part of Torres.¹⁵⁷ Based on these allegations, the court said, a jury might reasonably conclude that Torres knew or should have known of the necessity and opportunity for exercising such control, as well as the ability to control Anderson's conduct through reasonable measures.¹⁵⁸

The pivotal question for the court, however, concerned Torres's lack of physical presence on the property, either at the time Anderson and Chavez first entered the house or later during the assaults.¹⁵⁹ Section 318 refers to the property owner's presence on the property as a condition to imposing a duty to control third-party conduct.¹⁶⁰ A caveat inserted by the American Law Institute, however, expressly leaves open the possibility of a duty where the actor is not on the premises but is in the vicinity, is informed of the necessity and opportunity of exercising such control, and can do so easily.¹⁶¹

Whether Torres was "in the vicinity" of her home or could "easily" have exercised control over Anderson's criminal activities in her house were issues not addressed by Chavez.¹⁶² Therefore, the court declined to decide whether this case fit within the narrow scope of situations under section 318 in which a homeowner, although not physically present, might nonetheless have a duty of reasonable care to control tortious conduct within the home.¹⁶³ The court signaled that there might be situations in which the homeowner's duty of care extends beyond physical presence on the property.¹⁶⁴ Further, the thrust of *Chavez* is that in an appropriate

152. 124 N.M. 296, 949 P.2d 1193 (Ct. App. 1997), *aff'd in part and rev'd in part*, 128 N.M. 84, 990 P.2d 197 (1999).

153. *Chavez*, 128 N.M. at 175, 991 P.2d at 6.

154. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 318 cmt. c (1965)).

155. *Id.*

156. *Id.*

157. *Id.* at 175-76, 991 P.2d at 6-7.

158. *Id.* at 176, 991 P.2d at 6.

159. *Chavez v. Torres*, 128 N.M. 171, 176, 991 P.2d 1, 6 (Ct. App. 1999).

160. RESTATEMENT (SECOND) OF TORTS § 318 (1965) (stating that if present, the owner is under a duty to exercise reasonable care so as to control the conduct of the third person).

161. *Chavez*, 128 NM at 176, 991 P.2d at 7; RESTATEMENT (SECOND) OF TORTS § 318 (1965).

162. *Chavez*, 128 N.M. at 176, 991 P.2d at 7.

163. *Id.*

164. *Id.* (indicating that had Chavez included factual information such as whether Torres's place of work was in the "vicinity" of her home and if she could have "easily" exercised control over Anderson's criminal activities in her house from her absentee position at work, the court might have reversed the summary judgment entered in the lower court and allowed the case to proceed on the basis of a duty created under section 318).

case New Mexico courts will make section 318 a part of its common law of torts.¹⁶⁵

V. ANALYSIS AND IMPLICATIONS

The *Chavez* court acknowledged that "[u]nder New Mexico's Uniform Jury Instructions, owners and occupiers of land who fail to exercise ordinary care for the safety of their visitors may be liable for injuries proximately caused,"¹⁶⁶ which duty of care includes "a foreseeable risk that a third person will injure a visitor."¹⁶⁷ It also noted that the language of the jury instructions is not restricted to a business or commercial context.¹⁶⁸ Yet, the court would not extend the duty to include owners of non-commercial, private property or homeowners, absent any supporting New Mexico case law.¹⁶⁹ Moreover, the court declined to expand the duties of a private landowner not physically present by adopting section 318, further diminishing the duties of a landowner as stated in N.M. U.J.I. Civ. 13-1309 and 13-1320. The decisions reflect a reluctance both to abandon the common law premises liability distinctions of licensee and invitee and to acknowledge a landowner's general duty of ordinary care established by the New Mexico Supreme Court in *Ford*.¹⁷⁰

A. *The Established Duty in New Mexico Is Clear*

The supreme court's adoption of Uniform Jury Instructions establishes a presumption that the instructions are correct statements of the law.¹⁷¹ N.M. U.J.I. Civ. 13-1309 states that "an [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor [,whether or not a dangerous condition is obvious]."¹⁷² N.M. U.J.I. Civ. 13-1320 is to be used in conjunction with N.M. U.J.I. Civ. 13-1309 when comparing the conduct of a third person injuring a visitor to the negligence of the defendant property owner.¹⁷³ It acknowledges the duty of a landowner to control the conduct of a third person. In part, it states, "[i]f an [owner] [occupant] breaches the duty to use ordinary care to keep the premises safe for use by a visitor, resulting in injury to the visitor from the acts of a third person, the [owner's] [occupant's] breach of duty is to be compared with the conduct of the third person who actually caused the injury to the visitor."¹⁷⁴

