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Tort Law - Constructive Fraud or Actual Fraud - Is There Still a Distinction between Them - Wolf and Klar Cos. v. Garner

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TORT LAW—Constructive Fraud or Actual Fraud—Is There Still a Distinction Between Them? *Wolf and Klar Cos. v. Garner*

I. INTRODUCTION

In *Wolf and Klar Cos. v. Garner,*[1] the New Mexico Supreme Court addressed the question of whether one party was liable to another for constructive fraud in the absence of a fiduciary relationship between the parties.[2] The supreme court held that the absence of a fiduciary relationship would not preclude liability for constructive fraud.[3] The court's rationale for arriving at this conclusion, however, is unclear.

This Note will demonstrate that the *Wolf* decision, by failing to fully utilize New Mexico case law, blurred the distinction between actual and constructive fraud. The distinction between actual and constructive fraud is important in that actual fraud involves intentional conduct, while constructive fraud does not. The decision rendered in *Wolf* made it difficult to determine when a claim will lie for actual fraud as opposed to constructive fraud. Consequently, plaintiffs will be more likely to plead both actual fraud and constructive fraud as causes of action against a defendant.

II. STATEMENT OF THE CASE

Some time in 1977, Robert Garner began purchasing jewelry items from Wolf and Klar Companies, a wholesale jeweler.[4] Every sales transaction was handled on a charge account basis through Wolf and Klar's agent, Bobby Gee.[5] Gee and Garner knew each other personally prior to

1. 101 N.M. 116, 679 P.2d 258 (1984).

2. *Id.* at 118, 679 P.2d at 260. *See also* Leitensdorfer v. Webb, 1 N.M. (Gild., E.W.S. ed.) 34, 53–54 (1857) (constructive fraud was defined as "acts contrary to public policy, to sound morals, to the provisions of a statute, etc., however honest the intention with which they may have been performed"), *aff'd* 61 U.S. (20 How.) 176 (1857). *Cf.* Scudder v. Hart, 45 N.M. 76, 82, 110 P.2d 536, 539 (1941) (quoting 26 C.J. Fraud §4 (1921), where constructive fraud was defined 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 confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.").

3. 101 N.M. at 118, 679 P.2d at 260.

4. *Id.* at 117, 679 P.2d at 259.

5. *Id.* Wolf and Klar Companies entered into a written contractual agreement with Bobby Gee. Under the terms of the contract Bobby Gee was employed to act as a sales representative for Wolf and Klar. Specifically, Gee agreed to "sell and promote the goods, wares and merchandise of Wolf and Klar Companies." Trial Transcript of Proceedings at 111. Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

the transactions.[6] Under terms of the purchase sale agreement, Gee delivered jewelry to Garner from the stock he carried on hand.[7] The merchandise was then charged to Garner's Wolf and Klar account.[8] After each sale, Gee forwarded a sales order form to Wolf and Klar.[9] Wolf and Klar, in turn, sent Garner a monthly statement.[10]

After the first three sales, Gee began ordering and receiving merchandise without Garner's knowledge, subsequently charging it to Garner's account.[11] Gee, however, disposed, used, and benefited from the merchandise credited to Garner's account.[12] Garner never received any of the merchandise that Gee charged to his account, after the first three sales were completed.[13]

When Garner became aware that Gee was charging items through his account, he told Gee to discontinue using the account in that manner.[14] Gee paid most of the outstanding charges.[15] Within a short period of time, however, Gee again began charging merchandise to Garner's account without Garner's knowledge.[16] For the entire three-year period during which Gee used Garner's charge account, Garner never notified Wolf and Klar of Gee's personal use of the account, even though Garner received monthly statements that reflected the charges made by Gee.[17]

Bobby Gee died in February 1981.[18] At the time of Gee's death, Gee had made $66,309.84 in purchases on Garner's open account and had made payments totaling $57,140.30.[19] The balance owed to Wolf and

6. Trial Transcript of Proceedings at 63, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Defendant-Appellant's Brief in Chief at 3, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

12. 101 N.M. at 117, 679 P.2d at 259. Although the court's opinion does not contain any language which states exactly how Gee used and benefited from the merchandise credited to Garner's account, the opinion does suggest that evidence was submitted at trial which tended to show that Gee had a drug abuse problem which required hospitalization while he was employed by Wolf and Klar Cos. The inference, though unsubstantiated, is that Gee sold the merchandise and pocketed the proceeds. 101 N.M. at 118, 679 P.2d at 260.

