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## **Spencer v. Health Force, Inc.: One Step Forward, Two Steps Back for New Mexico Tort Jurisprudence**

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# SPENCER V. HEALTH FORCE, INC.: ONE STEP FORWARD, TWO STEPS BACK FOR NEW MEXICO TORT JURISPRUDENCE?

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## I. INTRODUCTION

In *Spencer v. Health Force, Inc.*,<sup>1</sup> the New Mexico Supreme Court held that a home health care provider owed a duty of care to a patient who was killed when one of the providers injected the patient with a lethal dose of heroin.<sup>2</sup> In evaluating the case, the supreme court attempted to clarify the court of appeals' confusion over the element of duty in a negligence claim.<sup>3</sup> The court of appeals had ruled that the Caregivers Screening Act,<sup>4</sup> a statute that required background checks, but provided no mechanism to conduct such checks, created no duty.<sup>5</sup> The New Mexico Supreme Court disagreed with the court of appeals, holding that despite the fact that the statute requiring background checks was "flawed," a duty, rooted in both the statute and common law, existed.<sup>6</sup>

*Spencer* has been heralded as evincing a change in New Mexico tort jurisprudence; health care agencies will now be expected to "exercise great care in hiring," even in the absence of a statutory mandate to do so.<sup>7</sup> However, the duty to exercise care in hiring, for health care agencies, as well as other employers, existed prior to the decision in *Spencer*.<sup>8</sup> The supreme court's holding in *Spencer*, therefore, took an important step forward in correcting an erroneous decision by the court of appeals, yet the court's opinion has two shortcomings, which detract from the value of the opinion. First, the court in *Spencer*, by the language and the structure of the opinion, conflated the standard of care required under the justifiable violation doctrine with the common law ordinary care standard. In conflating the two standards, the court missed an opportunity to impose a standard of care that would have been faithful to the legislature's desire to have special protection for disabled individuals.<sup>9</sup> Second, the court's rationale reveals a lack of consideration of several elements traditionally associated with tort jurisprudence in New Mexico—in particular, the idea that a defendant owes a duty only to a "foreseeable plaintiff."<sup>10</sup>

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1. 2005-NMSC-002, 107 P.3d 504.

2. *Id.* ¶ 19, 107 P.3d at 510.

3. *Id.* ¶ 18, 107 P.3d at 510.

4. NMSA 1978, § 29-17-1 (1997) (repealed 1998); see also *infra* notes 135–140 and accompanying text.

5. *Spencer*, 2005-NMSC-002, ¶ 1, 107 P.3d at 506; see also *infra* note 142 and accompanying text.

6. *Spencer*, 2005-NMSC-002, ¶ 26, 107 P.3d at 512.

7. See Scott Sandlin, *Agencies Accountable for Caregivers*, ALBUQUERQUE J., Apr. 6, 2005, at A1.

8. See *infra* Part II.A.2–3; see also Sandlin, *supra* note 7, at A1 ("[The court's decision] simply confirms the duty that most people would have assumed was there initially." (quoting Rob Schwartz, Professor of Law, University of New Mexico)).

9. See *infra* Part V.B.1; see also Brief of the N.M. Trial Lawyers Ass'n in Support of Petitioner at 6 n.6, *Spencer v. Health Force, Inc.*, 2005-NMSC-002, 107 P.3d 504 (No. 28,532) [hereinafter *Amicus Brief*] ("Indeed, the revised...version of the Act...makes explicit, that which was implicit in the predecessor version at issue here: 'The purpose of the Caregivers Criminal History Screening Act...is to ensure to the highest degree possible the prevention of abuse, neglect or financial exploitation of care recipients.'" (quoting NMSA 1978, § 29-17-3 (1998) (emphasis added))).

10. See *infra* Part V.B.2.

The court's cursory treatment of the concept of the foreseeable plaintiff in the context of negligent hiring and retention may create further confusion for future courts and practitioners.<sup>11</sup>

Part II of this Note begins with a general examination of the history of duty and negligent hiring and retention as a cause of action in New Mexico.<sup>12</sup> Part III briefly describes the factual and procedural background of *Spencer v. Health Force, Inc.*<sup>13</sup> Part IV then turns to the supreme court's rationale in *Spencer*, focusing on the court's discussion concerning the sources of duty, as well as the court's consideration of the difference between duty owed and the breach of that duty as defined by the standard of care required to satisfy that duty.<sup>14</sup>

Finally, Part V of this Note analyzes the court's rationale and the implications arising from the court's holding.<sup>15</sup> This Note considers the importance of the fact that, while the court had the opportunity to impose a heightened standard of care—that of the justifiable violation doctrine—the court failed to do so, instead imposing only the duty of ordinary care. This Note concludes that the court's merger of the two standards of care, while not directly impacting the outcome of *Spencer*, may affect future litigants because defendants, in the absence of a clearly defined statutory standard of care, will now be held only to ordinary care. Further, this Note contemplates the results of the court's lack of analysis of the foreseeable plaintiff, concluding that the opinion's instructional value, for practitioners and litigants alike, would have been enhanced by a more thorough examination of the elements traditionally required by New Mexico tort jurisprudence.

## II. BACKGROUND OF DUTY IN NEW MEXICO

Negligence, as a cause of action in New Mexico, consists of several elements, all of which must be present for the defendant to be held liable for a plaintiff's injuries.<sup>16</sup> This Part examines two elements central to the supreme court's rationale in *Spencer*—duty owed and the standard of care required to satisfy that duty. This Part discusses these elements in depth, as well as the elements of negligent hiring and retention, not only to underscore their importance in New Mexico jurisprudence, but also as a point of reference to demonstrate the inconsistencies of the court's decision in *Spencer*.

According to the New Mexico Supreme Court, the elements of a negligence claim are the "existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages."<sup>17</sup> Negligence "encompasses the concepts of foreseeability of harm to the person injured and a duty of care toward that person."<sup>18</sup> A duty may arise from a statute or from common-law

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11. See *infra* Part V.B.2.

12. See *infra* Part II.

13. 2005-NMSC-002, 107 P.3d 504. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

16. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 73 P.3d 181, 185–86.

17. *Id.*

18. *Id.* (quoting *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983)); accord *Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990).

principles.<sup>19</sup> In either case, for a defendant to be liable under a negligence theory, the defendant must owe a duty of care to the plaintiff.<sup>20</sup> Once a duty is established, the defendant must breach that duty, which, under Anglo-American common law, is typically based upon a standard of reasonable care.<sup>21</sup> Finally, in order for a defendant to be found negligent, the breach must be both the cause in fact and the proximate cause<sup>22</sup> of the plaintiff's injuries.<sup>23</sup> Therefore, duty is comprised of a determination of to whom a duty is owed and the standard of care.<sup>24</sup>

### A. To Whom a Duty Is Owed

In New Mexico, the existence of a duty is determined by the court as a matter of law.<sup>25</sup> Often, a critical and complicated element of that analysis is determining "to whom was the duty owed?"<sup>26</sup> To answer this difficult question, the New Mexico Supreme Court has turned to both "statutes and well-established common law traditions."<sup>27</sup>

#### 1. Statutory Duty Owed

In *Hayes v. Hagemeister*,<sup>28</sup> the New Mexico Supreme Court acknowledged that legislation may be the source of a legal duty and described the process to follow when determining whether a defendant owed the injured party a duty based on statutory law.<sup>29</sup> In *Hayes*, the plaintiff alleged that the defendant bus driver discharged children from a school bus without operating the required special warning devices, in violation of New Mexico law.<sup>30</sup> The court noted that the first

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19. See *Calkins*, 110 N.M. at 62, 792 P.2d at 37 ("The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law."). Duty may also arise from a contractual agreement. See generally *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995).

20. *Herrera*, 2003-NMSC-018, ¶ 6, 73 P.3d at 186.

21. See *id.* ¶ 6, 73 P.3d at 185–86; RESTATEMENT (SECOND) OF TORTS § 298 (1965) (defining reasonable care as "that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another"); see also *infra* Part II.B.

22. "'Proximate cause' is that which in a natural and continuous sequence unbroken by any new independent cause produces the injury and without which the injury would not have occurred." *Lopez v. Maez*, 98 N.M. 625, 631, 651 P.2d 1269, 1275 (1982) (quoting *Chavira v. Carnahan*, 77 N.M. 467, 469, 423 P.2d 988, 990 (1967)). See also UJI § 13-305 NMRA (2006) (committee commentary) (removing the word "proximate" from the causation jury instructions but clarifying that its removal does not indicate a change of law, as proximate cause is still embodied in the phrase "reasonably connected as a significant link").

23. *Herrera*, 2003-NMSC-018, ¶ 6, 73 P.3d at 186.

24. The determination of whether the standard of care has been breached is a question for the factfinder rather than a question for the court. See *infra* note 111 and accompanying text.

25. *Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990).

26. *Id.* at 61, 792 P.2d at 38.

27. *Id.* at 62, 792 P.2d at 39.

28. 75 N.M. 70, 400 P.2d 945 (1963).

29. *Id.*

30. *Id.* at 73, 400 P.2d at 947. The statute required:

A. When stopping to receive or discharge school children on a roadway, the operator of a school bus shall drive his vehicle to the extreme right side of the paved or traveled portion. Before discharging any passengers the school bus shall be brought to a complete STOP, and the special warning devices provided in Section 64-18-47 New Mexico Statutes Annotated, 1953 Compilation shall be in operation the full time the bus is stationary.

....

