NEW MEXICO LAW REVIEW

Volume 53
Issue 1 *Winter*

Winter 2023

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Recommended Citation
Annika Cleveland, *Negligent Commercial Transactions: Does New Mexico Face a Slippery Slope After Morris?*, 53 N.M. L. Rev. 183 (2023).
Available at: https://digitalrepository.unm.edu/nmlr/vol53/iss1/7

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NEGLIGENT COMMERCIAL TRANSACTIONS: DOES NEW MEXICO FACE A SLIPPERY SLOPE AFTER *MORRIS*?

Annika Cleveland*

ABSTRACT

In its July 2021 decision, Morris v. Giant Four Corners, the New Mexico Supreme Court held that the doctrine of negligent entrustment includes liability for someone who supplies gasoline to a person they knew or should have known was intoxicated. While the Morris court's decision is novel in New Mexico, courts will likely interpret the inclusion narrowly, restricting the duty to circumstances where a commercial transaction enabled a DWI. By reviewing the decisions of other jurisdictions to include certain commercial transactions under negligent entrustment claims and the impact those decisions had on subsequent litigation, this article argues that Morris will not lead to a slippery slope regarding commercial transactions in negligent entrustment law. The argument is further bolstered by an examination of the particular policy analysis behind the Morris decision. This article concludes by briefly considering some of the specific concerns raised by critics of the decision.

I. INTRODUCTION

At the end of 2011, in the early morning of December 30, a gas station clerk sold a gallon of gasoline to Andy Denny.[1] Her action eventually led the New Mexico Supreme Court to hand down a controversial decision that has raised significantly more questions than it answered.

Denny spent the night drinking and was giving his friend a ride home.[2] Running out of gas about a mile from the nearest gas station, owned by Giant Four

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1. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 5, 498 P.3d 238.
2. Morris v. Giant Four Corners, Inc., 294 F. Supp. 3d 1207, 1210 (D.N.M. 2018).

Corners, the two men walked to the station.[3] There, they learned that the gas station did not sell empty gas cans, so they purchased a gallon of water to use as a makeshift gas can.[4] The clerk that night initially refused to sell the men anything because they were visibly intoxicated.[5] However, her resistance subsided, and she sold them the gallon of water and a gallon of gasoline.[6] The men walked back to the car, then drove back to the station and filled up the rest of the tank.[7] Later that night, Denny drove over a highway centerline and struck an oncoming car, killing the other driver.[8]

The decedent's family brought a wrongful death action against Giant Four Corners.[9] The case eventually prompted the Tenth Circuit Court of Appeals to certify a question to the New Mexico Supreme Court:

> Under New Mexico law, which recognizes negligent entrustment of chattel as a viable cause of action, does a commercial gasoline vendor owe a duty of care to a third party using the roadway to refrain from selling gasoline to a driver it knows or should know to be intoxicated?[10]
>
> The supreme court's answer? Yes.[11]

While the court's decision in *Morris* to include commercial transactions under negligent entrustment law is novel in New Mexico, this article proposes that the courts will likely interpret this inclusion narrowly, restricting this newfound duty to circumstances where a commercial transaction enables a person to drive while intoxicated ("DWI").

Part II will discuss the factors that go into recognizing a duty under New Mexico tort law and give a brief history of negligent entrustment of chattel. It will conclude with a summary of the majority opinion's rationale in *Morris.* New Mexico is not the first state to include certain commercial transactions in negligent entrustment of chattel, so Part III(A)(i) will give a brief overview of the states that have expanded the tort to commercial transactions. It will demonstrate how, in those jurisdictions, the new inclusions are often narrowly applied. New Mexico is also not the first to impose a duty on gasoline vendors not to sell gasoline to intoxicated

3. *Id.*
4. *Morris*, 2021-NMSC-028, ¶ 5, 498 P.3d at 241–42.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* ¶ 6, 498 P.3d at 242.
9. *Id.* ¶ 3, 498 P.3d at 241. The case has a somewhat unusual procedural history. The decedent's estate first filed parallel actions; one in the District Court of the Navajo Nation and another in New Mexico state court. *Id.* The case before the Navajo Nation district court was dismissed since the statute of limitations had already expired. *Id.* Regarding the state case, Defendants successfully removed it to federal court. *Id.* Eventually, the federal district court "declined to find that Defendant owed a duty to Plaintiff, because no New Mexico statutes or cases specifically imposed a duty 'to refrain from selling gasoline to an allegedly intoxicated driver.'" *Id.* ¶ 8, 498 P.3d at 242. The decedent's family appealed to the 10th Circuit. *Id.* That court then certified a question to the New Mexico Supreme Court. *Id.* ¶ 1, 498 P.3d at 241. The New Mexico Supreme Court's answer, of course, is the subject of this article.
10. *Id.* ¶ 1, 498 P.3d at 241.
11. *Id.* ¶ 2, 498 P.3d at 241.

individuals. Part III(A)(ii) will discuss a 2005 case from Tennessee, *West v. East Tennessee Pioneer Oil Co.*, that reached a near-identical conclusion to *Morris* about a gas station's duty regarding inebriated clients.[12] With sixteen years of case law since *West* and plenty of time for retail businesses to adjust to this potential liability, Tennessee provides a good case study. Specifically, a deep dive into Tennessee jurisprudence can help to answer many questions that those concerned with the recent decision in New Mexico have brought up, like whether *Morris* will open the floodgates in tort litigation and lead to a significant restraint on retail. Part III(A)(iii) will address why the *Morris* decision, in particular, will be interpreted narrowly since it implicates specific New Mexican policy goals related to DWIs.

Finally, Part III(B) will address some of the other implications of *Morris* that have raised concern. Ultimately, these concerns are questions of breach, so they will be decided as a matter of fact. This article considers (i) how this duty will affect gas stations with a majority of pay-at-the-pump customers, (ii) whether gas stations will need to train their employees to identify intoxicated individuals, (iii) how far this duty applies when it comes to restraining or otherwise preventing an intoxicated individual from driving, and (iv) how this decision affects auto parts stores, tire shops, and mechanics.

II. BACKGROUND

Prior to *Morris*, New Mexico courts had never recognized a cause of action based on negligent entrustment of anything but automobiles.[13] Despite this, negligent entrustment has been a cause of action in New Mexico for quite a while.[14] When analyzing such a claim, courts use general principles of negligence.[15] Ultimately, the court in *Morris* only decided one element of negligence: duty.[16]

Since the court in *Morris* recognized a new duty, Subpart A of this section gives a brief overview of how New Mexico courts determine duty. Following that, Subpart B looks at negligent entrustment in New Mexico and traditional scenarios where it creates a cause of action. Finally, Subpart C gives the facts and legal reasoning in *Morris*.