13. Trial Transcript of Proceedings at 70, *Wolf*.

14. 101 N.M. at 117, 679 P.2d at 259. During the period of time from May 1977 through December 1980, Wolf and Klar sent 30 charge account invoices to Garner. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* In addition to the monthly statements and invoices that Garner received from Wolf and Klar, Garner also engaged in numerous telephone conversations with Wolf and Klar concerning the status of Garner's charge account. *See* Transcript of Record at 44. Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

18. Defendant-Appellant's Brief in Chief at 3, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

19. Transcript of Record at 44, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

Klar was $9,169.54.[20] Only after Gee's death did Garner inform Wolf and Klar of Gee's misuse of the charge account.[21]

Wolf and Klar filed suit in the District Court of Lea County in an attempt to recover the outstanding balance from Garner.[22] The trial court ruled that Garner's silence amounted to constructive fraud because Garner allowed Gee to misuse his charge account for three years without notifying Wolf and Klar, who had no knowledge of Gee's dishonest conduct.[23] The New Mexico Supreme Court affirmed the decision of the trial court, holding that the finding of constructive fraud was justified by the evidence and that the trial court acted within its discretion by refusing to absolve Garner's participation in Gee's dishonest conduct.[24]

III. DISCUSSION AND ANALYSIS

A. The Court Altered the Constructive Fraud Analysis

On appeal, Garner argued that there had been no fiduciary relationship between himself and the plaintiff, Wolf and Klar. He maintained that, without such a relationship, he owed no duty to disclose his knowledge of Gee's conduct to Wolf and Klar.[25] Garner contended that, absent a duty to disclose, his conduct did not amount to constructive fraud.[26] The supreme court disagreed.

The *Wolf* court's holding focused on whether, under the circumstances, Garner's silence was contrary to sound morals and public policy.[27] The court found that Garner's conduct was "contrary to sound morals," irrespective of any dishonesty or intent to deceive Wolf and Klar.[28] The

20. *Id.* at 47. Upon direct examination, Garner testified that he placed no more than three orders with Gee, that Wolf and Klar had billed him for those purchases, and that he paid for the purchases in full. Trial Transcript of Proceedings at 64, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

21. Trial Transcript of Proceedings at 67, Wolf & Klar Cos. v. Garner, 101 N.M. 116, 679 P.2d 258 (1984).

22. Transcript of Record at 1–2, *Wolf.*

23. *Id.*

24. 101 N.M. at 118, 679 P.2d at 260. At trial, Garner argued that Wolf and Klar could have pursued payment of the outstanding balance in a more vigorous fashion and that failure to do so amounted to negligence, thereby absolving him of liability. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. 101 N.M. at 118, 679 P.2d at 260. The court relied on Leitensdorfer v. Webb, 1 N.M. (Gild., E.W.S. ed.) 34 (1857). In *Leitensdorfer,* appellee Webb filed an affidavit and sued out a writ of attachment against appellants Leitensdorfer and Houghton to recover the sum of $8,297.92. 1 N.M. (Gild., E.W.S. ed.) at 36. At trial, Webb introduced into evidence a paper purporting to be a deed of assignment from Leitensdorfer to H.N. Smith and Thomas Biggs. 1 N.M. (Gild., E.W.S. ed.) at 37. The deed of assignment was given to Smith and Biggs for the purpose of paying off Leitensdorfer's creditors. 1 N.M. (Gild., E.W.S. ed.) at 37. Houghton ratified this assignment. 1 N.M. (Gild., E.W.S. ed.) at 38. Sufficient funds, however, were unavailable to pay all creditors. 1 N.M. (Gild., E.W.S. ed.) at 39. Houghton contended that as the assignment was the act of Leitensdorfer

court, however, did not state exactly why Garner's silence violated public policy and sound morals, thus constituting constructive fraud.[29] Instead, the court noted that, under agency law, one who intentionally aids and abets an agent in an act which perpetrates a fraud upon his principal is as liable as the agent to the principal for any damages suffered.[30] The court concluded that Garner's silence permitted Gee to violate Gee's duty of honesty to Wolf and Klar.[31]