C. Any operator...failing to comply with the provisions of this section shall be punished....

NMSA 1953, § 64-18-48 (repealed 1963).

step was to establish that the provision of the statute that the defendant had violated was created "for the benefit of plaintiff under the circumstances at the time of the accident."<sup>31</sup> According to the court in *Hayes*, the purpose of the legislation and the "evils" for which the legislation was intended to correct must be considered when construing the statute.<sup>32</sup>

In *Calkins v. Cox Estates*,<sup>33</sup> the New Mexico Supreme Court confirmed that a reference to statutory law is the first step in assessing whether a duty is owed.<sup>34</sup> In *Calkins*, the petitioner was the personal representative of an eight-year-old boy who was killed when he was struck by an automobile traveling on a frontage road near the apartment complex where he lived.<sup>35</sup> The petitioner filed a wrongful death claim against the apartment complex owner, contending that the landlord owed a duty of care to his tenants to maintain the common areas of the complex in a "reasonably safe condition."<sup>36</sup> In considering the petitioner's claim, the court took note of section 47-8-20(A)(3),<sup>37</sup> which provides that a landlord has a duty to "keep common areas of the premises in a safe condition."<sup>38</sup>

The court noted that the area in dispute was a fenced playground near the frontage road.<sup>39</sup> Behind the playground fence was an arroyo that led to a flood control ditch and then to an unfenced road paralleling Interstate 25.<sup>40</sup> Interstate 25 was approximately 945 feet from the playground.<sup>41</sup> The eight-year-old boy climbed through a hole in the fence and was killed by traffic on the frontage road.<sup>42</sup> Despite the considerable distance between the fenced playground and the frontage road, the New Mexico Supreme Court concluded that the statute, among other factors, had created a duty to maintain the common area for the benefit of the tenants.<sup>43</sup>

The New Mexico Supreme Court undertook another discussion of statutes as a source of duty in *Torres v. State*.<sup>44</sup> In *Torres*, the supreme court referred to section

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31. *Hayes*, 75 N.M. at 73, 400 P.2d at 947.

32. *Id.*

33. 110 N.M. 59, 792 P.2d 36 (1990).

34. *Id.* at 63, 792 P.2d at 40.

35. *Id.* at 61, 792 P.2d at 38.

36. *Id.* at 63, 792 P.2d at 40.

37. NMSA 1978, § 47-8-20(A)(3) (1999).

38. *Id.* For other cases citing statutory duty, see *Ruiz v. Garcia*, 115 N.M. 269, 850 P.2d 972 (1993) (holding that while no common-law duty existed, the defendant title company did owe a duty to the seller based on section 59A-30-11(A) (2000), which requires that a title company must conduct a reasonable search and examination of a title), and *Norwest Bank N.M. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 26, 981 P.2d 1215, 1223-24 (concluding that "the common law of New Mexico does not impose any duty to wear seat belts, and the statutory duty...cannot form the basis for either liability or apportioning damages").

39. *Calkins*, 110 N.M. at 61, 792 P.2d at 38.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 65, 792 P.2d at 42. The court also acknowledged that the landlord had a common-law duty to his tenants as foreseeable plaintiffs. For an explanation of the *Calkins* view of the role of foreseeability in establishing a common-law duty, see *infra* notes 65-66 and accompanying text.

44. 119 N.M. 609, 894 P.2d 386 (1995). Additionally, the court found that the police officers also owed the plaintiffs a common-law duty. See *infra* notes 68-75 and accompanying text.

41-4-12 of the New Mexico Statutes<sup>45</sup> and determined that the legislature had imposed a duty on police officers to “investigate crimes called to their attention.”<sup>46</sup> According to the court in *Torres*, the statute was a source of duty that required the Albuquerque Police Department to “exercise that care ordinarily exercised by reasonably prudent and qualified law enforcement officers” when investigating the murders.<sup>47</sup>

In *Herrera v. Quality Pontiac*,<sup>48</sup> the New Mexico Supreme Court reaffirmed that the determination of duty is a matter of law<sup>49</sup> that involves reference to, among other things, statutes.<sup>50</sup> In *Herrera*, an automobile repair shop was held liable for injuries suffered by a motorist who collided with a vehicle stolen from the repair shop’s parking lot.<sup>51</sup> The theft was facilitated by the repair shop’s policy that customers leave their keys in the ignition when dropping their vehicles off for repairs.<sup>52</sup> The plaintiffs brought suit against Quality Pontiac, alleging that the car dealership owed a duty to them as a result of the accident caused by the individual who stole the car.<sup>53</sup>

In finding the repair shop liable, the court in *Herrera* first looked to statutes to determine if the legislature had expressed its policy preference by creating a statutory duty.<sup>54</sup> Noting the existence of section 66-7-353,<sup>55</sup> the court examined the purposes of the statute and found that the legislature had impliedly endorsed a policy to deter theft.<sup>56</sup> The court concluded, however, that because evidence of a violation of the statute was not admissible in a civil claim arising out of the theft of a vehicle,<sup>57</sup> the statute did not evince a “legislative intent to create a duty.”<sup>58</sup> Finding that the statute did not create a duty, the court examined other potential sources of

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45. NMSA 1978, § 41-4-12 (1977) (“The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest...when caused by law enforcement officers while acting within the scope of their duties.”).

46. *Torres*, 119 N.M. at 612, 894 P.2d at 389. Importantly, the court in *Torres* deferred to the legislature as the body that creates policy. *Id.* (acknowledging that “[c]ourts should make policy in order to determine duty only when the body politic has not spoken”).

47. *Id.* at 614, 894 P.2d at 391.

48. 2003-NMSC-018, 73 P.3d 181.

49. *Id.* ¶ 6, 73 P.3d at 186.

50. *Id.* ¶ 7, 73 P.3d at 186.

51. *Id.* ¶ 1, 73 P.3d at 184–85.

52. *Id.* ¶ 2, 73 P.3d at 185.

53. *Id.* ¶¶ 3–4, 73 P.3d at 185.

54. *Id.* ¶¶ 11–13, 73 P.3d at 187–88.

55. The text of the statute provides:

No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key and effectively setting the brake, or placing the transmission in parking position....A violation of this section shall not mitigate the offense of stealing a motor vehicle, nor shall the provisions of this section or any violation thereof be admissible as evidence in a civil action for the recovery of a stolen motor vehicle, or in any other civil action arising out of the theft of a motor vehicle.

NMSA 1978, § 66-7-353 (1978).

56. *Herrera*, 2003-NMSC-018, ¶ 12, 73 P.3d at 187.

57. *Id.* ¶ 12, 73 P.3d at 187–88.

58. *Id.* ¶ 12, 73 P.3d at 188. Additionally, the court noted that the legislature had limited the statute to operation of vehicles on the highways, whereas the thief in this case stole the vehicle from a fenced lot. *Id.*

duty.<sup>59</sup> In doing so, the court rigorously analyzed the common law and carefully considered important principles of public policy.<sup>60</sup> Therefore, while New Mexico courts first look to statutes to determine the existence of a duty, in the absence of a statutorily created duty, the courts will examine legal precedents and other principles of law.

## 2. Common-Law Duty Owed

In New Mexico, the common-law definition of to whom a duty is owed has evolved from Justice Cardozo's approach based on the foreseeable plaintiff, which was first defined in the landmark case of *Palsgraf v. Long Island Railroad Co.*<sup>61</sup> Justice Cardozo, writing for the majority in *Palsgraf*, determined that the defendant must be able to foresee harm to a particular plaintiff before a duty may be owed.<sup>62</sup> This formulation of the "foreseeable plaintiff" was adopted by New Mexico in *Ramirez v. Armstrong*,<sup>63</sup> in which the New Mexico Supreme Court held that "[i]f...a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."<sup>64</sup>

The concepts of duty owed, adopted in *Ramirez*, were refined in the New Mexico Supreme Court's opinion in *Calkins v. Cox Estates*.<sup>65</sup> In *Calkins*, the supreme court echoed its language in *Ramirez* when it held that, in determining duty owed, the injured party must be a foreseeable plaintiff, meaning that the plaintiff was "within the zone of danger created by the [defendant's] actions."<sup>66</sup> Since the tenants of the apartment complex were clearly within the zone of the landlord-defendant's actions, the landlord owed a duty of care to those tenants irrespective of the existence of a statute.<sup>67</sup>

59. *Id.* ¶¶ 14–32, 73 P.3d at 188–94.

60. *Id.* For a discussion of the common-law duty owed in *Herrera*, see *infra* notes 76–80 and accompanying text.

61. 162 N.E. 99 (N.Y. 1928).

62. *Id.* at 100. While the definition of duty in New Mexico has evolved, foreseeability has remained an important element in the duty analysis. See *Herrera*, 2003-NMSC-018, ¶ 20, 73 P.3d at 190–91 (reiterating the importance of foreseeability as a "critical and essential component of New Mexico's duty analysis because 'no one is bound to guard against or take measures to avert that which he [or she] would not reasonably anticipate as likely to happen'" (alteration in original) (quoting *Bogart v. Hester*, 66 N.M. 311, 316, 347 P.2d 327, 330 (1959))).

63. 100 N.M. 538, 673 P.2d 822 (1983), *overruled on other grounds by* *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990). The court in *Ramirez* stated, "In New Mexico, negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person." *Id.* at 541, 673 P.2d at 825.

64. *Id.*; see also *Herrera*, 2003-NMSC-018, ¶ 20, 73 P.3d at 190:

New Mexico has adopted and applied for decades the majority view of *Palsgraf*, that a negligent actor owes a duty to those whose injuries are a foreseeable result of the negligence, rather than the dissenting *Palsgraf* view [as expressed by Justice Andrews], that one owes a duty to the world, even if the plaintiff is outside the zone of danger.

*But see id.* ¶ 42, 73 P.3d at 196 (Bosson, J., specially concurring) (remarking that the New Mexico jury instruction "sounds more like [Justice] Andrews' dissent than [Justice] Cardozo's majority opinion in *Palsgraf*"); UJI § 13-1604 NMRA (2006) ("Every person has a duty to exercise ordinary care for the safety of the person and the property of others.").

65. 110 N.M. 59, 792 P.2d 36 (1990).

66. *Id.* at 61, 792 P.2d at 38.

67. *Id.* at 63, 792 P.2d at 40. For a discussion of the *Calkins* analysis of statutory duty, see *supra* notes 33–43.