A. Duty in New Mexico

Duty is determined by the court as a matter of law.[17] Unlike other jurisdictions, New Mexico duty relies solely on policy and does not factor in any foreseeability analysis.

12. West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545 (Tenn. 2005).
13. *Morris*, 2021-NMSC-028, ¶ 17, 498 P.3d at 244–45.
14. *Id.* ¶ 13, 498 P.3d at 243.
15. McCarson v. Foreman, 1984-NMCA-129, ¶ 13, 102 N.M. 151, 692 P.2d 537; Tafoya v. Seay Bros. Corp., 1995-NMSC-003, ¶ 6, 119 N.M. 350, 890 P.2d 803 (noting that a prima facie case of negligence in New Mexico requires duty, breach, proximate cause, and damages).
16. *Morris*, 2021-NMSC-028, ¶ 46, 498 P.3d at 252–53.
17. Calkins v. Cox Estates, 1990-NMSC-044, ¶ 8, 110 N.M. 59, 792 P.2d 36.

i. Foreseeability

New Mexico courts do not consider foreseeability when determining duty.[18] The New Mexico Supreme Court articulated this position definitively in *Rodriguez v. Del Sol Shopping*, stating that "[i]n this opinion we clarify and expressly hold that foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases."[19]

In *Rodriguez*, the court made clear that all questions regarding foreseeability are relegated to the jury so that the "jury's common sense, common experience, and its consideration of community behavioral norms" can inform any conclusions.[20] This falls in line with the New Mexico judiciary's broader goal of protecting the jury's role as the trier of fact.[21] The supreme court has noted its interest in rejecting procedures that would "adversely impact our jury system and infringe on the jury's function as the trier of fact and the true arbiter of the credibility of witnesses."[22] For example, the New Mexico Supreme Court declined to follow the standard for summary judgment established in the United States Supreme Court case *Anderson v. Liberty Lobby, Inc*.[23] because it would cause summary judgment to turn "into a full-blown paper trial on the merits," interfering with the jury's function of weighing the evidence.[24] The court did note, however, that a foreseeability analysis would still be included if a court determined as a matter of law that no reasonable jury could find that a defendant breached the relevant duty.[25]

ii. Policy

Instead of relying on foreseeability, New Mexico courts determine duty based solely on policy rationales.[26] These rationales must be specific[27] and linked to "legal precedent, statutes, and other principles comprising the law."[28] While statutes can certainly indicate policies endorsed by the legislature, the absence of a statute that specifically addresses what is at issue should not be construed as a reason not to

18. *See* Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 1, 326 P.3d 465.
19. *Id.*
20. *Id.* ¶ 22, 326 P.3d at 473.
21. Romero v. Philip Morris Inc., 2010-NMSC-035, ¶ 9, 148 N.M. 713, 242 P.3d 280.
22. Bartlett v. Mirabal, 2000-NMCA-036, ¶ 38, 128 N.M. 830, 999 P.2d 1062.
23. 477 U.S. 242 (1986).
24. *Bartlett*, 2000-NMCA-036, ¶ 32, 999 P.2d at 1068–69 (internal quotation marks omitted).
25. Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 24, 326 P.3d 465.
26. *Id.* ¶ 25, 326 P.3d at 474 (holding that "courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited").
27. *Id.* ¶ 1, 326 P.3d at 467.
28. Calkins v. Cox Estates, 1990-NMSC-044, ¶ 8, 110 N.M. 59, 792 P.2d 36.

impose a duty.[29] Finally, the policies must be "unrelated to foreseeability considerations."[30]

In *Rodriguez*, the court specifically reaffirmed its adoption of Restatement (Third) of Torts: Liability for Physical and Emotional Harm Section 7 comment j (2010).[31] This portion of the Restatement (Third) provides more reasoning behind this policy-based duty analysis, stating that "articulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort law."[32]

The New Mexico courts and legislature often have noted that the prevention of DWIs is an important policy. For example, in determining that DWI is a strict liability crime in New Mexico, the court of appeals observed that "the public's interest in deterring individuals from driving while intoxicated is compelling."[33] Further, the supreme court has articulated that the underlying policy in the state's criminal DWI statute[34] is "to prevent individuals from driving or exercising actual physical control over a vehicle when they, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to themselves and the public."[35] Then, in general, the legislature's intention behind all DWI legislation is "to protect the health, safety, and welfare of the people of New Mexico."[36]

B. Negligent Entrustment of Chattel

New Mexico has adopted the definition of negligent entrustment found in the Restatement (Second) of Torts:[37]

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[38]

Generally, an injured plaintiff can recover under this theory if they demonstrate "(1) that the defendant entrusted the offending instrumentality to [an] entrustee or permitted [an] entrustee to engage in an activity, (2) [the] defendant knew or should have known that entrustee was incompetent, and (3) [the] entrustee's

29. *Rodriguez*, 2014-NMSC-014, ¶ 17, 326 P.3d at 472 ("Full compliance with codes, laws, or ordinances that are silent with respect to the relevant issue—the need for protective devices to minimize risk from vehicle-building collisions—cannot dictate whether the duty of ordinary care should be modified.").

30. *Id.* ¶ 1, 326 P.3d at 467.

31. *Id.*

32. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010).

33. State v. Harrison, 1992-NMCA-139, ¶ 19, 115 N.M. 73, 846 P.2d 1082.

34. N.M. STAT. ANN. § 66-8-102 (2016)

35. State v. Johnson, 2001-NMSC-001, ¶ 17, 130 N.M. 6, 15 P.3d 1233 (internal quotations omitted).

36. State v. Warford, 2022-NMCA-034, ¶ 22, 514 P.3d 31 (internal quotations omitted).

37. McCarson v. Foreman, 1984-NMCA-129, ¶ 13, 102 N.M. 151, 692 P.2d 537.

38. RESTATEMENT (SECOND) OF TORTS § 308 (AM. L. INST. 1965).

incompetent use of the instrumentality or conduct of the activity caused the injury."[39] Put simply, "it is negligent to make an entrustment that creates an appreciable risk of harm."[40]

The great majority of negligent entrustment cases in New Mexico have arisen out of car accidents.[41] In fact, prior to *Morris*, New Mexico courts had only found liability for the negligent entrusting of vehicles.[42] The only uniform jury instruction available for the tort in New Mexico is titled "Negligent Entrustment of a Motor Vehicle," though the Use Note states that "the instruction may apply to chattels other than automobiles."[43] The instructions require that (1) the defendant "was the owner or person in control of the vehicle that caused [the plaintiff's] injuries," (2) the defendant "permitted the third party to operate the vehicle," (3) the defendant "knew or should have known that [the third party] was likely to use the vehicle in such a manner as to create an unreasonable risk of harm to others," (4) the third party "was negligent in the operation of the motor vehicle," and (5) the third party's "negligence was a cause of the injury to plaintiff."[44]

