IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CRAIG BEAUDRY,

Plaintiff/Appellee,

v.

Ct. App. No. 33,618
Santa Fe County
Dist. Ct. No. D-101-CV-2011-00646

FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, FARMERS NEW WORLD LIFE INSURANCE COMPANY, FARMERS INSURANCE COMPANY OF ARIZONA, LANCE CARROLL, AND CRAIG ALLIN,

Defendants/Appellants.

Appeal from the First Judicial District Court
County of Santa Fe, State of New Mexico
Honorable Sarah Singleton, District Judge, Presiding

AMICUS CURIAE BRIEF BY THE ASSOCIATION OF COMMERCE & INDUSTRY OF NEW MEXICO

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STATEMENT OF INTEREST

Amicus Curiae the Association of Commerce and Industry in New Mexico ("ACI")[1] is a statewide chamber of commerce and business advocate that works to promote business and economic growth in the State of New Mexico. ACI is a member-driven organization whose policy positions come directly from its members, who are businesses of all types and sizes throughout the state. The organization serves as the state chamber of commerce and the state representative to the National Association of Manufacturers. ACI's mission is to enrich the lives and prosperity of New Mexicans through a vibrant business climate built by effective advocacy and education. In furtherance of that goal, ACI works closely with the executive and legislative branches of state government, as well as businesses and individuals, to promote laws and regulations that foster a positive business climate in New Mexico and combat bad policies that unreasonably impede business. As advocates for the development of business and economic growth for all New Mexicans, ACI submits this *Amicus* Brief to assist the Court in

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[1] Pursuant to Rule 12-215(F) NMRA, ACI indicates that the Contract Companies' counsel, Lewis Roca Rothgerber LLP, provided comments and proposed edits to the Brief, and that Farmers Group, Inc. made a monetary contribution as the attorney in fact for Farmers Insurance Exchange, which was intended to fund the preparation and submission of the Brief.

evaluating the significant economic and business considerations implicated by this matter.

SUMMARY OF PROCEEDINGS

ACI relies on the Statement of Facts and Procedural History put forth by Appellants in their Brief-in-Chief and incorporates those summaries herein by reference.

INTRODUCTION

Appellee seeks to make New Mexico the sole jurisdiction in the nation in which the mere act of enforcing an arms-length contract against a breach—lawfully and in compliance with the contract's negotiated terms—can result in the liability of the enforcing party to pay compensatory *and punitive* damages to the breaching party. Affirming such a rule would upend long-established business principles and expectations; materially invade and alter established bodies of substantive law in other areas unrelated to contract law; and create bad law and even worse policy for the people and businesses of New Mexico by creating an unpredictable business environment, increasing the costs of doing business, overburdening the judiciary with unnecessary litigation, stifling economic growth, and discouraging investment in the state.

ARGUMENT

I. APPELLEE'S REQUESTED APPLICATION OF *PRIMA FACIE* TORT CREATES AMBIGUITY AND UNPREDICTABILITY IN CONTRACTUAL RELATIONS, UPENDING LONG-ESTABLISHED BUSINESS PRINCIPLES AND EXPECTATIONS.

Appellee has brandished the "catch-all" tort of *prima facie* tort to extract compensatory and punitive damages from Appellants Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, Farmers New World Life Insurance Company, and Farmers Insurance Company of Arizona (the "Contract Companies") for Appellee's own breach of the long-standing contract between them. And it subjects two individuals who lived and worked in this State (Craig Allin and Lance Carroll), to the exact same liability for fulfilling their job duties to enforce that same contract. The fact that the cause of action for *prima facie* tort—after all other substantive causes of action were dismissed or withdrawn—was even submitted to the jury for consideration at trial is troubling, not only as a matter of law but as a matter of policy.

A. Justification

New Mexico law requires that a claim for *prima facie* tort be established, in part, by evidence that the defendant's conduct "was not justifiable under all the circumstances." See N.M. UJI Civ. 13-1634 (cited in Negrete v. Maloof Distrib.