The language of N.M. U.J.I. Civ. 13-1320, adopted in 1996 after both the *Reichert* and *Ford* decisions, is general and not limited to commercial settings.¹⁷⁵ It

165. *Id.*

166. *Chavez*, 128 N.M. at 174, 991 P.2d at 5; N.M. U.J.I. Civ. 13-1320.

167. *Chavez*, 128 N.M. at 174, 991 P.2d at 5; N.M. U.J.I. Civ. 13-1309.

168. *Chavez*, 128 N.M. at 174, 991 P.2d at 5; N.M. U.J.I. Civ. 13-1309.

169. *Chavez*, 128 N.M. at 174, 991 P.2d at 5; N.M. U.J.I. Civ. 13-1309.

170. 118 N.M. 134, 879 P.2d 766 (1994).

171. *State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994).

172. N.M. U.J.I. Civ. 13-1309.

173. *Id.*

174. N.M. U.J.I. Civ. 13-1320.

175. The jury instruction proposed by the supreme court in *Reichert v. Atler* referred to the duty of a business owner in relation to the conduct of a third party. *Reichert v. Atler*, 117 N.M. 623, 626, 875 P.2d 379, 382 (1994). One month before the *Ford* decision was published, the *Reichert* court was still writing in the context of the common law classifications of invitees and licensees to define a premises owner's duty to visitors. A visitor with a business purpose was owed a duty of reasonable care to make the premises safe. Licensees and trespassers were owed a lesser duty of care. Adherence to these common law distinctions and the commercial setting in which the

reflects the duty of reasonable care owed by all landowners to all visitors. Recognizing that the language is not limited to a commercial context,¹⁷⁶ the *Chavez* court was nevertheless unwilling to extend this general duty to Torres because she was a private homeowner rather than the owner of a business or commercial enterprise.¹⁷⁷ The court of appeals relied on the *Reichert* court's emphasis on the "importance of the duty of the *owner or operator of a place of business* to prevent the harmful conduct of a third party,"¹⁷⁸ rather than on *Ford*'s subsequent elimination of the distinction between business and private visitors. The plain meaning of the jury instructions was ignored and no deference was given to premises liability developments after *Reichert*¹⁷⁹ in interpreting the general duty stated in N.M. U.J.I. Civ. 13-1320. Instead, the court searched for some positive statement from New Mexico courts that the general duty stated applies to non-commercial settings. Finding no New Mexico case indicating this duty extended to owners of non-commercial, private property or to homeowners,¹⁸⁰ the court surmised a need to find the duty elsewhere.¹⁸¹

Section 318 provided the *Chavez* court with a source of specific authority giving the possessor of land a duty to control the conduct of a third-party non-business visitor to prevent injuries on the land by the third party.¹⁸² The broad duty of a landowner under N.M. U.J.I. Civ. 13-1320 to protect visitors from acts of a third person arising from a foreseeable risk that the third person will injure the visitor narrows under section 318. The duty exists under section 318 only when there is a "special relationship"¹⁸³ between the owner and a third person that gives the owner the ability to control the third person's behavior, or with the person threatened with injury that gives that person an entitlement to protection.¹⁸⁴ The court viewed this limitation on a homeowner's duty with favor.¹⁸⁵ It assumed, without deciding, that in an appropriate case section 318 would become a part of New Mexico's common law of torts.¹⁸⁶

B. The Chavez Court Failed to Fully Consider Modern Trends and Values

By finding and maintaining special rules for landowners that effectively protect them from liability that others have, the *Chavez* court obscured the considerations the New Mexico Supreme Court deemed appropriate to a determination of the

Reichert case arose naturally inclined the supreme court to propose a jury instruction specifically addressing the duty of a business owner. The *Ford* decision eliminated the need to distinguish between a business owner's duty and a non-commercial property owner's duty. It also led to the revision of N.M. U.J.I. Civ. 13-1309 by deleting the word "business" from the instruction. See Tuma, *supra* note 65, at 379-380.