The definition of duty owed evolved further in *Torres v. State*,<sup>68</sup> where the court stated that duty can be derived from policy.<sup>69</sup> In *Torres*, the New Mexico Supreme Court extended its holding in *Calkins*, concluding that Albuquerque police officers owed a duty to individuals murdered in California because the officers' failure to investigate in Albuquerque allowed criminals to escape to California.<sup>70</sup> The court in *Torres* relied on the existence of a common-law duty<sup>71</sup> to extend foreseeability of harm from a particular plaintiff to a class of plaintiffs.<sup>72</sup>

The court in *Torres* concluded that "[a]ll persons who are foreseeably at risk within the general population are within the class of persons to be protected by the duty to investigate."<sup>73</sup> In finding that the victims in California were foreseeable plaintiffs, the court noted that foreseeability is not determined by considerations of place and time.<sup>74</sup> Rather, the court stated that the murders were not so far removed from the police officers' conduct that the victims were unforeseeable.<sup>75</sup>

While the court in *Torres* held that policy may determine duty, the court in *Herrera v. Quality Pontiac*<sup>76</sup> reiterated the principle that duty is determined with reference to both policy and foreseeability.<sup>77</sup> Importantly, the supreme court recognized that "legal duty is dependent upon considerations of both foreseeability and policy."<sup>78</sup> Having determined that the defendant's actions created a foreseeable zone of duty, the New Mexico Supreme Court questioned, as a matter of policy, whether it should "impose" a duty on the defendant.<sup>79</sup> The court concluded that it should, finding that "the risk of harm to the class of persons typified by the Plaintiffs was not unforeseeable and that a duty of ordinary care would be consistent with contemporary notions of public policy...."<sup>80</sup> Therefore, in New Mexico, the court, as a matter of law, determines the existence of a common-law duty with reference to both foreseeability and policy.

### 3. Statutory and Common-Law Duty in the Context of a Negligent Hiring and Retention Claim

A court may find that a defendant owes a plaintiff a common-law duty based on a theory of negligent hiring and retention. In New Mexico, a claim based on negligent hiring "flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring."<sup>81</sup> Thus, when determining if an employer owes a duty to a person injured as a result of an

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68. 119 N.M. 609, 894 P.2d 386 (1995).

69. *Id.* at 612, 894 P.2d at 389.

70. *Id.* at 615, 894 P.2d at 392.

71. For a discussion of the statutory duty owed in *Torres*, see *supra* notes 44–47 and accompanying text.

72. *Torres*, 119 N.M. at 615, 894 P.2d at 392.

73. *Id.*

74. *Id.* at 613–14, 894 P.2d at 390–91.

75. *Id.* at 614, 894 P.2d at 391.

76. 2003-NMSC-018, 73 P.3d 181.

77. *Id.* ¶ 20, 73 P.3d at 190.

78. *Id.* ¶ 26, 73 P.3d at 192.

79. *Id.*

80. *Id.* ¶ 31, 73 P.3d at 194.

81. *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987).



employee's actions, in addition to any explicit statutory duty that may exist, New Mexico recognizes an employer's common-law duty to injured plaintiffs.

The seminal case in New Mexico regarding negligent hiring and retention is *F & T Co. v. Woods*.<sup>82</sup> In *Woods*, the plaintiff brought suit against F & T Co., a home appliance retailer, alleging that she was raped by one of their employees.<sup>83</sup> The plaintiff claimed that F & T Co. negligently hired and retained the employee, Sanders, and that the negligence was the proximate cause of her injuries.<sup>84</sup> In analyzing the issue of duty owed, the court took note of the fact that at the time of the rape, Sanders was not acting within the scope of his employment as he did not enter the plaintiff's apartment to deliver or repair an appliance, and he was not driving the defendant's delivery vehicle.<sup>85</sup>

Under the law articulated in *Woods*, negligent hiring or retention does not solely depend upon an employer's actual knowledge of the employee's lack of fitness.<sup>86</sup> Rather, a claim of negligent hiring or retention depends on whether the employer knew or should have known that the employee posed a risk to the public.<sup>87</sup> In addition to the employer's knowledge of the defendant's propensities, there must be a connection between the employer's business and the injury sustained by the plaintiff, and the negligent hiring or retention must have been the proximate cause of the plaintiff's injury.<sup>88</sup> Accordingly, the court found that, because the employee's action could not have been foreseen at the time that he was hired, the defendant, F & T Co., was not liable under a theory of negligent hiring<sup>89</sup> or negligent retention.<sup>90</sup>

In *Pittard v. Four Seasons Motor Inn*,<sup>91</sup> the New Mexico Court of Appeals distinguished the petitioner's negligent hiring and retention claim from the claim that was raised in *Woods*.<sup>92</sup> In *Pittard*, the defendant's employee sexually assaulted the plaintiff-guest's son while on the Motor Inn's premises and while the employee was on duty.<sup>93</sup> The employee admitted that he had a drinking problem, that he became violent when he drank, and that he had been drinking on the day of the

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82. 92 N.M. 697, 594 P.2d 745 (1979).

83. *Id.* at 698, 594 P.2d at 746. The plaintiff purchased a television from the defendant, which was delivered by the employee, Sanders. Several nights later, Sanders entered the plaintiff's home and raped her. *Id.*

84. *Id.* at 699, 594 P.2d at 747.

85. *Id.* at 698, 594 P.2d at 746.

86. *Id.*

87. *Id.* at 699-700, 594 P.2d at 747-78.

88. *Id.* These elements have remained more or less constant throughout New Mexico's tort jurisprudence. See, e.g., *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987) (holding that a jury instruction on negligent hiring and retention will be given if there is evidence that the employee was unfit and that the employer knew or should have known that he was unfit). Additionally, there must be a connection between the employer's business and the plaintiff, and the negligent hiring or retention must have been the proximate cause of the injury. *Id.*; see also *Los Ranchitos v. Tierra Grande, Inc.*, 116 N.M. 222, 228, 861 P.2d 263, 269 (Ct. App. 1993) (holding that the proper standard for determining whether to hold an employer liable does not require proof of actual knowledge of employee's unfitness but instead examines whether employer knew or reasonably should have known that some harm might be caused by acts or omissions of employee); *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct. App. 1992) (holding that defendant was liable under a negligent hiring theory because liability flows from a direct duty running from the employer to members of the public who the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring).

89. *Woods*, 92 N.M. at 701, 594 P.2d at 749.

90. *Id.*

91. 101 N.M. 723, 688 P.2d 333 (Ct. App. 1984).

92. *Id.* at 730, 688 P.2d at 340.

93. *Id.*

assault.<sup>94</sup> Critically, the Motor Inn operator in *Pittard* was aware of the employee's drinking problem.<sup>95</sup> The court held that "[n]otice of an employee's alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable to the employer."<sup>96</sup>

The role of the "foreseeable plaintiff" in a duty analysis arising from a claim of negligent hiring and retention was clearly demonstrated by Judge Apodaca, writing for the court of appeals in *Narney v. Daniels*.<sup>97</sup> In *Narney*, the plaintiff was stopped for speeding by an off-duty Deming, New Mexico police officer who was driving his personal vehicle filled with guns and ammunition.<sup>98</sup> After the officer pretended to radio in the incident using a nonexistent handheld radio, the officer took control of the plaintiff's car.<sup>99</sup> The officer then drove the car off the road and wrecked it, injuring the plaintiff.<sup>100</sup> While walking back to the highway to get help for the injured plaintiff, the police officer asked one of the other plaintiffs if he was Jesus because he "want[ed] to kiss Jesus."<sup>101</sup> The plaintiffs alleged that the Deming police force negligently hired and retained the officer and that his injuries resulted from the police force's breach of its duty.<sup>102</sup>

The court in *Narney* relied on the foreseeable plaintiff as set forth in *Calkins* as a first step in determining whether the Deming Police Department owed the plaintiff a duty.<sup>103</sup> In following the axiomatic principle that duty is a question of policy to be determined with reference to statutes, precedent, and other legal principles, the court first looked to section 29-7-8(A)(4),<sup>104</sup> a law that required that no one may be permanently appointed as a police officer unless he or she is "found, after examination by a certified psychologist, to be free of any emotional or mental condition which might adversely affect his performance."<sup>105</sup> In examining the statute, the court found a "strong public policy that defendants have a duty to appoint and retain only mentally stable police officers."<sup>106</sup>

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94. *Id.*

95. *Id.* In fact, the employee was fired from his job as dishwasher for drinking. After he was fired, he returned intoxicated to the hotel in an effort to get rehired. Although he became violent when he was asked to leave the premises and had to be forcibly subdued, the hotel later rehired the employee as a steward. *Id.*

96. *Id.* at 731, 688 P.2d at 341.

97. 115 N.M. 41, 846 P.2d 347 (Ct. App. 1992). Importantly, this is possibly the only time either the court of appeals or the supreme court has addressed the issue of the "foreseeable plaintiff" rather than the foreseeability of injury, which goes to proximate cause, in a meaningful fashion in the context of negligent hiring and retention. The distinction between the foreseeable plaintiff and a foreseeable injury (proximate cause) has been the subject of much discussion in New Mexico tort jurisprudence. See, e.g., *Calkins v. Cox Estates*, 110 N.M. 59, 64 n.5, 792 P.2d 36, 41 n.5 (1990) (stating that the court of appeals and respondent "confused the question of duty with that of proximate cause"); *F & T Co. v. Woods*, 92 N.M. 697, 700, 594 P.2d 745, 748 (1979) ("Although the concepts of foreseeability and proximate cause are sometimes confused in the cases, their applicability is the same.").

98. *Narney*, 115 N.M. at 43, 846 P.2d at 349.

99. *Id.* at 44, 846 P.2d at 350.

100. *Id.*

101. *Id.* The officer also told the plaintiffs that they needed to get back to the highway so that they could be "beamed up" by "Scotty." *Id.*

102. *Id.*

103. *Id.* at 50, 846 P.2d at 356.

104. NMSA 1978, § 29-7-8(A)(4) (repealed 1993).

105. *Narney*, 115 N.M. at 51, 846 P.2d at 357 (quoting NMSA 1978, § 29-7-8(A)(4) (repealed 1993)).

106. *Id.*

Not surprisingly, the court took note of the fact that the defendant police department had notice that the officer had received psychological care prior to being employed by the department and that, during his employment, he felt quite a bit of stress.<sup>107</sup> Thus, the court concluded that, as a matter of law, it was not unforeseeable that the officer would “misuse his authority...that the City had first cloaked him with and then allowed him to retain....”<sup>108</sup> Therefore, a defendant who negligently hires or retains an employee owes a duty of care to those plaintiffs who may be injured as a result of the employee’s actions.