L.L.C., 762 F. Supp. 2d 1254, 1295-96 (D.N.M. 2007) (listing elements)); see also Schmitz v. Smentowski, 1990-NMSC-002, ¶ 37, 109 N.M. 386 (same). Where, as here, the enforcing party's actions are authorized by the very terms of the negotiated contract, such conduct is "justified" and a *prima facie* tort cannot be established. See, e.g., Carreon v. Goodtimes Wood Prods., Inc., No. CIV 09-161 BB/CEG, 2011 WL 9686895, at *13 (D.N.M. Mar. 22, 2011) (finding that "if [defendant] was in breach of contract, the remedy for that breach lies in contract, not tort"; and "if [defendant] was not in breach of contract, its legal position was justified and cannot be the basis of a claim for *prima facie* tort").

This framework generally conforms to existing business practices and expectations, as it is clear that a party to a contract (or persons employed to enforce that contract) need not anticipate contract *or* tort law punishment unless it breaches the contract. Appellee's position, however, completely upends this fundamental understanding of contractual and business relations, and creates an alternate universe in which a party that breaches a contract can achieve a windfall—here, compensatory and punitive damages in the amount of approximately $3.5 million—by suing any party that dares to enforce that contract. **[33 RP 8070-72.]**

1. Conduct That Is Both Lawful and Expressly Authorized By the Parties' Contract Must Be Justified.

There are generally two types of lawful conduct: (1) conduct that is lawful because there is nothing (statute, case law, contract) forbidding it, and (2) conduct that is lawful because it is expressly authorized (by statute, case law, contract). In order for our legal system to operate in a predictable way, justification must always exist for the second type of conduct – conduct that is expressly permitted. Thus, at the very least, conduct that is expressly permitted—whether by statute, case law, or contract—cannot be the basis for *prima facie* tort. Otherwise, the law provides little guidance to what is acceptable behavior.

2. Conduct that is Lawful, Complies With the Parties' Contract, and is Done in Furtherance of a Party's Valid Business Interests Must Be Justified.

If a party's lawful enforcement of a contract, in full accordance with the terms of that contract—to protect a party's legitimate, bargained-for business interests—cannot constitute justified conduct, it is hard to imagine what would constitute such justification. The Court's submission of this issue to the jury and then the jury's astronomical award both willfully ignore the numerous and significant legitimate business interests advanced by the Contract Companies' enforcement of their contractual rights, as well as negate all of those that could potentially have been advanced: economic interests (including but not limited to a

business' profit margins and ability to conduct its own cost/benefit analysis), the need to be able to trust agents, employees, and contractors to abide by agreed terms, the party's ability to train and expect its representatives to enforce those agreed terms on a day-to-day basis, the right to exercise freedom of contract (including whether to engage in business with those who breach agreements), the ability to handle business risks, the enforcement of candid business relations, the protection of a business's relationships with (by fairness to) its non-breaching parties, agents, employees, and contractors, and the protection of a business' competitive edge.

In stark contrast, New Mexico law recognizes the right of businesses to make lawful business decisions without second-guessing by the court or jury. See Melnick v. State Farm Mut. Auto. Ins. Co., 1988-NMSC-012, ¶ 20, 106 N.M. 726 (in the context of an employment at-will relationship: "Employers are entitled to be motivated by and to serve their own legitimate business interests, and they must have wide discretion and flexibility in deciding who they employ in an uncertain business world."); see also Cont'l Potash, Inc. v. Freeport-McMoran, Inc., 1993-NMSC-039, ¶ 66, 115 N.M. 690 (refusing to allow plaintiffs to recover damages for defendant's authorized business decisions regarding mining operation: "The defendants were not obligated to act to their economic detriment for the benefit of

the plaintiffs.") (citation omitted); DiIaconi v. New Cal Corp., 1982-NMCA-064, ¶ 29, 97 N.M. 782 (citing the "business judgment" rule, "a court will not interfere with internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.") (citation omitted). Appellee's interpretation of *prima facie* tort would deprive businesses such as the Contract Companies from enjoying the "wide discretion and flexibility" to "serve their own legitimate business interests" (see Melnick, 1988-NMSC-012, ¶ 20), and would impose heightened obligations on businesses far exceeding those bargained for in contract or required by law. And it would expose countless employees and agents to liability for lawfully exercising their discretion while abiding by the legitimate business wishes of their employers and principals.