Much of New Mexico case law on negligent entrustment has centered on whether the defendant knew or should have known the entrustee "was likely to use the vehicle in such a manner as to create an unreasonable risk of harm to others"; that is, whether the entrustee was an incompetent driver.[45] While the court will look to other indicators of incompetence if needed,[46] it considers an intoxicated individual to be incompetent.[47]

Only two cases in New Mexico have considered negligent entrustment outside of the context of entrusting a vehicle—both related to real property—and both courts declined to allow a cause of action.[48] For example, in *Gabaldon v. Erisa Mortgage Co.*, the supreme court overturned the lower court's decision to recognize "a cause of action for negligent entrustment of real property by a non-possessory landlord."[49] There, plaintiff sued a landlord who leased his property to a water park

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39. Nancy English, *Tort Law* - Chavez v. Torres*: New Mexico Premises Liability Reform: Two Steps Forward, One Step Back*, 31 N.M. L. REV. 651, 657–58 (2001).

40. *McCarson*, 1984-NMCA-129, ¶ 13, 692 P.2d at 542.

41. *See, e.g.*, Armenta v. A.S. Horner, Inc., 2015-NMCA-092, 356 P.3d 17; Hermosillo v. Leadingham, 2000-NMCA-096, 129 N.M. 721, 13 P.3d 79; Spencer v. Gamboa, 1985-NMCA-033, 102 N.M. 692, 699 P.2d 623.

42. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 13, 498 P.3d 238.

43. N.M. R. ANN. 13-1646 (2010).

44. *Id.*

45. Amparan v. Lake Powell Car Rental Companies, 882 F.3d 943, 948 (10th Cir. 2018).

46. Such as the entrustee's traffic citations, previous accidents, lack of sleep, or substance use. *See* DeMatteo v. Simon, 1991-NMCA-027, ¶ 6, 112 N.M. 112.

47. *See Armenta*, 2015-NMCA-092, ¶ 25, 356 P.3d 17; Sanchez v. San Juan Concrete Co., 1997-NMCA-068, 123 N.M. 537, 943 P.2d 571; McCarson v. Foreman, 1984-NMCA-129, 102 N.M. 151, 692 P.2d 537; s*ee also* RESTATEMENT (SECOND) OF TORTS § 390 cmt. c (AM. L. INST. 1965) (defining incompetent as "incapable of exercising the care which it is reasonable to expect of a normal sober adult").

48. *See* Chavez v. Torres, 1999-NMCA-133, ¶ 9, 128 N.M. 171, 991 P.2d 1 (holding that negligent entrustment did not apply when a defendant allowed an individual access to her home even though she knew the individual was dangerous); Gabaldon v. Erisa Mortg. Co., 1999-NMSC-039, 128 N.M. 84. 990 P.2d 197.

49. 1999-NMSC-039, ¶ 23, 990 P.2d 197.

where the plaintiff's son nearly drowned.[50] The lower court granted a cause of action for the negligent entrustment of leased real property which also included "a duty to investigate a lessee's ability to safely operate the leased premises."[51] The supreme court rejected the expansion of the tort; it noted that "negligent entrustment has been discussed only in the context of chattel entrustment" in New Mexico.[52] The court expressed concerns about "the uncertainty in the law that the new cause of action and new duty to investigate creates," pointing out that "even in the context of chattel entrustments, ordinary care has not required a duty to investigate."[53] Therefore, in New Mexico, liability for negligent entrustment has only ever been found for the entrustment of vehicles.

C. Summary of *Morris v. Giant Four Corners*

Andy Denny ran out of gas about a mile from the defendant's gas station.[54] He had been drinking heavily that night and was visibly intoxicated when he entered the gas station.[55] The clerk sold him a gallon of gasoline, and Denny took it back to his vehicle.[56] He then drove to the gas station and put additional gasoline into his car.[57] Later that night, Denny crossed the centerline on the highway, causing a head-on collision that resulted in the death of the other driver.[58]

The matter came before the New Mexico Supreme Court as a certified question from the Tenth Circuit.[59] This restricted the court's analysis to the narrow question of whether "under New Mexico law and the doctrine of negligent entrustment of chattel, a commercial gasoline vendor owes to a third party using the roadway a duty of care to refrain from selling gasoline to a driver the vendor knows or has reason to know is intoxicated."[60]

The court began its analysis by noting that New Mexico has used the Restatement (Second) Section 308 and Section 390 as a framework for negligent entrustment analyses.[61] Section 308 describes negligent entrustment generally,[62] and Section 390 addresses the negligent entrustment of chattel specifically.[63] Under Section 390, anyone who supplies chattel to a third person "whom the supplier knows

50. *Id.* ¶¶ 1–6, 990 P.2d at 198–99.
51. *Id.* ¶ 6, 990 P.2d at 199.
52. *Id.* ¶ 25, 990 P.2d at 203.
53. *Id.* ¶ 34, 990 P.2d at 205.
54. Morris v. Giant Four Corners, Inc., 294 F. Supp. 3d 1207, 1210 (D.N.M. 2018).
55. *Id.*
56. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 5, 498 P.3d 238.
57. *Id.*
58. *Id.* ¶ 6, 498 P.3d at 242.
59. *Id.* ¶ 1, 498 P.3d at 241.
60. *Id.*
61. *Id.* ¶¶ 14–15, 498 P.3d at 243.
62. RESTATEMENT (SECOND) OF TORTS § 308 (AM. L. INST. 1965).
63. RESTATEMENT (SECOND) OF TORTS § 390 (AM. L. INST. 1965):

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

or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability."[64] Significantly, the Restatement's "comment a" to Section 390 specifically lists sellers as an example of a "supplier."[65]

The court boiled down Sections 308 and 390 as asserting a "duty to refrain from supplying chattel to a person the supplier knows or has reason to know is likely to use the chattel in a manner creating unreasonable risk of physical harm to the entrustee or others."[66] The court then turned to whether New Mexico would recognize this duty in the context of gasoline vendors selling gasoline to intoxicated drivers.[67] Since duty is determined by policy, the court evaluated the policy considerations that would support finding a duty.[68]

Noting that it is "the particular domain of the legislature, as the voice of the people, to make public policy," the court reviewed a number of New Mexico statutes regarding DWI.[69] New Mexico's criminal statute prohibiting driving while intoxicated,[70] the Liquor Control Act,[71] the Liquor Liability Act,[72] and other recent laws and amendments led the court to conclude that "the Legislature clearly intends to limit intoxicated driving."[73] More specifically, these acts involve a duty not to sell alcohol to an intoxicated person, which led the court to conclude that a "duty not to sell gasoline to an intoxicated person is consistent with liability for providing an intoxicated person with alcohol or a vehicle."[74]

The court also looked to the case law of the only other states that had considered this particular issue: California and Tennessee.[75] In an unpublished opinion, a California court found that a "gas station could be liable for injuries caused by an intoxicated driver to whom the gas station had sold gasoline."[76] More persuasively, the Tennessee Supreme Court published an opinion that affirmed the same type of duty, holding that "liability for the sale of gasoline to an intoxicated driver is a straightforward application of the doctrine of negligent entrustment of chattel."[77]

In the end, the *Morris* court's opinion rested on the idea that there is no meaningful difference between supplying keys to an intoxicated individual and

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64. *Id.*

65. *Id.* cmt. a ("The rule stated applies to anyone who supplies a chattel for the use of another. It applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration.").