New Mexico case law, however, has never required intentional conduct as a necessary element of constructive fraud.[32] In *Wolf,* the court recognized that intent is not an essential element of constructive fraud. Nonetheless, the court implied that Garner's silence was in fact intentional.[33] In effect, the court relied on an agency law principle in which intent is an essential element to find that Garner was justifiably liable for constructive fraud. The court's reliance on this principle is significant because it is neither necessary to prove dishonesty of purpose nor intent to deceive in order to sustain a cause of action for constructive fraud.[34]

In fact, *Scudder v. Hart*[35] made it very clear that the intent of the fraud feasor was irrelevant when determining liability for constructive fraud. The *Scudder* court was faced with the issue of whether a county treasurer who mistakenly informed a mortgagor and mortagee that there were no delinquent taxes due on the mortgaged property could be held liable for constructive fraud due to giving erroneous information.[36] The *Scudder*

alone, with which Houghton had nothing to do, the act of one defendant (Leitensdorfer) would not authorize an attachment against Houghton himself. 1 N.M. (Gild., E.W.S. ed.) at 40. The supreme court disagreed with this contention and held that where one partner makes an assignment of the partnership which fraudulently affects creditors and is subsequently approved by the copartner, the copartner is equally a party to the fraud, and an attachment may issue against both. 1 N.M. (Gild., E.W.S. ed.) at 50.

29. 101 N.M. at 118, 679 P.2d at 260. The court may have felt that Garner's silence was violative of public policy and contrary to sound morals because Garner was the only person who could have informed Wolf and Klar of the fraudulent conduct of Wolf and Klar's salesman.

30. *Id.*

31. *Id. See, e.g.,* Craig v. Parsons, 22 N.M. 293, 161 P. 1117 (1916). *See generally* Restatement (Second) of Agency § 312 (1958), which provides as follows: "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal."

32. *See* Archuleta v. Kopp, 90 N.M. 273, 276, 562 P.2d 834, 837 (Ct. App. 1977).

33. *See supra* note 32.

34. 101 N.M. at 118, 679 P.2d at 260 (citing Archuleta v. Kopp, 90 N.M. 273, 276, 562 P.2d 834, 837 (Ct. App. 1977)). The court in *Archuleta* stated that constructive fraud occurs upon "a breach of a legal or equitable duty, irrespective of the moral guilt of the fraudfeasor. It is not necessary to prove dishonesty of purpose nor intent to deceive to maintain a cause of action for constructive fraud." 90 N.M. at 276, 562 P.2d at 837.

35. 45 N.M. 76, 82, 110 P.2d 536, 539 (1941).

36. *Id.* at 78, 110 P.2d at 537. The treasurer advised Scudder that the property in question had been sold for 1937 taxes and that the last half of the taxes for 1938 were delinquent. *Id.* Additionally, the treasurer stated that the payment of all asessed and delinquent taxes would result in full redemption and clearance of title to the property. *Id.* The treasurer was given a check for what Scudder and the treasurer believed was the delinquent amount. *Id.* Shortly thereafter, the treasurer learned that taxes for the last half of 1936 had not been paid and that the property had been sold to the state, which assigned the sale certificate to appellee Hart. *Id.* After learning of the assignment, Scudder filed suit to have appellee Hart's tax deed cancelled. *Id.*

court, in concluding that the treasurer was liable, suggested the elements of constructive fraud. Those elements were: (1) the breach of a legal or equitable duty; (2) the breach of the duty must either deceive another or violate the public interest; and (3) the deceived party must have relied upon the representation of the party who breached the duty, thereby causing harm to the deceived party.[37]