3. Failure to Recognize the Justification of Lawful Actions Taken Pursuant to a Contract and in Furtherance of Valid Business Interests Will Produce Uncertainty in Business Relationships and Overburden the Courts with Litigation.

If the trial court judgment in this case is affirmed and becomes the law of this state, the predictability of contracts and the ability to conduct business will be seriously jeopardized. The damages awarded in this case illustrate the absurd consequences that flow from a determination that the lawful enforcement of a contract to protect legitimate business interests is not justified conduct as a matter

of law. Here, despite having his contract lawfully terminated for breach, Appellee was able to extract a multi-million dollar judgment from the Contracting Companies for *prima facie* tort. **[33 RP 8070-72.]** Had the Contracting Companies gone so far as to *breach* the Agreement, they would have only been liable for a tiny fraction of the ultimate award.

In addition, Appellants Lance Carroll and Craig Allin, who were merely doing their jobs as representatives of the Contracting Companies **[6 RP 1435 ¶ 5; 7 RP 1468 ¶ 5; 6 RP 1435 ¶ 7; 7 RP 1468 ¶ 7]**, were levied with a multi-million-dollar judgment for enforcing the Agreement. **[33 RP 8070-72.]** Appellee's interpretation of *prima facie* tort robs not only businesses but their employees and agents of the ability to engage in lawful work-related duties without fear of incurring extreme monetary damages, both for the employer/principal and for the employee/agent personally. The law would no longer provide guidance on how to conduct oneself in the business world as an employer, employee, agent, or contractor, and produce a chilling effect on business.

In light of these outcomes, it is clear that the only way to protect oneself from a *prima facie* tort claim upon the breach of contract by a party to that contract, would be to immediately obtain legal counsel and file a lawsuit for breach of contract. Any other action taken in an attempt to enforce the contract through

customary, established, non-judicial channels would place the non-breaching, enforcing party at great risk for significant financial repercussions. Moreover, it logically follows that even the act of filing suit for breach of contract could be argued by the breaching party as a *prima facie* tort. This is particularly true if, as here, the mere enforcement of a contract by termination was found to embody the malicious intent and unjustified conduct necessary to establish a *prima facie* tort – these same lowered standards would presumably apply to the initiation of litigation against a breaching party. It goes without saying that this would further clog and burden an already overloaded court system.

And not only that, when confronted with the other party's breach, the employees or agents tasked with enforcing the contract would face a dilemma – look the other way to avoid tort liability to the breaching party, while exposing themselves to discipline or termination for not fulfilling their job duties; or fulfill those duties, get sued by the breaching party, and have a jury second-guess the motives behind their lawful business behavior. That dilemma leads to further troubling aspects of the trial court's judgment below.

B. Intent to Harm/Motive

Appellee's requested application contradicts existing bodies of substantive law – both with regard to contract law and other areas of law. New Mexico law

requires that a claim for *prima facie* tort be established, in part, by evidence that the defendant "intended that the [act or failure to act] would cause harm to the plaintiff or that defendant knew with certainty that the [act or failure to act] would cause harm to the plaintiff." See N.M. UJI Civ. 13-1634 (cited in Negrete, 762 F. Supp. at 1295-96 (listing elements)); see also Schmitz, 1990-NMSC-002, at ¶ 37 (same). If the defense of justification is no longer available for the lawful enforcement of a contract against a breach, as discussed above, the entire analysis (assuming some injury to plaintiff and a lawful act by defendant) then hinges upon a determination by the judge or jury of the subjective intent or motive of the enforcing person or entity. There are numerous problems with allowing this approach to prevail.

1. Tort Law Cannot Be Used to Rewrite Contracts or Fabricate the Intent of the Parties After the Fact, and the Line Between Tort Law and Contract Law Should Not Be Blurred.