176. *Chavez v. Torres*, 128 N.M. 171, 174, 991 P.2d 1, 4 (Ct. App. 1999).

177. *Id.*

178. *Id.* (emphasis added).

179. The Court ignored not only *Ford*'s abrogation of the common law status of entrants to define a landowner's duty, but the subsequent modification of N.M. U.J.I. Civ. 13-1309 and the adoption of N.M. U.J.I. Civ. 13-1320 as well.

180. *Chavez*, 128 N.M. at 173, 991 P.2d at 4.

181. *Id.*

182. *Id.*

183. *Id.* at 174, 991 P.2d at 5.

184. *Id.*

185. *Id.*

186. *Id.*

question of duty.¹⁸⁷ Placing the burden on Chavez, the injured party, to prove the duty stated in N.M. U.J.I. Civ. 13-1320 applies to non-commercial settings, focused the inquiry on the status of Chavez as an entrant. Thus, while not literally perpetuating the rigid classifications abolished in *Ford*, the *Chavez* court nevertheless resisted the New Mexico Supreme Court's trend toward a flexible general negligence standard in tort cases.¹⁸⁸ Its decision reinforced an ideology contrary to modern social mores and humanitarian values, modern trends and values supported by precedent.¹⁸⁹

Furthermore, the favorably viewed section 318 may create the specific type of land rule the New Mexico Supreme Court sought to abolish. The *Ford* court attempted to bring tort law into conformity with modern tort principles that look to the reasonableness of the behavior when determining liability. Through increased jury participation, this modern trend allows the application of contemporary community standards.¹⁹⁰ The presence requirement of section 318 undermines the concept that "[e]veryone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property."¹⁹¹ Adoption of this special rule might have the effect of protecting landowners from liability, contrary to the flexible, general negligence standard promulgated by the New Mexico Supreme Court.¹⁹² Even if section 318 is adopted and presence is not required, under section 318 the injured party must prove the landowner was (1) in the vicinity, (2) informed of the necessity and opportunity of exercising control, and (3) situated so that she could easily exercise such control.¹⁹³ While these factors may be relevant to whether a landowner breached a duty of care, they should not be determinative in deciding whether the landowner owed a duty of care.

187. *Ford*, 118 N.M. at 138, 879 P.2d at 770 (following California's reasoning in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), that the proper consideration governing the question of duty is that everyone is responsible for an injury caused to another because of his lack of ordinary care or skill in the management of his property).

188. See Tuma, *supra* note 65, at 378-79 (citing to *Klopp v. Wackenbut*, 113 N.M. 153, 156, 824 P.2d at 293, 299 (1992), where the court held that the obvious danger rule was incompatible with the doctrine of comparative negligence). See also *Calkins v. Cox Estates*, 100 N.M. 59, 64, 792 P.2d 36, 41 (1990), where the foreseeability of injury to the plaintiff, not the physical boundaries of the property, determined the scope of a landlord's duty; *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234, 1241 (1981), where contributory negligence was abolished and comparative negligence was established as the law in New Mexico; *Gabaldon v. Erisa Mortgage Company*, 124 N.M. 296, 308, 949 P.2d 1193, 1205 (Ct. App. 1997), *aff'd in part and rev'd in part*, 128 N.M. 84, 990 P.2d 197 (1999) (acknowledging that New Mexico has followed the recent trend of recognizing a general tort duty of landlords who retain control or possession of property to protect tenants and their employees from negligent and criminal activity by tenants or strangers to the property); *Ford v. Bd. of County Comm'rs of the County of Doña Ana*, 118 N.M. 134, 879 P.2d 766 (1994) (abrogating the common law distinctions of entrants to property as invitees or licensees).

189. See *Ford*, 118 N.M. at 137, 879 P.2d at 769 (adopting the view that focusing upon the status of the injured party as a licensee or invitee in order to determine a landowner's duty is contrary to modern social mores and humanitarian values and continued adherence to the common law distinctions can only lead to injustice, complexity, or confusion).

190. Mark J. Welter, *Premises Liability: A Proposal to Abrogate the Status Distinctions of "Trespasser," "Licensee" and "Invitee" as Determinative of a Land Occupier's Duty of Care Owed to an Entrant*, 33 S.D.L. REV. 66, 69 (1988).