66. *Morris*, 2021-NMSC-028, ¶ 16, 498 P.3d at 243.

67. *Id.* ¶ 18, 498 P.3d at 245.

68. *Id.* ¶ 24, 498 P.3d at 246 ("Regardless of whether this Court is considering limiting an existing duty or articulating a new duty, our analysis involves review and articulation of policy rationales for and against the imposition of that duty.").

69. *Id.* ¶ 29, 498 P.3d at 247–48 (internal quotation marks omitted).

70. N.M. STAT. ANN. § 66-8-102 (2016).

71. N.M. STAT. ANN. § 60-7A-16 (1993).

72. N.M. STAT. ANN. § 41-11-1 (1986).

73. *Morris*, 2021-NMSC-028, ¶ 29, 498 P.3d at 248.

74. *Id.* ¶ 33, 498 P.3d at 249.

75. *Id.* ¶ 34, 498 P.3d at 249.

76. *Id.* ¶ 35, 498 P.3d at 249.

77. *Id.* ¶ 3, 498 P.3d at 241; *see* West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 545 (Tenn. 2005).

supplying gasoline to an intoxicated driver: "[b]oth instrumentalities enable driving while intoxicated."[78] New Mexico has long recognized liability for negligently entrusting a vehicle to an intoxicated driver. Given that "[g]asoline, alcohol, and the vehicle itself are all enabling instrumentalities involved in intoxicated driving," the court concluded that "liability under negligent entrustment for the sale of gasoline to an intoxicated driver is consistent with New Mexico law." [79]

The decision was not unanimous, however. Justice Barbara Vigil raised a number of concerns in her dissent. First, she disagreed with the majority opinion's decision to incorporate commercial transactions into the doctrine of negligent entrustment, rejecting Section 390's inclusion of sellers as potential suppliers for a negligent entrustment of chattel claim.[80] Second, she held that New Mexico's public policy against DWI did not warrant recognizing a duty that would implicate vendors of nonalcoholic chattel.[81] Third, she expressed concern over the vagueness of the new duty and how it would be recognized practically, including how "auto parts stores, tire shops, mechanics, and others will be left guessing as to whether they are subject to the new duty and, if so, how to behave so as to avoid liability." [82]

II. ANALYSIS AND IMPLICATIONS

Many questions have been raised about the impact of the supreme court's decision in *Morris*. This section addresses a few of the more common concerns, concluding that the scope of duty defined in *Morris* will apply only in situations where a commercial transaction supplied chattel that enabled a DWI. This section ends by addressing several scenarios that the supreme court dismissed as issues of breach and proximate cause that must be determined by a jury.

A. Including Commercial Transactions in Negligent Entrustment Law

Critics of extending negligent entrustment to include commercial transactions have long worried that recognizing such a theory would eventually force retailers to require their customers to blow into breathalyzers or answer a burdensome number of questions regarding criminal records, drug addictions, and the reasons for their purchases.[83] In *Morris*, the dissent expressed concern about judicial overreach that would interfere with the legislative role of regulating commercial business, ultimately leading to a restraint on trade.[84] The dissent warned of a slippery-slope where "vendors of any item that enables DWI—not only gasoline—could now be liable for a customer's DWI-related torts," causing "auto parts stores, tire shops, mechanics, and others" to wonder if they are now open to

78. *Morris*, 2021-NMSC-028, ¶ 39, 498 P.3d at 250.

79. *Id.* ¶ 33, 498 P.3d at 249.

80. *Id.* ¶¶ 54, 63, 498 P.3d at 254, 256–57 (Vigil, J., dissenting).

81. *Id.* ¶ 64, 498 P.3d at 257.

82. *Id.* ¶ 52, 498 P.3d at 254.

83. *See* Gail K. McCracken, *Responsibility of the Retailer: Don't Ask, Don't Tell*, 72 MICH. B.J. 1138 (1993).

84. *Morris*, 2021-NMSC-028, ¶ 54, 498 P.3d at 254 (Vigil, J., dissenting).

liability.[85] This decision could potentially create a "legion" of "proximate causes of DWI."[86]

The following sections explain why the court's decision in *Morris* will likely not lead to these consequences. First, allowing negligent entrustment claims to include commercial transactions—sometimes referred to as "negligent commercial transactions"[87]—is not as novel as the dissent makes it out to be.[88] For years, other jurisdictions have recognized a cause of action for the negligent sale of firearms and ammunition. Additionally, the Tennessee Supreme Court reached a near identical conclusion about the liability of a gasoline vendor selling to an intoxicated individual, and that decision has not led Tennessee to recognize commercial liability for any other product. Finally, the *Morris* decision came out of a very particular policy goal in New Mexico, which will ultimately restrict this newfound liability from expanding to other commercial contexts.

i. Firearms and Ammunition

While New Mexico courts have not considered a negligent entrustment claim arising out of the sale of a firearm or ammunition, many other jurisdictions have. Of those that have extended the tort to these commercial transactions—i.e., firearm and ammunition sales—most did so with strong policy reasons. Further, they also applied and followed the Restatement (Second)'s framework in section 390[89] and "comment a" (which expounds on who can be deemed a supplier in a negligent entrustment claim and includes sellers among those qualifying).[90] Consistently over time, the jurisdictions that allow the seller of a firearm to be liable under a negligent entrustment theory have neither recognized nor expanded the cause of action in the sale of other goods. That is, these jurisdictions have not experienced a slippery slope. It would follow that New Mexico courts, having expanded the tort under explicit policy goals and applying the same legal framework, will be able to do the same, albeit limiting the liability to a completely different context.