Established law dictates that a court will uphold the intent of the contracting parties, at the time of contracting, when clearly set forth in the contract's unambiguous language. "When a contract is clear as written, a court 'must give effect to the contract and enforce it as written.'" ConocoPhillips Co. v. Lyons, 2013-NMSC-009, ¶ 67, 299 P.2d 844 (quoting Ponder v. State Farm Mut. Auto Ins. Co., 2000-NMSC-033, ¶ 11, 129 N.M. 698). Courts "cannot create a new

agreement for the parties and will not give effect to a party's undisclosed intentions." ConocoPhillips, 2013-NMSC-009, at ¶ 67 (citations and quotations omitted). In direct contravention, Appellee's interpretation will require that courts and juries blatantly ignore the parties' intent at the time of contracting, and instead place singular focus on the intent of the purported *prima facie* tortfeasor at the time of the purported tort.

In fact, that is precisely what happened in this case. The Contract Companies entered into an independent contractor agreement with Appellee, with negotiated terms and conditions that plainly reflected the parties' intent at the time. **[4-23-13 Tr. 86:22-23, 92:1-7, 132:19-23.]** The Agreement reflected the parties' intent as to what conduct would constitute breach of the contract, as well as what remedies were available and appropriate for such breach. For more than a decade, the parties were able to conduct business in a mutually beneficial manner, in accordance with their negotiated terms. **[4-23-13 Tr. 86:22-23, 92:1-7, 132:19-23.]** During that time, Appellee enjoyed the benefits of the parties' mutual understanding and predictability of the parties' contractual agreement, as well as the opportunity to do business with the Contract Companies. Then, Appellee (through his employee) breached a core, material, and central term of the contract

by placing a policy with the Contract Companies' competitor.[2] After confirming that Appellee's conduct constituted a material breach of the Agreement, the Contract Companies and their representatives scrupulously followed the Agreement's termination requirements to terminate the Agreement,[3] and the district court found that they complied with those requirements as a matter of law. **[28 RP 6926-30.]** Despite finding the Contract Companies had lawfully enforced the Agreement, the court permitted the jury to nullify the parties' original negotiated intentions and instead—under an amorphous tort theory—grant a multi-million dollar damages award, including punitive damages. **[33 RP 8070-72.]** By doing so, the court permitted the jury to expand the universe of contract damages well beyond that intended by the parties at the time of contracting. See, e.g., Amrep Sw. v. Shollenbarger Wood Treating, Inc., 1995-NMSC-020, ¶ 28, 119 N.M. 542 (the purpose of the economic loss rule, which conceptually separates tort and contract, "is to preserve the bedrock principle that contract damages be limited to those within the contemplation and control of the parties framing their

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[2] See **4-23-13 Tr. 110:13-111:11, 239:11-240:20, 253:4-254:11, 257:16-258:12; 4-24-13 Tr. 115:15-22, 119:7-21, 123:22-124:11; 4-29-13 Tr. 182:20-186:19; 1 RP 17 ¶¶ B-C; 19 RP 4490-91, 4556, 4559-60, 4603, 4615-34; 28 RP 6926-30.**

[3] See **4-24-13 Tr. 53:3-13, 118:8-124:11, 130:19-136:19, 206:2-207:7; 4-25-13 Tr. 154:1-159:17; 4-26-13 Tr. 11:22-14:8, 74:18-24, 19:17-23:13, 92:6-112:2, 115:2-119:16; 6 RP 1435-37, 1468-70; 16 RP 3772; 18 RP 4280-84; 20 RP 4703.**

agreement") (citations and internal quotation marks omitted). In addition, contrary to New Mexico law, which "holds that as a matter of policy, the parties to a contract should not be allowed to use tort law to alter or avoid the bargain struck in the contract . . . [as t]he law of contract provides an adequate remedy," the court permitted an improper blurring of the lines between tort and contract and permitted the jury to rewrite the parties' agreement. See U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co., 952 F. Supp. 2d 1259, 1269 (D.N.M. 2013) (internal quotation marks and citation omitted).