191. *Ford*, 118 N.M. at 138, 879 P.2d at 770.

192. See Welter, *supra* note 190, for an explanation of the flexible general negligence standard toward which New Mexico is gravitating.

193. *Chavez v. Torres*, 128 N.M. 171, 175, 991 P.2d 1, 5; RESTATEMENT (SECOND) OF TORTS § 318 (1965).

C. The Court's Reasoning in Light of *Gabaldon* and *Madsen* Is Questionable

Viewed in light of the supreme court's opinions in *Gabaldon*¹⁹⁴ and *Madsen*,¹⁹⁵ a luxury not afforded the court of appeals when it decided *Chavez*, the *Chavez* decision becomes suspect.¹⁹⁶ Like the *Gabaldon* and *Madsen* courts before it, the *Chavez* court attempted to create special rules to govern landowners' duties.¹⁹⁷ The supreme court, however, in both *Gabaldon* and *Madsen* was reluctant to embrace additional specific rules of premises liability.¹⁹⁸

The quest by the court of appeals for specific rules conflicts with the supreme court's inclination toward a single, general standard of care in lieu of complex standards, as reflected in *Ford* and in the *Madsen* and *Gabaldon* supreme court opinions.¹⁹⁹ Considering its recognition of a general duty, the New Mexico Supreme Court would be unlikely to accept the *Chavez* court's assumption that section 318 would become a part of New Mexico's common law of torts in an appropriate

194. 128 N.M. 84, 990 P.2d 197 (1999).

195. 128 N.M. 255, 992 P.2d 268 (1999).

196. The *Chavez* court relied on the court of appeals' decisions in both *Gabaldon* and *Madsen* to support its finding that negligent entrustment does not apply to the facts of its case. *Chavez*, 128 N.M. at 172, 991 P.2d at 3. Furthermore, the *Chavez* decision was arrived at through the same analytical approach used by the lower court in *Gabaldon* and *Madsen*. The supreme court subsequently questioned the general holdings in both cases and also rejected the analysis by the court of appeals in those cases, as a matter of form and as a matter of policy. See *Gabaldon v. Erisa Mortgage Co.*, 128 N.M. 84, 90, 990 P.2d 197, 203 (1999) (criticizing the court of appeals' establishment of negligent entrustment of real estate because it is unsupported by legal authority, irreconcilable with its holding regarding negligent inherently dangerous activities, and does not offer parties, attorneys, and courts guidance in similar situations); see also *Madsen v. Scott*, 128 N.M. 255, 992 P.2d 268 (1998) (disagreeing with the court of appeals' assessment of the facts and applicable legal authority and suggesting that the court of appeals' decision could lead to unreasonable burdens of foreseeability). The *Chavez* court found the court of appeals' decisions in both *Gabaldon* and *Madsen* inapplicable, yet it implied that negligent entrustment of real property might apply under different circumstances. See *Chavez* at 172, 991 P.2d at 3 (indicating *Chavez* failed to cite applicable legal authority to support her claim of negligent entrustment against Torres). The court of appeals also indicated that there were situations in which the homeowner's duty might extend even when not physically present. *Id.*

197. In both *Gabaldon* and *Madsen*, the supreme court declined to adopt the reasoning of the court of appeals. The idea that negligent entrustment can be applied to real estate and the notion that an absent homeowner could be held responsible for the shooting death of one guest by another with the guest's own gun without some proof of foreseeability were subsequently rejected by the supreme court. See *Gabaldon v. Erisa Mortgage Co.*, 128 N.M. 84, 90, 990 P.2d 197, 203 (1999); see also *Madsen*, 128 N.M. at 260-61, 992 P.2d at 273-74. Although the court of appeals in *Gabaldon* viewed section 318 with favor and even used it to create its new theory of liability, the supreme court found the *Restatement* unpersuasive and not binding because the *Restatement* makes no reference to negligent entrustment of real property. *Gabaldon*, 128 N.M. at 90, 990 P.2d at 203. Further, the lack of language in the *Restatement* specifically precluding application of negligent entrustment to real property leases does not constitute a mandate to create new duties or apply old duties in new contexts. *Id.* The supreme court's treatment of the *Restatement* is clearly less favorable than that of the court of appeals.