The *Scudder* court found that the treasurer had a duty to convey accurate information to persons attempting to redeem property that had been sold for delinquent taxes.[38] By giving erroneous information to *Scudder,* the treasurer breached his duty to impart correct information regarding the amount of delinquent taxes due.[39] Moreover, the court also found that Scudder had a right to rely on the affirmations of the treasurer.[40] The treasurer's breach caused harm to Scudder in that a tax deed for the property was issued to appellee Hart, thereby depriving Scudder of title to the property.[41] Not only did the *Scudder* court suggest the elements of constructive fraud, the court also recognized the duty of correct disclosure owed to the appellant by the treasurer.[42]

B. The Court Erred in Finding Garner Liable for Constructive Fraud

Given the *Wolf* court's findings that Garner's conduct was intentional, the court should have found Garner liable for actual fraud. Actual fraud liability should have been based upon Garner's breach of the duty to disclose the material fact of Gee's misuse of Garner's Wolf and Klar charge account.[43] This duty was first recognized by the New Mexico Supreme Court in *Everett v. Gilliland.*[44]

In *Everett,* the New Mexico Supreme Court addressed the question of

37. 45 N.M. 76, 81, 110 P.2d 536, 539 (1941). In imposing liability upon the treasurer, the *Scudder* court relied on the rationale given in Pace v. Wright, 25 N.M. 276, 181 P. 430 (1919), where it was suggested that the failure of a treasurer to perform the duties incumbent upon him resulting in prejudice to a taxpayer would lead to manifest injustice and afford ample opportunities for fraud. *Id.* at 282, 181 P. at 432.

38. 45 N.M. at 82, 110 P.2d at 539 (quoting 61 C.J. 1290, *Taxation* § 1794 (1933)). 61 C.J. 1290, *Taxation* § 1794 states:

> It is the duty of the proper officers to impart correct information to those seeking to redeem from tax sales, and an owner does not lose his right to redeem by permitting the appointed time to elapse, or paying less than the proper amount, or otherwise failing to comply with the directions of the statute, when this was caused by the fraud of a public officer, or by the latter's inability to furnish necessary information, or by his mistake, negligence, or miscalculation, or by misleading advice given by him, no act of misconduct by him can prevent the redemption.

39. 45 N.M. at 81, 110 P.2d at 539.

40. *Id.*

41. *Id.* at 78, 110 P.2d at 537.

42. *Id.* at 82, 110 P.2d at 539.

43. *See* Keeton, *Fraud Concealment and Non-disclosure,* 15 TEX. L. REV. 1 (1936). Professor Keeton stated that "if either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent." *Id.* at 31. *See also* Wirth v. Commercial Resources, Inc., 96 N.M. 340, 630 P.2d 292 (Ct. App. 1981).

44. 47 N.M. 269, 141 P.2d 326 (1943).

whether the defendants, as sellers of real estate, were duty bound to make full disclosure of all material information within their knowledge concerning the balance due on a mortgage, so that the plaintiff purchaser would not be deceived regarding the total mortgage amount.[45] In finding that the defendant was liable to the plaintiff for not disclosing the existence of an interest lien against the property, the court held that a claim of actual fraud is maintainable where a party knowing material facts is under a duty to speak but remains silent.[46] In reaching its decision, the *Everett* court said:

> [I]f one party to a contract . . . has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain.[47]

Impliedly, the *Everett* court equated the duty to disclose with the duty to exercise good faith during the bargaining and negotiating process. Essentially, the duty of exercising good faith includes the duty to disclose material facts to a party relying upon that disclosure[48] Consequently, the failure to disclose is actionable under both tort law, as constructive fraud, or under contract law, as failure to exercise the duty of good faith and fair dealing.[49]

The *Wolf* court's reluctance to use the analysis promulgated in *Everett* is puzzling given that *Everett* was the first case to find that failure to disclose material facts amounts to actual as opposed to constructive fraud. Under the rationale given in *Everett,* to determine whether one party to

45. *Id.* at 275, 141 P.2d at 330.

46. *Id.*

47. *Id.* at 276, 141 P.2d at 330 (quoting 23 Am. Jur. *Fraud and Deceit* § 80 (1939)).