### *B. Defining the Standard of Care*

Once the existence of a duty has been established, it becomes necessary to define the standard of care—the element of a negligence action that defines the scope of that duty.<sup>109</sup> Defining the standard of care is essential to determine whether the defendant breached the duty he or she owed to the plaintiff.<sup>110</sup> Unlike duty, which is decided by the court as a matter of law, breach has traditionally been a question for the factfinder.<sup>111</sup>

When a claim involves a statute, the statute generally defines the standard of care. The New Mexico Supreme Court had occasion to review a statutory claim in *Ruiz v. Garcia*.<sup>112</sup> The court found that, while no duty existed under case law, a duty did exist based on a statute.<sup>113</sup> After determining that the defendant title company owed a duty to a seller of real estate based on the statute, the court held that the defendants were “subject to the standard of care defined in the statute.”<sup>114</sup>

The common-law duty standard of care is usually described as the reasonable person or ordinary care.<sup>115</sup> The New Mexico Supreme Court has defined that duty as one that would require a defendant to exercise reasonable care to protect a plaintiff’s interests.<sup>116</sup>

Importantly, this common-law standard of care seems to apply in all circumstances, independent of any relevant statutory authority. In *Bober v. New Mexico State Fair*,<sup>117</sup> the supreme court noted that “[e]very person has a duty to exercise ordinary care for the safety of the person and the property of others,” a duty that

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107. *Id.*

108. *Id.*

109. See *supra* note 21 and accompanying text.

110. See *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 33, 73 P.3d 181, 194–95; *Bober v. N.M. State Fair*, 111 N.M. 644, 648, 808 P.2d 614, 618 (1991).

111. See, e.g., *Herrera*, 2003-NMSC-018, ¶ 33, 73 P.3d at 194–95; *Torres v. State*, 119 N.M. 609, 616, 892 P.2d 386, 393 (1995); *Bober*, 111 N.M. at 648, 808 P.2d at 618; *Calkins v. Cox Estates*, 110 N.M. 59, 66, 792 P.2d 36, 43 (1990).

112. 115 N.M. 269, 850 P.2d 972 (1993).

113. *Id.* at 272, 850 P.2d at 975.

114. *Id.* at 273, 850 P.2d at 976. Similarly, the supreme court in *Calkins* determined that section 47-8-20(A)(3) imposes a certain standard of care on a landlord. *Calkins*, 110 N.M. at 63, 792 P.2d at 40.

115. See *supra* note 21 and accompanying text; see also CHARLES P. SABATINO & SANDRA L. HUGHES, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADDRESSING LIABILITY ISSUES IN CONSUMER-DIRECTED PERSONAL ASSISTANCE SERVICES (CDPAS): THE NATIONAL CASH AND COUNSELING DEMONSTRATION AND SELECTED OTHER MODELS 10 (2004), available at <http://aspe.hhs.gov/daltcp/reports/cdliab.pdf> (defining “ordinary care” as “the care of a reasonable and prudent person”).

116. See *Leyba v. Whitley*, 120 N.M. 768, 771, 907 P.2d 172, 175 (1995).

117. 111 N.M. 644, 808 P.2d 614 (1991).

exists apart from a statute.<sup>118</sup> The court, quoting the New Mexico Civil Uniform Jury Instructions, defined ordinary care:

“Ordinary care” is that care which a reasonably prudent person would use in the conduct of his own affairs. What constitutes “ordinary care” varies with the nature of what is being done.

As the risk of danger that should be reasonably foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.<sup>119</sup>

The New Mexico Supreme Court in *Bober*, quoting the rationale of the Arizona Supreme Court in *Coburn v. City of Tucson*,<sup>120</sup> stated that “duty remains constant, while the conduct necessary to fulfill it varies with the circumstances.”<sup>121</sup> The court emphasized the fact that the factfinder makes the determination of breach by evaluating the defendant’s behavior against what a “reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all the surrounding circumstances.”<sup>122</sup>

When a statute defines a specific standard of care, yet compliance with that standard of care would be impossible, courts have recognized the “justifiable violation” doctrine.<sup>123</sup> For example, the court in *Hayes*, when considering the question of whether violation of a statute constitutes negligence per se, stated, “The standard of conduct [necessary to comply with the statute] has been fixed by the legislature, and jurors have no dispensing power by which to relax it, except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law.”<sup>124</sup> Importantly, the justifiable violation doctrine requires that the defendant prove that he or she acted as would a person of ordinary prudence who wanted to comply with the statutorily defined standard of care, not just as a person acting with ordinary care.<sup>125</sup> Therefore, in a situation where the defendant is relying on the justifiable-violation doctrine as an excuse for non-compliance with a statute, the defendant must meet a heightened standard of care.

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118. *Id.* at 648, 808 P.2d at 618 (quoting UJI § 13-1604 NMRA (2006)).

119. *Id.* (quoting UJI § 13-1603 NMRA (2006)).

120. 691 P.2d 1078 (Ariz. 1984).

121. *Bober*, 111 N.M. at 649, 808 P.2d at 619 (quoting *Coburn*, 691 P.2d at 1080).

122. *Id.* at 650, 808 P.2d at 620. The court also noted that a similar standard of care is incorporated in the New Mexico Tort Claims Act. *Id.* at 652, 808 P.2d at 622; see NMSA 1978, § 41-4-2(B) (1996) (“Liability...shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty.”).

123. *Jackson v. Sw. Pub. Serv. Co.*, 66 N.M. 458, 471, 349 P.2d 1029, 1038 (1960); accord *Hayes v. Hagemeyer*, 75 N.M. 70, 76, 400 P.2d 945, 949 (1963).

124. *Hayes*, 75 N.M. at 75, 400 P.2d at 948 (internal quotation marks omitted) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 34, at 161 (2d ed. 1955)).

125. *Id.* at 76, 400 P.2d at 949 (citing *Jackson*, 66 N.M. at 472, 349 P.2d at 1038).

### III. STATEMENT OF THE CASE

#### A. Facts and Background

*Spencer v. Health Force, Inc.*<sup>126</sup> arose out of the death of thirty-six-year-old quadriplegic Hope Rigolosi, who died of a drug overdose on April 23, 1998, while hospitalized for pneumonia at the University of New Mexico Hospital.<sup>127</sup> Before being admitted to the hospital, Rigolosi had required twenty-four-hour care and received that care from the defendant, Health Force.<sup>128</sup> Pursuant to this arrangement, Health Force hired Ben Williams on March 20, 1998, and assigned him to provide care for Rigolosi in her home.<sup>129</sup> Williams continued to provide Rigolosi with care, even after she was admitted to the University of New Mexico Hospital for pneumonia on April 1.<sup>130</sup> Rigolosi was to be discharged on April 23.<sup>131</sup> However, on that date, Williams allegedly injected Rigolosi with a lethal dose of heroin, causing her death.<sup>132</sup>

James Spencer, the personal representative of the estate of Hope Rigolosi, filed a wrongful death claim against Health Force.<sup>133</sup> Spencer asserted that Health Force owed Rigolosi a duty based on the negligent hiring and retention of Williams.<sup>134</sup> Spencer's negligent hiring allegations stemmed from the failure of Health Force to perform a criminal background check on Williams as required by the Criminal Records Screening for Caregivers Employed by Care Providers Act.<sup>135</sup>

126. 2005-NMSC-002, 107 P.3d 504.

127. *Id.* ¶¶ 2, 4, 107 P.3d at 506.

128. *Id.* ¶ 2, 107 P.3d at 506. Health Force is a home health care provider that provides long-term care to disabled individuals. *See id.*

129. *Id.* Williams' care of Rigolosi lasted just over one month, from March 20, 1998, until her death on April 23, 1998. *Id.* ¶¶ 2–4, 107 P.3d at 506. According to the court of appeals, Health Force may not have introduced Rigolosi to Williams. *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 5, 91 P.3d 73, 75–76. She may have already known Williams and requested that he act as her caregiver. *Id.*

130. *Spencer*, 2005-NMSC-002, ¶ 4, 107 P.3d at 506.

131. *Id.* Importantly, Health Force asserted that while Williams may have continued to care for Rigolosi, they no longer employed him. *Id.* ¶ 5, 107 P.3d at 507; *see also infra* notes 151–152 and accompanying text.

132. *Spencer*, 2005-NMSC-002, ¶ 4, 107 P.3d at 506. At the time of Rigolosi's death, the hospital staff found Williams in her room "dancing and chanting." *Spencer*, 2004-NMCA-047, ¶ 4, 91 P.3d at 75.

133. *Spencer*, 2005-NMSC-002, ¶ 1, 107 P.3d at 505–06.

134. *Id.* ¶ 1, 107 P.3d at 506.

135. *Id.*; *see* Criminal Records Screening for Caregivers Employed by Care Providers Act, NMSA 1978, § 29-17-1 (1997) (repealed 1998):

A. As used in this section:

....