Several states have found defendants liable for negligent entrustment of chattel after selling a firearm or ammunition. The Supreme Court of Kansas, in the 2013 case *Shirley v. Glass*, concluded that a pawn shop could be held liable under a negligent entrustment claim for selling a firearm to a felon who proceeded to kill a child with it.[91] Similarly, the Supreme Court of Missouri held that selling a firearm and ammunition to an individual who was known to pose an unreasonable risk of harm to herself could be the basis of a negligent entrustment claim.[92] The court's reasoning focused primarily on the fact that the defendants had supplied the chattel, and the "fact that [the defendants] supplied the firearm to [the plaintiff] through a

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85. *Id.*

86. *Id.* ¶ 101, 498 P.3d at 264.

87. *See* Robert M. Howard, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to 'Defective' Customers*, 1988 DUKE L.J. 755 (1988)

88. *Morris*, 2021-NMSC-028, ¶ 53, 498 P.3d at 254 (discussing the "relative scarcity of cases adopting the tort of negligent commercial transaction").

89. RESTATEMENT (SECOND) OF TORTS § 390 (AM. L. INST. 1965).

90. *Id.* cmt. a.

91. 308 P.3d 1, 9 (Kan. 2013).

92. Delana v. CED Sales, Inc., 486 S.W.3d 316, 319 (Mo. 2016).

sale does not preclude [a] negligent entrustment claim."[93] Courts in California, Colorado, Georgia, Florida, Tennessee, and Washington have all come to similar conclusions.[94]

Congress confirmed that a seller could be liable under a negligent entrustment theory when it passed the Protection of Lawful Commerce in Arms Act ("PLCAA") in 2005.[95] The PLCAA primarily protects the firearm industry from civil liability after a product is used criminally, but Congress carved out several exceptions—most significantly, an exception for negligent entrustment claims.[96]

After many of these courts' decisions and the passage of the PLCAA, commentators expressed concern that all commercial transactions could now be included under a negligent entrustment theory.[97] However, despite so many jurisdictions recognizing a cause of action for a negligent entrustment claim against a seller of a firearm, courts have repeatedly rejected expanding this claim to include other commercial transactions.[98] For example, California specifically declined to apply the doctrine to the sale of a slingshot to a child.[99] Similarly, a Florida court rejected the argument that "a CO2 cartridge should be treated like a gun or a car" in the context of a negligent entrustment claim.[100]

The decision to include the sale of one type of good under a negligent entrustment theory does not mean that all sales are at risk of being included. Law surrounding gun sales is particularly ripe for special treatment given the need for courts to consider constitutional protections and the high rates of gun violence in our country.[101] Many courts that have chosen to allow liability under negligent

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93. *Id.* at 326.

94. *See* Ireland v. Jefferson Cty. Sheriff's Dep't, 193 F. Supp. 2d 1201, 1229 (D. Colo. 2002) (selling a firearm to a minor could constitute grounds for a negligent entrustment action); Bernethy v. Walt Failor's, Inc., 653 P.2d 280, 283 (Wash. 1982) (holding that a gun shop negligently "furnished a firearm to an intoxicated person"); Jacoves v. United Merch. Corp., 11 Cal. Rptr. 2d 468 (Ct. App. 1992) ("If, during the normal course of the purchasing process, the seller knows or has reason to know that the purchaser is likely to be a danger to himself or herself, or others, the seller has a duty to decline to sell the firearm."); Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1208 (Fla. 1997) (holding that "an action for negligent entrustment as defined under section 390 of the Restatement is consistent with Florida public policy in protecting its citizens from the obvious danger of the placement of a firearm in the hands of an intoxicated person"); Rains v. Bend of the River, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003) (recognizing "a claim for negligent entrustment of a firearm or ammunition"); Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532, 1536 (S.D. Ga. 1995) (applying a negligent entrustment analysis after the sale of a rifle).

95. *See* Katie Feierabend, *A Potential Bullet Hole in the Protection of Lawful Commerce in Arms Act: A Comparison of the Cutpa and the Mmpa*, 89 UMKC L. REV. 161 (2020).

96. *Id.* at 163.

97. *See*, *e.g.*, Andrew D. Holder, *Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas (*Shirley v. Glass*, 241 P.3d 134 (Kan. Ct. App. 2010))*, 50 WASHBURN L.J. 743, 770 (2011) (concluding that "the Shirley court failed to differentiate between firearms sales and other types of chattels in terms of applying negligent entrustment liability" so "Kansas doctrine of negligent entrustment now may be applicable not only to firearms but to all sales of chattels").

98. *See* DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 16:4 (4th ed. 2022).

99. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 182 (Ct. App. 1999).

100. Warren ex rel. Brassell v. K-Mart Corp., 765 So. 2d 235, 237 (Fla. Dist. Ct. App. 2000).

101. *See generally* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability Is*

entrustment have cited the high rates of gun violence within the United States and the need for greater liability for manufacturers and sellers of firearms.[102] The unique policy goals guiding these decisions likely explain why these jurisdictions have not expanded negligent entrustment law to include other types of commercial sales.

Even though the court in *Morris* decided to include the sale of gasoline in negligent entrustment law does not mean that New Mexico will now recognize this cause of action for all types of commercial sales. Like jurisdictions that include the sale of firearms under this doctrine, New Mexico has strong, distinct policy reasons when it comes to ensuring the sale of gasoline is not done negligently. Preventing DWI has been a big motivating factor for many court decisions and legislation in New Mexico.[103] The supreme court's conclusion that sellers of gasoline may be liable under negligent entrustment does not mean that all sellers of other products must now worry about their liability. Ultimately, the decision in *Morris* was narrowly tailored to one kind of commercial transaction, and, as has been seen in many other states, finding liability under a negligent entrustment theory for one type of sale does not lead to liability for all kinds of sales.

ii. Tennessee and the Duty Not to Sell Gasoline

As the supreme court noted in *Morris*, New Mexico is not the first state to impose a duty on gas stations not to sell gasoline to intoxicated drivers.[104] In its 2005 opinion *West v. East Tennessee Pioneer Oil Co.*, the Tennessee Supreme Court concluded that "convenience store employees owed a duty of reasonable care to persons on the roadways, including the plaintiffs, when selling gasoline to an obviously intoxicated driver."[105]

a. Facts of West v. East Tennessee Pioneer Oil Co.

In *West*, the Tennessee court considered a scenario where two employees of a gas station noticed an obviously intoxicated man struggling to fill his tank up with gasoline and went out to assist him.[106] The man had previously entered the convenience store, and the clerk had refused to sell him beer because of his intoxicated state.[107] After receiving assistance from the two gas station employees at the pump, the man drove away and got into an accident, seriously injuring several individuals.[108]

Unconstitutional, 72 U. CIN. L. REV. 1739 (2004); Daniel P. Rosner, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 427 (2018).

102. *See generally* Bret Matthew, *Responsible Gunmakers: How A New Theory of Firearm Industry Liability Could Offer Justice for Mass Shooting Victims*, 54 SUFFOLK U. L. REV. 401, 403 (2021).