198. See *Gabaldon*, 128 N.M. at 91, 990 P.2d at 204 (maintaining that non-possessory landlords are not responsible for what takes place on land they do not possess, and do not have a right to control). See also *Madsen*, 128 N.M. at 260-61, 992 P.2d at 273-74 (acknowledging that N.M. U.J.I. Civ. 13-1309 imposes on the homeowner a duty to use ordinary care to keep the premises safe for use by a visitor, but declining to extend the duty to the homeowner under the facts of the case, and finding no employer-employee relationship to create an exception to the homeowner's duty of ordinary care, despite the findings by the court of appeals of a question of homeowner's liability under the theory of respondeat superior).

199. As it did in both *Gabaldon* and *Madsen*, the court of appeals sought specific rules and exceptions with which to measure liability, as it was reluctant to extend liability based simply upon the general rules articulated in *Ford* and embodied in N.M. U.J.I. Civ. 13-1309 and N.M. U.J.I. Civ. 13-1320. *Chavez*, 128 N.M. at 173, 991 P.2d at 4. Though the *Chavez* court acknowledged that the Uniform Jury Instructions and prior case law dictate a general duty of reasonable care for owners and occupiers of land toward visitors, it measured the facts of this case against section 318. *Id.*

case.²⁰⁰ As the supreme court is creating a broader standard of ordinary care under the circumstances, section 318 would create yet another specific rule defining a landowner's duty. It is unlikely that the *Chavez* decision would withstand analysis under the standards and policy considerations advocated by the supreme court's opinions in *Gabaldon* and *Madsen*.²⁰¹

D. Negligent Entrustment Rulings May Be Inconsistent with Modern Tort Theory

The New Mexico Supreme Court has concluded that to bring premises liability law into conformity with modern tort principles demands the use of a general standard of reasonable care under all circumstances. The *Ford* court's finding that ordinary principles of negligence should govern a landowner's conduct toward all visitors other than trespassers reflects a movement in this direction. The standard of care a landowner owes a visitor is now that of the proverbial reasonable person.²⁰² Property must be maintained in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.²⁰³

Rather than looking to the reasonableness of the behavior, under the theory of negligent entrustment a duty arises if (1) an actor permits a third person to use a thing or to engage in an activity that is under the control of the actor, and (2) if the actor knows or should have known that the third person intends or is likely to use a thing or conduct an activity in such a manner as to create an unreasonable risk of harm to others.²⁰⁴ In *Chavez*, the court of appeals suggested that negligent entrustment could be applied to real estate under limited circumstances.²⁰⁵ The supreme court subsequently dismissed the idea that negligent entrustment could be applied to real estate under any circumstances.²⁰⁶ The supreme court found that, as a matter of law, non-possessionary landlords are not responsible for what takes place on land they do not possess and do not have a right to control.²⁰⁷ This decision, as

200. *Id.*

201. The policy concerns expressed by the supreme court in both *Gabaldon* and *Madsen* also surface in *Chavez*. Like the rule proposed by the court of appeals in *Gabaldon* (negligent entrustment of real property by a non-possessionary landlord), the *Chavez* court's proposition that there may be situations in which the homeowner's duty of care extends beyond physical presence on the property provides little guidance as to exactly how and when the duty should be invoked. See *Gabaldon*, 128 N.M. at 92, 990 P.2d at 205 (finding little guidance as to exactly when and how the duty to investigate a lessee's capacity to safely operate the leased premises should be invoked). It also may impose unreasonable duties similar to those reflected by the court of appeals' indication that a homeowner might be liable for the actions of a housesitter's guests, absent foreseeability of the harm caused by the guest, in *Madsen*. See *Madsen*, 128 N.M. at 260-61, 992 P.2d at 273-74 (agreeing with the court of appeals' dissent that expecting a homeowner to have anticipated a visitor's loaded gun would be used to play a fatal game of quick draw involving homeowner's unloaded weapon would require every homeowner to anticipate total disaster each and every time they left their home in the care of a housesitter).

202. *Ford*, 118 N.M. at 139, 879 P.2d at 771 (holding that henceforth a landowner must act reasonably in maintaining his or her property).