(3) "care provider" or "provider" means a skilled nursing facility; intermediate care facility...home health agency...;

(4) "care recipient" means any person under the care of a provider who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person's activities;

(5) "conviction" means any conviction of a felony or a misdemeanor, including a conviction on a plea of *nolo contendere*, of any crime specified in Subsection D of this section;

(6) "nationwide criminal records check" means:

(a) fingerprinting on federal bureau of investigation approved fingerprint cards, submitting the fingerprint cards to the bureau and obtaining the nationwide conviction record of an applicant or caregiver; or

(b) submitting an applicant's or caregiver's authorization for release form to the federal bureau of investigation for the purpose of obtaining the nationwide conviction record of an applicant or caregiver;

The Caregivers Screening Act provided that any care provider seeking to employ any caregiver should perform statewide and nationwide criminal records checks before offering the caregiver permanent employment.<sup>136</sup> Convictions for aggravated assault, burglary, robbery, and any criminal offense involving fraud, among other convictions, were listed as convictions that would disqualify an applicant under the statute.<sup>137</sup> Additionally, the statute provided a one hundred day window in which an employee could be temporarily employed while awaiting the background check, provided that the employer began the background check within five days of the date of hire.<sup>138</sup> The statute was repealed in May 1998 and was replaced with sections 29-17-2 through 29-17-5.<sup>139</sup> The revised statute changed the mechanism for obtaining background checks, authorizing the department of health to receive background information on caregivers obtained by the state department of public safety.<sup>140</sup>

In response to Spencer's allegation that Health Force owed a duty to Rigolosi because it was negligent in hiring Williams when it failed to perform a criminal background check, Health Force contended that it owed no duty to Rigolosi because the Caregivers Screening Act was flawed.<sup>141</sup> Health Force claimed that the mechanism in place for conducting the FBI background check could not be complied with because the statute did not enumerate who was to receive the

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(7) "statewide criminal records check" means fingerprinting on federal bureau of investigation approved fingerprint cards, submitting the cards to the department of public safety and obtaining the statewide conviction and felony arrest history of an applicant or caregiver....;

....  
B. A care provider that seeks to employ any caregiver shall initiate statewide and nationwide criminal records checks of the applicant before an offer of permanent employment is made. A care provider may make a temporary offer of employment to an applicant pending the results of the criminal records checks, and shall initiate these checks within five days of making the temporary offer of employment. A care provider may employ a person prior to receiving and reviewing the results of the criminal records checks for that person for a period not to exceed one hundred days....

....  
D. Except as otherwise provided for in Subsection E of this section, any of the following convictions disqualify an applicant or caregiver from employment as a caregiver:

- (1) homicide;
- (2) assault or battery;
- (3) aggravated assault or aggravated battery;

- ....  
(10) felony larceny, robbery, burglary or aggravated burglary;  
(11) felony trafficking controlled substances;  
(12) arson; or  
(13) any criminal offense involving fraud.

....  
L. Failure to comply with the requirements of this section are grounds for the state agency having jurisdiction of the care provider to impose administrative sanctions and penalties, including suspension or revocation of the provider's license and imposition of fines....This subsection neither limits any existing and independent sanctioning authority nor grants any additional sanctioning authority.

136. NMSA 1978, § 29-17-1(B) (repealed 1998).

137. *Id.* § 29-17-1(D).

138. *Id.* § 29-17-1(B).

139. *See Spencer*, 2005-NMSC-002, ¶ 9, 107 P.3d at 507-08. For the current version of the statute, see NMSA 1978, §§ 29-17-2 to -5 (2005).

140. NMSA 1978, § 29-17-5 (2005).

141. *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 14, 91 P.3d 73, 77; *see supra* note 135.

information from the FBI and, thus, the FBI would not provide the information.<sup>142</sup> Health Force argued that it was unable to comply with the statutory duty because “word came out” that the FBI would no longer be providing the information required for the background check.<sup>143</sup> It is important to note that Health Force never attempted to initiate any criminal background check on Williams.<sup>144</sup>

In further support of its position, Health Force asserted that, when it checked the references provided by Williams, it was told that he was “reliable and dependable.”<sup>145</sup> Additionally, the home health care provider stated that Williams indicated on his employment application that he had never been convicted of a felony.<sup>146</sup> Williams, as it turned out, had been convicted of aggravated assault, burglary, robbery, and fraud.<sup>147</sup>

Spencer, in support of the negligent retention claim, introduced evidence that Williams allegedly stole three of Rigolosi’s narcotic prescription pills while working for Health Force.<sup>148</sup> Spencer also alleged that Health Force knew of the theft but did not investigate or discipline Williams.<sup>149</sup>

Finally, Williams’ continued employment for Health Force was a disputed issue.<sup>150</sup> Health Force argued that because Williams was not its employee, was no longer subject to its control, and had not been authorized by it to continue to provide care for Rigolosi at the hospital, it was not liable for his actions.<sup>151</sup> In support of its contention that Williams was no longer its employee, Health Force stated that it had given thirty days’ notice to the state, ending its contract for Rigolosi’s care as of April 7.<sup>152</sup> Spencer countered Health Force’s argument by introducing statements from one of Williams’ co-workers as well as a time-dated voicemail message confirming Williams’ work schedule.<sup>153</sup>

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142. The court of appeals found that strict compliance with the statute was impossible. *Spencer*, 2004-NMCA-047, ¶ 16, 91 P.3d at 77. The nationwide check involved submitting fingerprints to the FBI while the statewide check involved submitting the fingerprints to the department of public safety. *Id.* ¶ 10, 91 P.3d at 76. However, the statute failed to identify which agency would receive the FBI information, and therefore the FBI would not supply the information. *Id.* ¶ 11, 91 P.3d at 76. As an expert for the plaintiff testified, “[health care] providers were left to their own devices to try and figure out what they were supposed to do.” *Id.* ¶ 11, 91 P.3d at 77. Despite these problems with the statute, however, the plaintiff’s witness testified that it was possible, at least in some locations within New Mexico, to obtain information from the police department. *Id.* ¶ 12, 91 P.3d at 77 (stating that in Belen, New Mexico, the police department would provide the necessary information, but the information may have only been statewide, not necessarily nationwide).

143. *Id.* ¶ 11, 91 P.3d at 77.

144. *Id.* ¶ 14, 91 P.3d at 77.

145. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 2, 107 P.3d 504, 506.

146. *Id.*

147. *Id.* Any one of these convictions would have kept Williams from being employed as a caregiver under the Caregivers Screening Act. See *supra* note 135.

Health Force would have found, if they’d done a background check, [that Williams] had been adjudicated as a habitual criminal in Albuquerque.... Judge (Diane) Dal Santo gave him a sentencing date, and then he didn’t show up for sentencing. He had a warrant for his arrest on the day he was hired by Health Force. That’s how bad he was.

Sandlin, *supra* note 7, at A1 (quoting Lisa Vigil, attorney for Rigolosi’s estate).

148. *Spencer*, 2005-NMSC-002, ¶ 3, 107 P.3d at 506.

149. *Id.*

150. *Id.* ¶¶ 5–6, 107 P.3d at 507.

151. *Id.* ¶ 5, 107 P.3d at 507.

152. *Id.*

153. *Id.* ¶ 6, 107 P.3d at 507. Additionally, Spencer asserted that Health Force did not have any

On the strength of Health Force's arguments, the district court granted its motion for partial summary judgment, finding that Health Force did not owe a duty to Rigolosi.<sup>154</sup> Spencer appealed to the New Mexico Court of Appeals, which affirmed the district court's ruling in a unanimous opinion.<sup>155</sup>

### *B. Procedural Posture from the New Mexico Court of Appeals*

The court of appeals found that Health Force had no statutory duty to perform a background check because compliance with the statute was not possible.<sup>156</sup> The court of appeals further concluded that the violation of the statute was excusable under the "justifiable violation doctrine."<sup>157</sup> Importantly, the court of appeals determined that Health Force had no common-law duty because of the existence of the statute.<sup>158</sup> In fact, the court of appeals stated that the legislature had already addressed the duty in the statute and that the court was not in a position to "legislate a duty when the legislature has specifically addressed the problem" by enacting the statute.<sup>159</sup> The New Mexico Supreme Court granted certiorari and reversed the court of appeals' disposition.<sup>160</sup>

## IV. RATIONALE

Following a short discussion of the standard of review,<sup>161</sup> the New Mexico Supreme Court began its analysis in *Spencer* with a discussion of duty in New

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documentation of Williams' resignation. *Id.* ¶ 5, 107 P.3d at 507. Spencer also introduced a time-dated voicemail recording made eight hours after Rigolosi's death, where a voice could be heard saying, "Hey Ben, this is Rachel. I just wanted to go over your schedule for this coming weekend. Give me a call when you get a chance, 883-4900. Thanks. Bye-bye." *Id.* ¶ 6, 107 P.3d at 507. Spencer contended that the phone number given in the message was identical to Health Force's published phone number and Health Force admitted that an individual named "Rachel" scheduled caregivers employed by them. *Id.*

154. *Id.* ¶ 1, 107 P.3d at 506.

155. *Id.*

156. *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 16, 91 P.3d 73, 77. The court of appeals found that statutory compliance was impossible because "word came out" that the statute was going to be repealed and the FBI would not accept fingerprints. *Id.* ¶ 11, 91 P.3d at 76-77.

157. *Id.* ¶¶ 16-18, 91 P.3d at 77-78; see RESTATEMENT (SECOND) OF TORTS § 288A(2)(c) (1965) (stating that an actor is not liable for negligence based on a statutory violation if the actor is "unable after reasonable diligence or care to comply"); see also *Hayes v. Hagemeier*, 75 N.M. 70, 76, 400 P.2d 945, 949 (1963) ("[T]he correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (quoting *Alarid v. Vanier*, 327 P.2d 897, 898 (Cal. 1958))); *Jackson v. Sw. Pub. Serv. Co.*, 66 N.M. 458, 471, 349 P.2d 1029, 1038 (1960) ("[A] violation of an ordinance may be excused or justified in certain cases.").

158. *Spencer*, 2004-NMCA-047, ¶ 23, 91 P.3d at 79.

159. *Id.* The court of appeals then turned to the issue of proximate cause and held that a reasonable jury would not be able to find that Health Force's hiring and retention of Williams was the proximate cause of Rigolosi's death. *Id.* ¶¶ 24-25, 91 P.3d at 79-80.

160. *Spencer*, 2005-NMSC-002, ¶ 1, 107 P.3d at 506.

161. *Id.* ¶ 7, 107 P.3d at 507. The New Mexico Supreme Court was faced with a claim that the court of appeals' judgment affirming the district court's grant of summary judgment was improper. *Id.* ¶ 1, 107 P.3d at 506. The supreme court stated that "[s]ummary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* ¶ 7, 107 P.3d at 507 (quoting *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992)). The court "view[s] the facts in a light most favorable to the party opposing the motion and draws all reasonable inferences in support of a trial on the merits." *Id.* ¶ 1, 107 P.3d at 507 (quoting *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 992 P.2d 879, 886).