103. For a more thorough discussion of New Mexico's initiatives regarding DWI, see *supra* notes 32–35 and accompanying text.

104. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 34, 498 P.3d 238.

105. 172 S.W.3d 545, 556 (Tenn. 2005).

106. *Id.* at 549.

107. *Id.*

108. *Id.*

b. Comparing *West* and *Morris*

Tennessee tort law is notably different from New Mexico law as Tennessee courts still consider foreseeability in the duty analysis.[109] Rather than New Mexico's exclusive focus on policy, Tennessee courts employ a balancing test that imposes a duty against a defendant when a plaintiff can demonstrate that the "foreseeable probability and gravity of harm posed by defendant's conduct outweigh[s] the burden upon defendant to engage in alternative conduct that would have prevented the harm."[110] Despite the states' different approaches to establishing duty, the development of the law in Tennessee from *West* can inform predictions about New Mexico's future in this area of law. There are several significant similarities between the two cases that allow for such an inference.

First, both Tennessee and New Mexico have adopted the Restatement (Second) of Torts Section 390.[111] Most of the duty analysis in *West* centered around a general negligence claim, but the court made a point to state that the same duty analysis would apply in the negligent entrustment claim.[112] While the two jurisdictions consider different factors when establishing duty, both decide duty as a matter of law.[113] Second, Tennessee has also included the sale of firearms in negligent entrustment claims,[114] which would suggest that Tennessee law would be even more vulnerable to a chain effect of implicating more and more commercial transactions in negligent entrustment claims. Furthermore, the duty recognized in *West* is also broader than the one recognized in *Morris*, which was limited by the particular facts of the case. Since Tennessee courts have not expanded negligent entrustment since *West*, it is possible that New Mexico courts will do the same post-*Morris*.

c. Commercial Transactions in Tennessee Post-*West*

In the sixteen years since *West*, Tennessee courts have not extended negligent entrustment of chattel outside the sale of gasoline. A survey of all 132 cases decided in Tennessee that cite to *West* demonstrates that the decision did not create a slippery slope effect regarding the inclusion of commercial transactions in negligent entrustment claims. [115] In fact, *West* has not been cited for any case relating

109. *Id.* at 551.

110. *Id.*

111. *Id.* at 555 ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."); Armenta v. A.S. Horner, Inc., 2015-NMCA-092, ¶ 12, 356 P.3d 17 ("New Mexico has adopted the general definition of negligent entrustment from the Restatement (Second) of Torts.").

112. *West*, 172 S.W.3d at 556 (stating that both the negligence and negligent entrustment claims "arise from the same facts, entail the same duty, and present the same factual issues to be resolved at trial regarding breach of duty, loss or injury, cause in fact, and proximate cause").

113. *Id.* at 550 (stating that "duty of care is a question of law to be determined by the court").

114. Rains v. Bend of the River, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003) (recognizing "a claim for negligent entrustment of a firearm or ammunition").

115. The 132 cases were found using Westlaw's "Citing References" tool and was last updated on Nov. 30, 2021. Of these cases, two were 6th Circuit decisions, fifty-two were district court decisions, and seventy-eight were state court decisions.

to negligent entrustment through a sale. Instead, subsequent courts have cited *West* primarily for general principles of negligence and negligent entrustment.[116]

Of course, this data does not preclude the possibility that this doctrine has been expanded in lower court opinions not included on Westlaw or that the ruling has had a significant impact on other litigation decisions. At the very least, however, this data does show that allowing the sale of gasoline to be included under a theory of negligent entrustment did not lead to immediate changes in the relationship between negligent entrustment law and commercial transactions in general. This would suggest that New Mexico will also not see a rapid or significant change in this area of law.

iii. Policy Goals in Morris

The dissent argued against expanding negligent entrustment to include commercial transactions because New Mexico has "never held that a business has a duty not to sell to a certain type of customer" except "in the special context of alcohol sales."[117] However, the policy rationale behind restricting sales in "the special context of alcohol sales" is the same policy rationale for the duty found in *Morris*. For this reason, this duty will not be applied beyond an entrustment of chattel that enables a DWI.

Reducing drunk driving is of particular importance in New Mexico given our high rates of DWI deaths and injuries.[118] The New Mexico legislature has passed many statutes indicating the state's interest in this issue, including a criminal statute prohibiting driving while intoxicated,[119] the Liquor Control Act,[120] and the Liquor Liability Act.[121] The legislature continues to enact statutes in response to this problem, amending several statutes just last year to prevent the sale of certain types of liquor at gas stations.[122] Additionally, traditional negligent entrustment law has been used to prevent intoxicated individuals from driving, and many of the negligent entrustment cases that have occurred in New Mexico had to do with drunk driving.[123]

Policy alone determines duty in New Mexico.[124] In *Morris*, the court centered its policy analysis around the unique interest to reduce drunk driving in New Mexico. The duty established in this case, then, will not likely lead to new duties that are not related to preventing intoxicated individuals from driving. The decision in *Morris* does not create a window for all commercial transactions to be now subject to scrutiny under negligent entrustment claims; instead, courts will likely not

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116. In 119 of the 132 cases, *West* was exclusively cited for general negligence principles. In the thirteen remaining cases, *West* was cited for negligent entrustment principles but not ever in the context of a commercial transaction.

117. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 55, 498 P.3d 238 (Vigil, J., dissenting).

118. *Id.* ¶ 25, 498 P.3d at 247.

119. N.M. STAT. ANN. § 66-8-102 (2016).

120. N.M. STAT. ANN. § 60-7A-16 (1993).

121. N.M. STAT. ANN. § 41-11-1 (1986).

122. *Morris*, 2021-NMSC-028, ¶ 25, 498 P.3d 238.

123. *Id.* ("New Mexico courts have recognized that entrustors owe a duty to refrain from voluntarily supplying a vehicle to an entrustee who is intoxicated.").

124. *See* Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2014-NMSC-014, ¶ 1, 326 P.3d 465.

consider claims of negligent commercial transactions outside circumstances where a DWI was enabled.