48. *Id.* at 275, 141 P.2d at 330 (quoting 23 Am. Jur. *Fraud and Deceit* § 78 (1939)). 23 Am. Jur. *Fraud and Deceit* § 78 states in part:

> [I]n the conduct of various transactions between persons involving business dealings, commercial negotiations, or other relationships relating to property, contracts, and miscellaneous rights, there are times and occasions when the law imposes upon a party a duty to speak rather than to remain silent in respect to certain facts within his knowledge and thus to disclose information, in order that the party with whom he is dealing may be placed on an equal footing with him.

See also Villalon v. Bowen, 273 P.2d 409, 414 (Nev. 1954), where the court stated that "the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist."

49. Restatement (Second) of Contracts § 205 (1979) states: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *See also* W. Prosser, Law of Torts § 106, at 698 (4th ed. 1971), where Dean Prosser stated that "the law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it."

a contract owes a duty to disclose material facts to another, the first inquiry is whether the first party had superior knowledge of a material fact.[50] In *Wolf,* defendant Garner admitted that he was fully aware of Gee's misuse of his charge account.[51] The second inquiry is whether the plaintiff could have discovered Gee's illegal use of Garner's charge account without Garner's assistance.[52] The trial record suggests that the only way that Wolf and Klar could have gained knowledge regarding Gee's conduct was through Garner's disclosure.[53] The final inquiry is whether the plaintiff relied upon the representations made by the defendant.[54] The trial record indicates that Wolf and Klar had reason to believe that the charges reflected on Garner's charge account were made by Garner.[55] Clearly, under these circumstances, Wolf and Klar reasonably relied upon the representations made by Garner. It was Wolf and Klar's reliance upon those representations which proximately caused the harm.[56]

What is particularly noteworthy about the decision rendered in *Wolf* is that, on the basis of the testimony given at trial and the language contained in the court's opinion, it appears that Garner's failure to disclose was intentional.[57] If Garner's silence was intentional, then he should have

50. 47 N.M. at 275, 141 P.2d at 330.

51. *See supra* notes 14–17 and accompanying text.

52. 101 N.M. at 117–18, 679 P.2d at 259–60. *See also* Trial Transcript of Proceedings at 67–68, *Wolf.*

53. *See* Transcript of Proceedings at 74, which reads as follows:

Q You testified that you didn't do anything to approve these transactions that Bobby Gee entered into?
A No, I didn't.
Q But you did not notify Wolf and Klar of your disapproval?
A No, I did not.
Q And you knew they were not aware of it or assumed that?
A Yeah, I assumed that they were not aware.

54. *Id.* at 67. Defendant Garner was called as an adverse witness by the plaintiff and upon direct examination testified as follows:

Q Over some three years plus, you never made any effort to advise Wolf and Klar as to the problem?
A No, I did not.
Q Did you know that Wolf and Klar was relying upon the account being paid by you as it was being charged to you?
A Yeah, I'm sure they did.

55. Transcript of Record at 44, Wolf & Klar v. Garner, 101 N.M. 116, 679 P.2d 258 (1984). The trial court judge found that during the period of time from May 1977 through December 1980, 30 separate invoices were sent to the defendant and were received by the defendant. *Id.* In addition to the invoices, payments, and monthly statements exchanged between the parties, there were also telephone calls and letters concerning the open charge account. *Id.*

56. *See generally* Keeton, *supra* note 43, at 39, where it is stated that "reliance is merely a phase of the problem of causation, and when there has been reliance and damage, the misrepresentation is a cause in fact of the damage."