Mexico.<sup>162</sup> The court in *Spencer* framed the issue as whether Health Force owed a duty to the disabled individuals who receive care from its employees based on theories of negligent hiring and retention.<sup>163</sup> In the court's view, duty is a "policy question that is answered by reference to legal precedent, statutes, and other principles of law."<sup>164</sup>

The first step in the court's analysis was a consideration of any potential statutory sources of duty.<sup>165</sup> The court found that the legislature had indeed spoken by enacting the Caregivers Screening Act.<sup>166</sup> The court noted that the legislature, in 1997, recognized that agencies that employ caregivers owe a duty to their clients and had codified that duty in section 29-17-1 by requiring all health care agencies to perform a criminal background check on all applicants prior to employment.<sup>167</sup> The court also noted that the statute was effective from April 1997 until May 20, 1998, when it was repealed.<sup>168</sup> The supreme court determined that the public policy behind the statute in effect at the time of Rigolosi's death was to "provide special protection for care-dependant individuals with regard to home care workers."<sup>169</sup>

After determining that Health Force owed Rigolosi a duty based on the policy expressed in the Caregivers Screening Act, the court found that Health Force also owed Rigolosi a duty arising from the common law.<sup>170</sup> The court noted the existence of the common-law duty of employers to "those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring."<sup>171</sup> The court in *Spencer* concluded that "New Mexico recognizes both an employer's common law duty for negligently hiring employees to those at risk of injury...as well as an explicit statutory duty for agencies such as Health Force that provide home care services to the disabled."<sup>172</sup>

The supreme court rejected the court of appeals' conclusion that when the legislature enacted the Caregivers Screening Act, the legislature effectively supplanted the common-law duty owed.<sup>173</sup> Instead, the court found that the statutory duty created by the Caregivers Screening Act and the common-law duty arising from negligent hiring and retention were complementary.<sup>174</sup> The court stated that the duty created by the Caregivers Screening Act was consistent with the common-law duty for employers arising from negligent hiring and retention.<sup>175</sup> Accordingly, the supreme court held that a home health care employer owes a statutory duty to clients

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162. *Id.* ¶¶ 8–25, 107 P.3d at 507–12.

163. *Id.* ¶ 8, 107 P.3d at 507.

164. *Id.* (quoting *Ruiz v. Garcia*, 115 N.M. 269, 272, 850 P.2d 972, 975 (1993)).

165. *Id.* ¶ 9, 107 P.3d at 507–08.

166. *Id.* For the text of the Caregivers Screening Act, see *supra* note 135.

167. *Spencer*, 2005-NMSC-002, ¶ 9, 107 P.3d at 507–08.

168. *Id.*

169. *Id.* ¶ 19, 107 P.3d at 510; see also Amicus Brief, *supra* note 9, at 4 (stating that the 1997 statute "articulated a public policy intended 'to provide special protection to care-dependent, defenseless, vulnerable members of the community' like Hope Rigolosi" (quoting the Petitioner's Brief-in-Chief)).

170. *Spencer*, 2005-NMSC-002, ¶¶ 19–20, 107 P.3d at 510.

171. *Id.* ¶ 10, 107 P.3d at 508 (quoting *Medina v. Graham's Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct. App. 1992)).

172. *Id.*

173. *Id.* ¶ 19, 107 P.3d at 510.

174. *Id.*

175. *Id.*

and patients who receive care from its employees, as well as a common-law duty to refrain from negligently hiring employees.<sup>176</sup> Finally, while breach could not be based on the statute, the court found that inability to comply with the statutory requirements did not negate the existence of a duty.<sup>177</sup>

The New Mexico Supreme Court found that the court of appeals had correctly determined that a duty may be established by statute or by common law.<sup>178</sup> The court of appeals had determined that the statute in question, however, “required a specific process that could not be followed” and, therefore, found that no statutory duty existed.<sup>179</sup> Consequently, the New Mexico Supreme Court concluded that the court of appeals confused the question of the existence of a duty with the question of breach of duty.<sup>180</sup>

Having determined that Health Force owed a duty to Rigolosi, the supreme court then turned to the standard of care required to satisfy that duty.<sup>181</sup> The court in *Spencer* stated that section 29-17-1 created a standard of care that would have been more specific than ordinary diligence.<sup>182</sup> Because the court found that the statute could not be complied with and therefore could not provide the standard of care, it concluded that an ordinary diligence standard should be applied.<sup>183</sup>

The supreme court itself did not reach the issue of whether that standard had been breached; rather, it determined that material issues of fact existed, which were matters for the jury or factfinder.<sup>184</sup> Specifically, the court stated that the factfinder would have to determine whether Health Force’s reliance on Williams’ references, rather than performing the criminal background check, constituted breach.<sup>185</sup> Additionally, the court concluded that the disputed facts concerning Williams’ continued employment at Health Force, the alleged theft of Rigolosi’s medication, as well as the determination of whether Health Force’s actions were the proximate cause and cause in fact of Rigolosi’s death, precluded summary judgment.<sup>186</sup>

In concluding its opinion, the New Mexico Supreme Court reaffirmed that the questions of duty owed and the breach of that duty are two distinct inquiries.<sup>187</sup> In an attempt to clarify the duty analysis in New Mexico, the supreme court held that an inability to comply with statutory requirements, while relevant to a finding of negligence per se or statutory breach, does not negate a general duty recognized by

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176. *Id.*

177. *Id.* ¶ 20, 107 P.3d at 510.

178. *Id.* ¶ 11, 107 P.3d at 508.

179. *Id.* (quoting *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 15, 91 P.3d 73, 77).

180. *Id.* ¶ 18, 107 P.3d at 510.

181. *Id.* ¶ 20, 107 P.3d at 510.

182. *Id.*; see *supra* Part II.B; see also Caregivers Screening Act, NMSA 1978, § 29-17-1 (repealed 1998).

183. *Spencer*, 2005-NMSC-002, ¶ 20, 107 P.3d at 510.

184. *Id.* ¶ 22, 107 P.3d at 511.

185. *Id.*

186. *Id.*; see *supra* notes 151–153 and accompanying text. The bulk of the court’s discussion regarding the negligent hiring and retention claim focused on the issue of the foreseeability of Health Force’s actions being the proximate cause of the plaintiff’s injuries. *Spencer*, 2005-NMSC-002, ¶ 22, 107 P.3d at 511. The court emphasized that, for a defendant to be liable for a plaintiff’s injuries, “there must be a connection between the employer’s business and the injured plaintiff.” *Id.* (quoting *Valdez v. Warner*, 106 N.M. 305, 307, 742 P.2d 517, 518 (Ct. App. 1987)).

187. *Spencer*, 2005-NMSC-002, ¶ 20, 107 P.3d at 510.

statutory and common law.<sup>188</sup> The court found that a general duty arising from both statute and common law existed and that the agency owed a duty of ordinary care to its clients when hiring and retaining employees.<sup>189</sup>

## V. ANALYSIS AND IMPLICATIONS

Although the supreme court's holding in *Spencer* has been heralded as creating a higher duty for employers when hiring employees,<sup>190</sup> the decision merely reinforced the common-law duty of ordinary care generally present in hiring and retaining employees.<sup>191</sup> Despite the correctness of the court's holding, there are two key shortcomings in the *Spencer* decision that may prove problematic for future courts and litigants. First, the court merged the standard of care required by the justifiable violation doctrine with that of the general common-law.<sup>192</sup> Second, the court's rationale reveals a lack of consideration of many of the elements traditionally associated with tort jurisprudence in New Mexico.<sup>193</sup> This Note attempts to clarify the potential confusion caused by the *Spencer* opinion and concludes that the precedential value of the court's opinion could have been enhanced by a more thorough analysis.

### A. *The Importance of the Supreme Court's Holding*

The supreme court's decision in *Spencer* has been described as requiring health care agencies to exercise more care when making hiring decisions.<sup>194</sup> However, prior to *Spencer*, health care agencies and other employers already had a duty arising from common-law principles to exercise care when hiring and retaining employees.<sup>195</sup> This duty is reflected in the negligent hiring and retention cases in New Mexico jurisprudence.<sup>196</sup>

While the implications of the court's decision do not reach the heights described by the media, the New Mexico Supreme Court's decision in *Spencer* is, nevertheless, important because it corrected an erroneous decision made by the court of appeals. The holding set forth by the New Mexico Court of Appeals would have effectively negated the common-law duty for any employers in fields where the legislature had enacted positive law, because the court of appeals was unwilling to "legislate a duty."<sup>197</sup> Additionally, the decision reached by the court of appeals contradicted the "time-honored application of the ordinary-care-under-the-circumstances test that applies when no more specific standard is established by

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188. *Id.*

189. *Id.*

190. See Sandlin, *supra* note 7, at A1 ("Agencies that employ nursing home and other care providers can be expected to exercise great care in hiring....").

191. See *supra* Part II.

192. See *infra* Part V.B.1.

193. See *infra* notes 237–251 and accompanying text.

194. See *supra* note 190 and accompanying text.

195. See *supra* notes 81–108 and accompanying text.

196. *Id.*

197. See ASS'N OF COMMERCE & INDUS. JUDICIAL REVIEW COMM., 2005 JUDICIAL SCOREBOARD, <http://www.aci.nm.org/pdfs/2005-Judicial-Scorecard.pdf> (last visited May 1, 2006) (describing the court of appeals' decision as favorable for businesses because "the Court refused to 'legislate a duty,' when the statute that had been passed could not be followed").

statute or common law.”<sup>198</sup> Further, the court of appeals holding was contrary to the legislative purpose of the Caregivers Screening Act—to protect vulnerable patients who may not be able to protect themselves.<sup>199</sup>

The New Mexico Supreme Court, consistent with *Hayes v. Hagemeier*,<sup>200</sup> examined the statute to determine if the legislature had created a duty.<sup>201</sup> The court in *Spencer* analyzed the language of the Caregivers Screening Act and found that the statute embodied a policy to protect the disabled patients who receive care from home health care providers such as Health Force.<sup>202</sup> Thus, in accordance with the mandate in *Hayes*, the supreme court, when construing the Caregivers Screening Act, considered the “evils which the legislature intended to correct and the purpose of the legislation” and determined that the “legislature would [not] do a futile thing.”<sup>203</sup> Consistent with this analysis, the supreme court’s holding in *Spencer* correctly reflects New Mexico courts’ deference to the policy considerations of the legislature.