203. *Id.*

204. RESTATEMENT (SECOND) OF TORTS § 308 (1965).

205. *Chavez*, 128 N.M. at 172, 991 P.2d at 3 (noting that the court of appeals in *Gabaldon* limited the circumstances giving rise to a legal claim under the expanded theory of negligent entrustment of real estate to apply only when a landlord requires or allows another to undertake an activity with known potential hazards for the landlord's own economic benefit).

206. See generally *Gabaldon*, 128 N.M. 84, 990 P.2d 197 (1999).

207. *Id.* at 92, 990 P.2d at 203.

well as the *Chavez* decision, may be inconsistent with the single duty of reasonable care under all circumstances espoused by the supreme court in *Ford*.

The common law doctrine of negligent entrustment itself may constrain this tendency toward a general rule for all persons. Just as common law classifications of entrants to land as "licensees" and "invitees" no longer fit contemporary society,²⁰⁸ the common law doctrine of negligent entrustment may no longer reflect modern social standards. The definitive nature of the doctrine is a departure from modern tort principles that look simply to the reasonableness of the behavior. The gradual change in favor of a broadening application of a general tort obligation to exercise reasonable care against foreseeable harm to others²⁰⁹ dictates abrogation of specific common law principles our modern society has outgrown. Application of the antiquated and awkward doctrine of negligent entrustment may have outlived its usefulness.

E. *Specificity versus Generality*

The *Chavez* decision reflects the apparent preference on the part of the court of appeals for specificity in tort law, as opposed to the supreme court's move toward generality. While the supreme court land cases modify or abolish specific doctrine of landowner liability in favor of a general doctrine of duty of reasonable care,²¹⁰ the court of appeals resists that trend in favor of more specific guidelines. Perhaps the reluctance on the part of the court of appeals to embrace a general standard of care for all landowners is well founded. Deference and respect for the supreme court might account for the court of appeals' hesitancy in interpreting and applying New Mexico's jury instructions, absent any guiding case law. The fear of unbridled liability is also a legitimate concern. Broad tort liability rules could lead to broad applications that the court of appeals may feel are unwarranted. Ambiguity and uncertainty in the law seem likewise disagreeable to the court of appeals.

It is precisely this preference for a general rule, even accompanied by ambiguity and uncertainty, however, that appears to be the impetus behind the supreme court's recent reforms. By moving toward a general duty of care by all landowners to all visitors, the supreme court advocates a standard of reasonable care by all persons under the circumstances and a case-by-case approach to tort liability. Modern social standards, with an emphasis on equality for all, dictate the need for change in the law. Premises liability rules are included in this shifting humanitarian trend. No longer should a person enjoy a privileged position simply by virtue of his or her status as a landowner.

VI. CONCLUSION

The decision of the court of appeals remains a paradox. The court declines to extend to *Torres* the duty of care promulgated by the New Mexico Uniform Jury

208. See Michael Sears, *Abrogation of the Traditional Common Law of Premises Liability*, 44 U. KAN. L. REV. 175, 184-85 (1995).

209. 62 AM. JUR. 2D *Premises Liability* § 79.

210. See *supra* note 188 describing the New Mexico Supreme Court's trend toward a flexible general negligence standard in tort cases.

Instructions, absent New Mexico case law extending the duty to non-commercial, private property or homeowners.²¹¹ Yet, it fails to acknowledge the supreme court's decisions in *Ford* and *Reichert* that led to the adoption of the jury instructions. The New Mexico Court of Appeals instead clings to the refuted notion that the status of the entrant determines the property owner's duty. While the court of appeals was entitled to consider the status of Chavez as a factor in determining Torres's liability, it should not have been determinative.²¹² The court should have followed the established principle that a landowner has a general duty to protect visitors from harm, including injuries caused by third parties. The absence of case law extending this duty to owners of private, non-commercial property, and the absence of factual allegations supporting adoption of section 318 notwithstanding, material issues of fact were raised regarding Torres's duty under the current New Mexico Uniform Jury Instructions. The rigidity of the common law of torts sought to be relaxed in *Ford* was tightened once again by the *Chavez* court and the ancient protections once afforded landowners reinforced.

NANCY ENGLISH

211. *Chavez v. Torres*, 128 N.M. 171, 173, 991 P.2d 1, 3 (Ct. App. 1999).

212. *Ford v. Bd. of County Comm'rs of the County of Doña Ana*, 118 N.M. 134, 139, 879 P.2d 766, 771 (1994).