57. 101 N.M. at 118, 679 P.2d at 260. In its opinion, the court emphasized the intentional nature of Garner's conduct. *Id.* The *Wolf* court also relied upon the rationale given in Craig v. Parsons, 22 N.M. 293, 161 P. 1117 (1916), where the *Craig* court held that where a person with full knowledge of the facts, aids and abets a broker in the commission of an act of fraud upon the principal, he is liable to the latter for loss sustained thereby. 22 N.M. at 301, 161 P. at 1120.

been held liable for actual fraud, rather than constructive fraud; intent is an element of actual fraud, not constructive fraud.[58] By holding that Garner's intentional conduct justified a finding of constructive fraud, the court has confused acts which constitute constructive fraud[59] with those which amount to actual fraud.[60]

Unfortunately, the *Wolf* court's confusion over the distinction between actual fraud and constructive fraud appears to stem from an improper reliance on *Archuleta v. Kopp*.[61] In *Archuleta,* the New Mexico Court of Appeals was faced with the issue of whether the defendant was liable for constructive fraud or innocent misrepresentation when he listed and sold "as is" to a sightless plaintiff a house with a defective fireplace that subsequently caused smoke damage to the home.[62] In holding the defendant liable, the court noted that two previous tenants advised the defendant of the useless condition of the fireplace.[63] The defendant, therefore, had a duty to disclose the defect because "the listing . . . tended to deceive the public in general and the plaintiff in particular."[64]

What is noteworthy about the decision rendered in *Archuleta* is that the court recognized that, while the defendant had a duty to disclose the condition of the fireplace, the defendant's failure to make disclosure was unintentional. It was this unintentional misrepresentation which provided the basis for holding the defendant liable for constructive fraud and not actual fraud.[65]

In *Wolf,* however, the court's language suggests that not only was Garner's failure to disclose injurious to Wolf and Klar, but also implies that Garner's act of silence was intentional.[66] Assuming that his conduct was intentional, then the court should have imposed liability for actual fraud. Moreover, as an alternative method of imposing liability, the court could have found that the defendant's breach of the duty of disclosure was violative of good faith and fair dealing practices.[67] Instead, the court

58. *See supra* note 2.

59. *See supra* note 34.

60. In fraud as it relates to nondisclosure, a charge of actual fraud is maintainable where a party knowing material facts is under a duty to speak but remains silent. Everett v. Gilliland, 47 N.M. 269, 275, 141 P.2d 326, 330 (1943).

61. 90 N.M. 273, 562 P.2d 834 (Ct. App. 1977).

62. *Id.* at 275, 562 P.2d at 836.

63. *Id.*

64. *Id.* at 276, 562 P.2d at 837. Apparently, the court felt that the defendant's representation was innocent in nature such that the defendant did not have the requisite intent to deceive necessary for actual fraud. *Id.*

65. *Id.*

66. 101 N.M. at 118, 679 P.2d at 260. Although the *Wolf* court did not state that Garner's conduct was intentional, the court's use of agency and tort law principles which include intentional conduct as necessary elements indicates that the court believed that Garner's act of silence may have been intentional. *See supra* note 31. *See generally* Restatement (Second) of Torts § 871 (1979).

67. *See supra* note 51.

used agency law and found that Garner caused Gee to violate his duty of honesty to his principal.[68] Although the court's use of agency law produced a fair and just result, the court should have analogized to agency law rather than employ it in a wholesale manner. By using agency law indiscriminately, the court has promoted more confusion over the all important element of intent as it relates to actual fraud as opposed to constructive fraud.

IV. CONCLUSION

In terms of an equitable and fair effect, the decision in *Wolf and Klar Cos. v. Garner* was correct because, of the parties, defendant Garner was in the best position to prevent the harm which occurred. The *Wolf* court, however, created a hybrid variety of constructive fraud. Essentially, constructive fraud doctrine in New Mexico now includes intentional conduct as one of its elements. While the court did not go so far as to expressly state that intentional conduct is an element of constructive fraud, it appears that the court has, through inference, attempted to merge actual fraud and constructive fraud. Whether the court intended this result is a question with no readily apparent answer.

Moreover, by finding that Garner's conduct abridged sound morals and by acknowledging that there was an open charge account agreement between Wolf and Garner, the court is implying that even where there are purely contractual relationships between parties, there are also certain moral and social responsibilities that the parties must adhere to with respect to one another. In rendering this decision, the court is apparently giving notice to legal practitioners that sound ethical and moral conduct is becoming intertwined with contractual causes of action.

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68. 101 N.M. at 118, 679 P.2d at 260.