B. Further Implications

Most critics of the decision in *Morris* worry about how this new duty will be implemented. The majority dismissed most of these concerns as they are "better described as questions of foreseeability and breach which are left for the jury in individual cases" and did not concern "whether a duty exists as a matter of policy."[125] However, *Morris* did ultimately provide some insight into the breach analysis, and other jurisdictions also provide some idea into how these concerns may play out.

i. Pay-at-the-Pump Customers

One popular concern raised about the *Morris* decision centers around pay-at-the-pump customers. Most people purchase gasoline at the pump with a card, never interacting with an attendant. Do gas stations now have a duty to interact with customers to ensure they are not intoxicated? Or, as the dissent asks, "if an attendant actually sees possible signs of intoxication, such as a customer outside fumbling with the pump or swaying, does the attendant have a duty to halt a sale in progress?"[126] The majority opinion largely does not attempt to answer these questions, contending instead that this concern is ultimately a concern of breach—not duty.[127] *West* took a similar approach to these concerns, stating that "[i]t is a question of fact for a jury as to what the employee knew with respect to the individual's intoxication and status as driver."[128]

Other states that have applied negligent entrustment to sales seem to rely on whether the seller actually interacted with the customer. In *Kitchen v. K-Mart Corp.*, the Florida Supreme Court concluded that a seller of a firearm to a customer whom the seller knew to be intoxicated could be held liable for injuries to a third party through a negligent entrustment action.[129] In *Kitchen*, a K-Mart clerk sold a rifle to an intoxicated man who later shot and severely injured his girlfriend.[130] The court distinguished this case from a Michigan case where a store was not found liable for selling ammunition to an intoxicated individual.[131] Significantly, the court primarily focused on the differences between how the purchases occurred.[132] The intoxicated customer in the Michigan case retrieved ammunition from a self-serve shelf without speaking to anyone or requiring any assistance,[133] but in *Kitchen*, the clerk had to retrieve the rifle and help the purchaser fill out paperwork.[134] These two cases are

125. *Morris*, 2021-NMSC-028, ¶ 46, 498 P.3d at 252.

126. *Id.* ¶ 79, 498 P.3d at 260 (Vigil, J., dissenting).

127. *Id.* ¶ 46, 498 P.3d at 252 (stating that "these types of concerns are better described as questions of foreseeability and breach which are left for the jury in individual cases").

128. West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 552 (Tenn. 2005).

129. 697 So. 2d 1200, 1208 (Fla. 1997).

130. *Id.* at 1201.

131. *See* Buczkowski v. McKay, 490 N.W.2d 330, 334 (1992).

132. *Kitchen*, 697 So. 2d at 1206.

133. *Buczkowski*, 490 N.W.2d at 332.

134. *Kitchen*, 697 So. 2d at 1206.

analogous to pay-at-the-pump customers and customers who interact directly with an attendant, illustrating the type of analysis that will go into whether a defendant had the opportunity to observe a customer.

This seems to be confirmed by the majority opinion's emphasis in *Morris* that fulfilling the scienter requirement[135] for this claim hinges on the gasoline vendor's "opportunity to observe" the intoxicated customer.[136] The court goes on to clarify that the "opportunity to observe" standard requires no more than the "routine observation of a customer without any investigation."[137] The dissent provides a lot of criticism on this standard, pointing out the possibility that it could incentivize gas stations not to interact with customers or use security cameras.[138] However, similar criticisms could be raised in a regular negligent entrustment claim by stating that an entrustor would be incentivized to be as ignorant as possible to avoid the scienter requirement.[139] This criticism can be adequately addressed by the fact that this element includes what is known or *should have been known*, meaning a gas station that decides never to interact with customers could still be liable.[140]

This scienter element of negligent entrustment law requires a fact-heavy analysis and can be difficult to prove. Out of New Mexico's very few negligent entrustment cases, many have failed because this element of the claim could not be satisfied.[141] Determining whether a gasoline vendor knew or should have known about a customer's intoxication—though perhaps difficult—is not wildly outside the lines of normal negligent entrustment analysis, and the type of factual determinations required are reserved for the jury.[142]

ii. Training Gas Station Employees to Identify Intoxicated Individuals

Another concern regarding *Morris*' impact is whether gas stations will now have to train their employees to recognize signs of intoxication. The majority opinion cited an earlier opinion that held "it is well recognized that laymen are capable of assessing the effects of intoxication as a matter within their common knowledge and

135. *See* N.M. R. ANN. 13-1646 (2010) (requiring that the defendant "knew or should have known that [the third party] was likely to use the [chattel] in such a manner as to create an unreasonable risk of harm to others").

136. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 44, 498 P.3d 238.

137. *Id.* ¶ 45, 498 P.3d at 252.

138. *Id.* ¶ 80, 498 P.3d at 260 (Vigil, J., dissenting).

139. The court has suggested that there is a duty to investigate when an "entrustor knew or should have known that the entrustee was not qualified to engage in the activity." Gabaldon v. Erisa Mortg. Co., 1999-NMSC-039, ¶ 34, 128 N.M. 84. 990 P.2d 197.

140. *See* DeMatteo v. Simon, 1991-NMCA-027, ¶ 6, 112 N.M. 112, 812 P.2d 361 (holding that because the defendant "testified that he knew how to obtain a copy of [the entrustee's] driving record" and "failed to make such an inquiry" that "a jury could reasonably conclude that [the defendant] knew or should have known that DeMatteo was an incompetent driver").

141. *See, e.g.*, Bryant v. Gilmer, 1982-NMCA-010, ¶ 5, 97 N.M. 358, 639 P.2d 1212 (finding that "no facts in the record to show that Gilmer knew or should have known that [the entrustee] was not a competent driver").

142. *See* McCarson v. Foreman, 1984-NMCA-129, ¶ 21, 102 N.M. 151, 692 P.2d 537 (holding that "although the record does not support a finding that [the defendant] knew all of the facts, there is evidence from which a jury could find that he should have known").

experience."[143] This would imply that gas stations will not be required to ensure their employees are trained to recognize signs of intoxication.[144]

However, some gas stations already do include such training, such as the defendant in *Morris*.[145] The court decided that the defendant's practice of training employees to recognize intoxicated individuals only "bolstered" the court's analysis concerning the "ability of people to identify those who are intoxicated."[146] The court's comment here raises a question of whether training employees to identify intoxicated individuals would make defendants more likely liable as it would increase the probability that the clerk knew or should have known about a customer's intoxication.

Gasoline vendors will need to consider carefully the pros and cons of instituting trainings for their employees to identify intoxicated individuals. On one hand, if an employee can successfully identify that a customer is intoxicated and refuse to sell the potential customer gasoline, the employer will have not only escaped any chance at liability but also will have potentially prevented a tragic accident. On the other hand, if an employee is trained to identify intoxicated drivers and fails to do so, that training could end up burdening the defendant as it creates more evidence that the employee knew or should have known of the intoxication. It is perhaps not insignificant that in both *Morris* and *West*, the gas stations had previously trained employees to refuse sales to intoxicated individuals.[147]

In the end, *Morris* did not create a legal duty to train gasoline vendors' employees to recognize signs of intoxication, but it did indicate that such training would be relevant in a breach analysis.[148]

iii. No Duty to Restrain

The *Morris* Court did not create, or even address, a duty for a gas station to physically restrain or take any other affirmative action to prevent an intoxicated individual from driving. Rather, it only created a duty not to sell gasoline to an intoxicated driver.[149]

The court in *West* specifically addressed this issue, stating that "convenience store employees [do not] have a duty to physically restrain or otherwise prevent intoxicated persons from driving."[150] As the Tennessee Supreme

143. State v. Privett, 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55.

144. *C.f.* N.M. STAT. ANN. § 60-6E-2 (1978) (requiring servers, licensees and their lessees to be trained to identify "the effect alcohol has on the body and behavior, including the effect on a person's ability to operate a motor vehicle when intoxicated").

145. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 44, 498 P.3d 238 ("Defendant required its gas station employees to be trained to identify intoxicated customers and allowed them to refuse sales to individuals who were intoxicated.").

146. *Id.*

147. *See* West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 552 (Tenn. 2005) (noting that "store policy required [the clerk] to refuse to sell alcohol to intoxicated persons" and that the clerk was aware that she was "never required to allow a customer to purchase any item, including gasoline"); *Morris*, 2021-NMSC-028, ¶ 44, 498 P.3d 238 ("Defendant required its gas station employees to be trained to identify intoxicated customers and allowed them to refuse sales to individuals who were intoxicated.").

148. *Morris*, 2021-NMSC-028, ¶ 46, 498 P.3d 238.

149. *Id.*

150. *West*, 172 S.W.3d at 552.

Court clarified in a later opinion, *West* "did not involve a special relationship between the business that sold gasoline to a third party and the driver who was injured by the third party's conduct."[151] This is consistent with other jurisdictions that have held that there is no duty to prevent an intoxicated person from driving unless a special relationship exists.[152] In Tennessee, then, while gas stations must not negligently entrust gasoline to intoxicated drivers, they are not required to take any additional action to prevent an individual from driving intoxicated.

This is likely to be the case in New Mexico as well, especially since a negligent entrustment claim requires that the entrustor had control over the chattel entrusted.[153] The court has declined to find liability for a defendant who knew of a driver's incompetence but did not stop her because the defendant had no control over the vehicle.[154] Under a negligent entrustment theory, then, the only way that a gas station could be found liable for allowing an intoxicated person to drive away is if it entrusted chattel (such as gas) to the individual, which enabled them to drive away. If New Mexico is going to recognize a duty to restrain in this context, it would have to arise out of a completely different doctrine.

iv. Liability for Auto Parts Stores, Tire Shops, and Mechanics

In *Morris*, the supreme court only considered gasoline vendors, but there are concerns that the reasoning could be similarly applied to any seller who provides chattel that allows an intoxicated driver to operate a vehicle. The dissent specifically named "auto parts stores, tire shops, [and] mechanics" as entities that will now be "left guessing as to whether they are subject to the new duty."[155] Despite this ambiguity, however, most retailers will likely not be significantly impacted by this possibility of a new duty given the rarity of a situation arising that would implicate this new duty.

Most vendors will likely never be in the situation where they would be supplying an enabling instrument to an intoxicated driver. There are two possibilities when an intoxicated individual is having car issues: (1) the individual's car will be somewhat drivable, or (2) it will not operate at all.

In the first scenario, where a vehicle is drivable, most intoxicated individuals would likely choose to go home and not stop at a mechanic, tire shop, or similar entity. Even if the driver did choose to stop to purchase a part or seek service for the vehicle, the seller would likely not be found to be the proximate cause of any incident thereafter since the intoxicated individual would have been able to drive

151. Cullum v. McCool, 432 S.W.3d 829, 838 (Tenn. 2013).

152. *See* Gustafson v. Mathews, 441 N.E.2d 388, 390 (Ill. App. Ct. 1982) (holding that the defendant taverns had no duty "to restrain, or to call the police or other law enforcement officers to restrain" an intoxicated individual after helping him to his car where his five children were inside); McGee v. Chalfant, 806 P.2d 980, 985 (Kan. 1991) (finding no liability for defendants who transported an intoxicated individual to his vehicle); Andrews v. Wells, 251 Cal. Rptr. 344 (App. Ct. 1988) (finding no duty for a bartender to arrange alternative transportation for an intoxicated customer after customer requested it).

153. *See* Gabaldon v. Erisa Mortg. Co., 1999-NMSC-039, ¶ 23, 128 N.M. 84, 990 P.2d 197 ("Standard negligent entrustment doctrine assigns liability to a defendant if they 'permit a third person to use a thing or to engage in an activity which is under the control of the defendant. . . .").

154. Hermosillo v. Leadingham, 2000-NMCA-096, ¶ 20, 129 N.M. 721, 13 P.3d 79.

155. Morris v. Giant Four Corners, Inc., 2021-NMSC-028, ¶ 52, 498 P.3d 238.

away anyway.[156] *West* provides some insight into how a situation like this might play out because the court analyzed whether the intoxicated driver would have been able to make it to the intersection where the accident occurred if not for the gasoline purchased at the gas station.[157] An expert testified that without the gas purchased at the gas station, the intoxicated driver would have run out of gas about a mile away.[158] The court's choice to analyze the situation in this way implies that had the driver had enough gas without the gas negligently entrusted by the gas station, the gas station would not have been found to be the proximate cause. Similarly, if an intoxicated person manages to drive to a retailer or service shop in their car, then the business would not have enabled the DWI because the car was functional without the intervention.

The second scenario would involve an intoxicated individual's vehicle not operating at all. In this situation, an intoxicated individual cannot drive drunk because the vehicle is not drivable at all. This would force individuals to find an alternative means of travel, which would likely lead to an individual not being able to retrieve his or her car until sober. A scenario where an intoxicated individual's vehicle is not operable, but the individual is able to find his or her way to a shop and purchase a good that will allow them to operate their car seems unlikely. A much more likely scenario would involve a tow truck and the individual finding a ride home.

Therefore, while a duty may exist for these businesses not to supply chattel that enables DWI, there likely will not be a significant economic impact or increase in litigation given the difficulty of proving proximate cause.

CONCLUSION

Only time will reveal the full implications of the *Morris* decision. However, despite fears that this case will create a slippery slope, it is unlikely that New Mexico courts will expand negligent entrustment to include many—if any—other commercial transactions. The type of policy goals implicated in the decision and evidence from other jurisdictions point to a narrow interpretation of the law, only applying to commercial transactions that enable a DWI, which likely will only include gasoline vendors. Future analyses of this case could include predictions about the economic impact of this case, perhaps drawing from economic data compiled from Tennessee after its similar decision. More research could also be done on the impact this case has on the amount of DWI in our state and whether the reduction in DWI outweighs the burden this case places on gasoline and similar vendors.

156. West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d 545, 549 (Tenn. 2005).
157. *Id.*
158. *Id.*