Unlike the court of appeals, whose opinion essentially began and ended with an analysis of the Caregivers Screening Act, the supreme court also looked to other potential sources of duty, including common-law duty. The supreme court in *Spencer*, following New Mexico precedent, first analyzed the Caregivers Screening Act and then turned to the common law.<sup>204</sup> Under a common-law theory of negligent hiring and retention, a duty exists from an employer to a third party who may be injured as a result of the negligent hiring or retention of an employee.<sup>205</sup> The supreme court recognized the existence of this duty in New Mexico and, based on the employer-client relationship, found that Health Force also owed Rigolosi a common-law duty.<sup>206</sup> Thus, where the court of appeals was unwilling to “legislate a duty,”<sup>207</sup> the supreme court correctly noted that a duty already existed—the common-law duty “running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.”<sup>208</sup>

After determining that Health Force owed a duty to Rigolosi, the court correctly turned to the issue of the standard of care.<sup>209</sup> The supreme court found that the Caregivers Screening Act imposed a burden on home health care providers to perform criminal background checks, which was a higher standard of care than the

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198. Amicus Brief, *supra* note 9, at 7. The Amicus Brief also remarked that the “pronouncement [of the court of appeals] is not consistent with common sense, the common law, or existing precedent.” *Id.*

199. See SABATINO & HUGHES, *supra* note 115, at 18–19.

200. See *supra* notes 28–32 and accompanying text.

201. See *supra* Part II.A.1; see also *supra* notes 165–169 and accompanying text.

202. See *supra* notes 165–169 and accompanying text.

203. *Hayes v. Hagemeier*, 75 N.M. 70, 73, 400 P.2d 945, 947 (1963); see also *supra* notes 28–32 and accompanying text.

204. See *supra* Part II.A.1–2.

205. See *supra* Part II.A.3.

206. See *supra* notes 168–170 and accompanying text.

207. See *supra* note 197 and accompanying text.

208. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 10, 107 P.3d 504, 508 (quoting *Medina v. Graham’s Cowboys, Inc.*, 113 N.M. 471, 473, 827 P.2d 859, 861 (Ct. App. 1992)).

209. See *supra* notes 109–122 and accompanying text.

ordinary-care standard.<sup>210</sup> In accordance with *Bober v. New Mexico State Fair*, where the New Mexico Supreme Court found that “a duty to exercise ordinary care” inherently exists aside from a statute,<sup>211</sup> the supreme court in *Spencer* held that Health Force continued to owe Rigolosi a duty, and that the standard of care was reasonable diligence rather than the standard set forth in the statute.<sup>212</sup> Therefore, the supreme court’s opinion can be seen as simply correcting a misstep of the court of appeals, ensuring that the duty to exercise ordinary care, arising from common law, remained intact, rather than as an attempt to increase the level of care required when hiring employees.

Ironically, while not increasing the level of care required by health care providers, as has been suggested, the supreme court was actually presented with the opportunity to do so in *Spencer* under the justifiable violation doctrine. However, the court failed to do a thorough analysis of the justifiable violation doctrine, which could have imposed a heightened standard of care on Health Force. By simply imposing the standard of ordinary care, the court was not faithful to the legislature’s intent of creating special protection for disabled individuals.

### B. The Shortcomings of the Supreme Court’s Analysis

While the New Mexico Supreme Court in *Spencer v. Health Force, Inc.* held that a health care provider owed the plaintiff both a statutory duty and a common-law duty based on negligent hiring, the court’s analysis is problematic and may lead to confusion for other courts and future litigants. The supreme court in *Spencer* corrected the court of appeals’ confusion of duty and breach but did not provide a clear analytical framework for future courts to follow regarding duty owed in the negligent hiring and retention context.<sup>213</sup> This lack of clarity is particularly troubling because the relationship between duty and the other elements of a negligence claim has often been a source of confusion for lower courts in New Mexico. A more precise explanation of duty owed would have enhanced the value of the *Spencer* opinion for practitioners and judges alike.<sup>214</sup> Additionally, the court did not clearly differentiate the standard of care arising under the justifiable violation doctrine from that arising under common law.<sup>215</sup>

#### 1. The Supreme Court’s Failure to Adequately Define the Standard of Care

While discussing the standard of care, the court in *Spencer* likened the common-law standard of care to the standard of care in *Jackson v. Southwestern Public*

210. See *supra* note 182 and accompanying text; see also NMSA 1978, § 29-17-1 (repealed 1998).

211. 111 N.M. 644, 648, 808 P.2d 614, 618 (1991); see *supra* notes 117–122 and accompanying text.

212. Consistent with the elements of a negligence claim, the supreme court, after finding that Health Force owed Rigolosi a duty, then discussed breach and proximate cause. *Spencer*, 2005-NMSC-002, ¶¶ 22–25, 107 P.3d at 511–12. The court determined that, because there were sufficient facts for a jury to decide that Williams was the proximate cause of Rigolosi’s death, the case should be remanded to the district court. *Id.* ¶ 16, 107 P.3d at 512.

213. See *infra* notes 237–251 and accompanying text.

214. See *Torres v. State*, 119 N.M. 609, 612 n.1, 894 P.2d 386, 389 n.1 (1995) (explaining that it was unclear if the author of the lower court’s opinion was discussing duty or breach of duty); *Calkins v. Cox Estates*, 110 N.M. 59, 64 n.5, 792 P.2d 36, 41 n.5 (1990) (describing how the court of appeals and respondent “confused the question of duty with that of proximate cause”).

215. See *infra* notes 217–236 and accompanying text.

*Service Co.*,<sup>216</sup> which evaluated the standard of care in relation to the justifiable violation doctrine.<sup>217</sup> The court in *Spencer* failed to delineate what triggers one standard of care rather than the other and what the implications of each may be.<sup>218</sup> This lack of analysis created unnecessary ambiguity for future litigants and for home health care providers, such as Health Force.<sup>219</sup> Further, this merger of the two standards imposes a less than optimal standard of care to protect plaintiffs such as Hope Rigolosi.

The justifiable violation doctrine imposes a heightened standard of care from that of ordinary diligence because it requires that a defendant attempt to comply with the obligations created by the statutorily defined standard of care.<sup>220</sup> Importantly, under the justifiable violation doctrine, the defendant has the burden of proving not just that he acted like a reasonable person under the circumstances or with reasonable diligence, but that he acted like a reasonable person under the circumstances who desired to comply with the law.<sup>221</sup> The statutory standard of care informs the defendant's compliance, allowing the court to remain faithful to the legislative purpose of the enactment.<sup>222</sup> The justifiable violation doctrine creates a default standard of care in a situation where a statutory standard of care may not be complied with.<sup>223</sup> Therefore, a defendant would actually have to meet a higher burden to demonstrate that his or her violation of a statute would be justified.

The standard of care required for compliance with the justifiable violation doctrine exists apart from the standard of care required by common law.<sup>224</sup> While the justifiable violation doctrine requires a defendant to act as someone wishing to comply with the relevant statutory mandate, the common-law standard differs in that it requires only that a defendant act with ordinary care. The New Mexico Supreme Court, however, in the structure of the opinion and its holding, merged the standard of care required to invoke the justifiable violation doctrine with the common law "ordinary care" standard. The court, in its discussion of the Caregivers Screening Act, stated that the "common law duty of ordinary care is also consistent with *Jackson*."<sup>225</sup> The quoted passage from *Jackson*, however, described the standard of care applied in cases asserting the justifiable violation doctrine—the care taken by

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216. 66 N.M. 458, 349 P.2d 1029 (1960).

217. *Id.* at 471, 349 P.2d at 1038 ("It is true that violation of an ordinance may be excused or justified in certain cases.")

218. See *supra* Part IV.

219. The opinion's ambiguity is further manifested by its structure. The court correctly stated that duty and breach are distinct issues and yet discussed duty, breach, proximate cause, and summary judgment under the "Duty" heading of the opinion. While this is not fatal to the opinion, it undermines the purported purpose of the opinion. Part of the confusion arises from what appears to be a departure from Justice Serna's previous jurisprudence on the subject. Justice Serna authored both *Spencer* and *Herrera*; however, *Herrera* provided a much clearer organization and discussion of duty in New Mexico. See *Herrera v. Quality Pontiac*, 2003-NMSC-018, 73 P.3d 181.

220. Thus, as the petitioners argued, Health Force had a duty to act as a reasonable person of ordinary prudence who desired to comply with the law would have acted. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 19, 107 P.3d 504, 510.

221. See *supra* notes 123–125 and accompanying text.

222. See *supra* notes 123–125 and accompanying text.

223. See *supra* notes 123–125 and accompanying text.

224. See *supra* notes 123–125 and accompanying text.

225. *Spencer*, 2005-NMSC-002, ¶ 19, 107 P.3d at 510; see *Jackson v. Sw. Pub. Serv. Co.*, 66 N.M. 458, 471, 349 P.2d 1029, 1038 (1960).

a person of ordinary diligence under the circumstances who desired to comply with the law.<sup>226</sup> In its conclusion, the court stated that Health Force owed, “at the very least, a duty of ordinary care” to disabled individuals such as Rigolosi.<sup>227</sup> Therefore, through the structure and the language of the opinion, the court in *Spencer* essentially equated the justifiable violation standard of care with the common-law standard of care.<sup>228</sup>

The supreme court in *Spencer* should have clearly stated that Health Force, by invoking the justifiable violation doctrine, had to meet a heightened standard of care. In order to fulfill the burden imposed by the justifiable violation doctrine, Health Force would have had to act like a reasonable health care provider under the circumstances, desirous of complying with the Caregivers Screening Act. In the instant case, the statute required that a background check be initiated within five days.<sup>229</sup> Additionally, the court of appeals heard testimony that background checks may have been obtained at local police stations, rather than relying on the FBI.<sup>230</sup> However, Health Force did not, at any time, begin a background check on Williams.<sup>231</sup> Health Force’s claim that its violation of the statute was excused under the justifiable violation doctrine would have likely failed because it never demonstrated any attempt to comply with the statute. However, when the supreme court remanded the case to the district court, it left open the possibility for the factfinder to determine that Health Force had fulfilled its duty to Rigolosi by relying on his references, rather than performing a background check.<sup>232</sup> Therefore, the court in *Spencer* did not clearly impose the heightened standard of care on Health Force.

Finally, had the supreme court adopted the heightened standard of care set forth by the justifiable violation doctrine, the court would have remained faithful to the public policy established by the state legislature. The court found that the legislature had intended for disabled patients to receive heightened protection.<sup>233</sup> The purpose of the statute was to protect those vulnerable patients who may not be able to protect themselves.<sup>234</sup> The legislature, through the background check requirements, demonstrated its commitment to safeguarding patients such as Hope Rigolosi by providing special protection.<sup>235</sup> Despite the court’s finding that the legislature intended to give disabled patients *special* protection, the supreme court in *Spencer* held that, in the absence of a statutory standard of care, ordinary care will suffice.<sup>236</sup>

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226. See *supra* notes 123–125 and accompanying text.

227. *Spencer*, 2005-NMSC-002, ¶ 26, 107 P.3d at 512.

228. See *id.* ¶ 20, 107 P.3d at 510–11 (concluding that *Jackson* described a reasonable diligence standard and then referencing *Bober*, which described the general common-law duty standard of care).

229. *Spencer v. Univ. of N.M. Hosp.*, 2004-NMCA-047, ¶ 14, 91 P.3d 73, 77.

230. *Id.* ¶ 12, 91 P.3d at 77.

231. *Id.* ¶ 14, 91 P.3d at 77.

232. *Spencer*, 2005-NMSC-002, ¶ 22, 107 P.3d at 511.

233. See *supra* notes 167–169 and accompanying text.

234. See *supra* notes 167–169 and accompanying text.

235. See *supra* notes 167–169 and accompanying text.

236. See *Spencer*, 2005-NMSC-002, ¶ 20, 107 P.3d at 510–11.

## 2. The Supreme Court's Cursory Treatment of Duty Owed

The supreme court in *Spencer* found that, as a matter of law, Health Force owed Rigolosi a duty with a nearly nonexistent discussion of the first element of duty: to whom the duty is owed.<sup>237</sup> The supreme court may simply have felt that Rigolosi was an obvious plaintiff not requiring any further explanation. However, because the supreme court was attempting to rectify a flaw in the court of appeals' opinion, a more complete discussion would have been helpful.

The existence of a statutory duty in New Mexico is premised on a finding that the statute was passed for the benefit of the injured plaintiff.<sup>238</sup> However, the court in *Spencer* never actually undertook this analysis.<sup>239</sup> The court noted that "New Mexico recognizes...an explicit statutory duty for agencies such as Health Force that provide home care services to the disabled."<sup>240</sup> After a brief discussion of the Caregivers Screening Act, the court further stated that "respondent owe[d] a duty, based on statute...to clients or patients who receive care from Respondent's employees."<sup>241</sup> Finally, the court concluded that "based on the legislative public policy determination that the disabled warrant special protection...Respondent clearly has a duty with regard to hiring and retaining its employees for harm caused to clients such as Rigolosi."<sup>242</sup> Unlike *Torres*, where the supreme court explicitly analyzed whether the plaintiffs in California could be considered part of the class of plaintiffs intended to benefit from the New Mexico statute,<sup>243</sup> the supreme court in *Spencer* did not explicitly describe Rigolosi as a person for whom the statute was intended to benefit.<sup>244</sup>

The court's failure to discuss the common-law requirement of the "foreseeable plaintiff" is more troubling.<sup>245</sup> The first step in New Mexico tort jurisprudence is to establish that the injured party was a foreseeable plaintiff.<sup>246</sup> The supreme court in *Calkins* explained that, "[i]n determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by respondent's actions."<sup>247</sup> Although the court in *Spencer* may have concluded that

237. *Id.* ¶¶ 9–10, 18–20, 107 P.3d at 507–08, 510.

238. *See, e.g., Torres v. State*, 119 N.M. 609, 614, 894 P.2d 386, 391 (1995) (analyzing the statutory duty owed in terms of "[p]ersons for whose benefit or protection the statutory duty of investigation is intended"); *Hayes v. Hagemeyer*, 75 N.M. 70, 73, 400 P.2d 945, 947 (1963) ("[D]amages may be recovered if the statutory provision violated was for the benefit of the person injured.").

239. *See supra* Part IV.

240. *Spencer*, 2005-NMSC-002, ¶ 10, 107 P.3d at 508. In holding that Health Force owed Rigolosi a common-law duty, the court may have felt that Rigolosi was an obviously foreseeable plaintiff and as such the court may have not felt the need to undertake a traditional "foreseeable plaintiff" analysis. *See infra* notes 245–255 and accompanying text.

241. *Spencer*, 2005-NMSC-002, ¶ 19, 107 P.3d at 510.

242. *Id.* ¶ 20, 107 P.3d at 510.

243. *Torres*, 119 N.M. at 614, 894 P.2d at 391; *see also supra* Part II.A.1.

244. *See Spencer*, 2005-NMSC-002, ¶ 19, 107 P.3d at 510.

245. *See Calkins v. Cox Estates*, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990) ("In determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by respondent's actions; in other words, to whom was the duty owed?"); *accord Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 20, 73 P.3d 181, 190–91; *Torres*, 119 N.M. 609, 615, 894 P.2d 386, 392 (1995); *see also supra* Part II.A.3. For an in depth discussion of the "foreseeable plaintiff" in a claim of negligent hiring and retention, *see Narney v. Daniels*, 115 N.M. 41, 846 P.2d 347 (1992).

246. *See supra* Part II.A.2.

247. *Calkins*, 110 N.M. at 61, 792 P.2d at 39.



Rigolosi was an obviously foreseeable plaintiff, this analysis was complicated by Health Force's claim that Williams was no longer its employee when the alleged heroin injection occurred and by the fact that the heroin injection occurred at the University of New Mexico Hospital, not in Rigolosi's home.<sup>248</sup> Further, Health Force may not have created the relationship between Rigolosi and Williams.<sup>249</sup> It would have been helpful had the court discussed whether Health Force could have foreseen that Williams would injure Rigolosi when he was allegedly no longer employed by them and when he was no longer providing her with health care in her home but rather at the University of New Mexico Hospital.<sup>250</sup> While the court's statements aptly summarized their determination, the reader is left wondering how the court reached its conclusions with no mention of the foreseeable plaintiff.<sup>251</sup>

Unlike *Narney*, where the court of appeals undertook a foreseeable plaintiff inquiry in the context of negligent hiring and retention,<sup>252</sup> the court in *Spencer* simply concluded that Health Force owed Rigolosi a duty.<sup>253</sup> While the court found that "New Mexico recognizes...an employer's common-law duty for negligently hiring employees to those at risk of injury as a result of the hiring," the court never discussed whether it was foreseeable to Health Force that Williams might injure Rigolosi.<sup>254</sup> When the court did discuss Rigolosi, the court simply concluded that Health Force owed Rigolosi a duty "with regard to hiring and retaining its employees for harm caused to clients such as Rigolosi," yet never discussed the possibility that she was not a foreseeable plaintiff.<sup>255</sup> The supreme court's choice to discuss Hope Rigolosi as a foreseeable plaintiff in such a cursory fashion may, therefore, lead to confusion for future practitioners.

## VI. CONCLUSION

The court in *Spencer* reiterated the two-fold duty inquiry in New Mexico jurisprudence—to whom is the duty owed and what is the standard of care required to satisfy that duty. The New Mexico Supreme Court correctly determined that the existence of a statute complements the common-law duty, rather than negating that duty. To have found otherwise, the court would have eliminated a duty owed from a defendant to a plaintiff in situations in which the legislature has enacted positive law.

However, the court's analysis of two key aspects of the case does not provide a concise analytical framework for future courts and practitioners. First, the court's conflation of the justifiable violation doctrine standard of care with that of the

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248. *Spencer*, 2005-NMSC-002, ¶¶ 4, 5, 107 P.3d at 506–07.

249. *See supra* note 129.

250. *See Calkins*, 110 N.M. at 61, 792 P.2d at 38 (determining that the foreseeable plaintiff is one who is within the zone of danger).

251. Additionally, the lack of the "foreseeable plaintiff" may demonstrate a turn toward Justice Andrew's approach in *Palsgraf*, as described in Justice Bosson's concurrence in *Herrera v. Quality Pontiac*, 2003-NMSC-018, 73 P.3d 181. *See supra* note 64.

252. *Narney v. Daniels*, 115 N.M. 41, 50, 846 P.2d 347, 356 (1992); *see also supra* Part II.A.2.

253. *Spencer*, 2005-NMSC-002, ¶¶ 19–20, 107 P.3d at 510.

254. *Id.* ¶ 10, 107 P.3d at 508. The court also found that Health Force owed Rigolosi a statutory duty. *See supra* notes 165–169 and accompanying text.

255. *Spencer*, 2005-NMSC-002, ¶ 20, 107 P.3d at 512. Again, the court may have felt that Rigolosi was an obvious plaintiff. *See supra* note 240.

common-law standard of care effectively reduced the legislatively crafted “special protection” under the Caregivers Screening Act to ordinary care. Second, the supreme court’s cursory discussion of the “foreseeable plaintiff” does not set forth any meaningful guidance for future judges and lawyers facing a negligent hiring and retention claim. Therefore, while the New Mexico Supreme Court’s holding in *Spencer* took an important step forward by enforcing the duty on Health Force even in the absence of a statutorily mandated standard of care, the court took two steps back by conflating the justifiable violation doctrine standard of care with that of the common-law standard of care and by not clearly analyzing the “foreseeable plaintiff” in a negligent hiring and retention context. This lack of clarity may lead to confusion for future practitioners and litigants, detracting from an otherwise valuable opinion in New Mexico tort jurisprudence.