2. Tort Law is Not Available to Remedy Breach of the Covenant of Good Faith and Fair Dealing, and Appellee Should Not Be Permitted to Use *Prima Facie* Tort to Circumvent that Prohibition.

The New Mexico Supreme Court has affirmed the established principle that

> Generally, a party who executes and enters into a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act of the contracting party. Each party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it, and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby.

Smith v. Price's Creameries, Div. of Creamland Dairies, Inc., 1982-NMSC-102, ¶ 13, 98 N.M. 541 (citations omitted). The Court in Smith refused to inquire into the defendant's motives in seeking to terminate the parties' contracts because it determined that such motivation would be immaterial, and the Court's inquiry

would result in a construction of the termination clause contrary to the plain wording of the agreement." Id. at ¶¶ 23-24. Similarly, the New Mexico Supreme Court has held that an implied covenant of good faith and fair dealing cannot be applied "to override express provisions addressed by the terms of an integrated, written contract." Melnick, 1988-NMSC-012, at ¶ 17. The Court of Appeals has clarified that "the rule in Melnick is not limited to employment contracts, but extends to other types of contracts." Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, at ¶ 48, 133 N.M. 669; see also Cont'l Potash, 1993-NMSC-039, at ¶ 56 ("The general rule is that an implied covenant cannot co-exist with express covenants that specifically cover the same subject matter.") (citation omitted). Any breach of the implied covenant of good faith and fair dealing purported to arise from the enforcement and termination of the Agreement would be covered by the same provisions that are expressly set forth in the Agreement on that same subject matter. Consequently, Appellee was unable to establish a claim of breach of the implied covenant of good faith and fair dealing on any basis he asserted, and the district court granted summary judgment in the Contracting Companies' favor on that claim. Appellee should not be able to use *prima facie* tort to circumvent the court's ruling and obtain the same relief. *See, e.g.*, U.S. ex rel. Custom Grading, Inc., 952 F. Supp. 2d at 1269 (dismissing *prima facie* tort claim because

the economic loss rule "prevents plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract") (internal quotation marks and citations omitted).

3. Tort Law Cannot Be Used to Override Parties' Freedom to Contract—Including the Right Not to Contract—Regardless of Lawful Motive.

Appellee's interpretation would eviscerate the freedom of contract, which is protected by both the federal and state constitutions. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (freedom to contract is entitled to qualified protection under the Fourteenth Amendment); U.S. CONST., ART. I § 10, cl. 1; NEW MEXICO CONST., ART. 2 § 19. "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be enforced." Tharp v. Allis-Chalmers Mfg. Co., 1938-NMSC-0044, ¶ 13; 42 N.M. 443 (quoting 12 Am. Jur. *Contracts* § 172, p. 670); see also United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 1989-NMSC-030, ¶ 13; 108 N.M. 467 (New Mexico has a "strong public policy of freedom to contract"). Freedom of contract grants each party the right to refuse to do business with another party—or to cease doing business with a party— and requires that the exercise of that right will not give rise to a claim for tortious

interference with prospective contractual relations, let alone a nebulous "catch-all" tort, "regardless of the motive for [the] decision." Quintana v. First Interstate Bank of Albuquerque, 1987-NMCA-062, ¶12, 105 N.M. 784, cert denied, 105 N.M. 781 (1987) (emphasis added). "The right to choose freely one's business relations has been described as a fundamental right, [...] and as a fundamental assumption in free business enterprise." Id. at ¶14; see also Kropinak v. ARA Health Services, Inc., 2001-NMCA-081, ¶ 14; 131 N.M. 128 (declining "to extend the implied covenant of good faith and fair dealing to cover bad faith conduct of improper motivation, overreaching, or discharge for a reason contrary to a clear mandate of public policy"). Notably, exceptions to freedom of contract such as anti-discrimination statutes provide both fairness to employees and clear guidance to employers regarding what constitutes lawful, permissible behavior, whereas a *prima facie* tort exception provides no such guidance, as explained above.

4. Appellee's Interpretation of *Prima Facie* Tort Rewards Breaches of Contract While Punishing Lawful Enforcement.

Our long-standing system of contracts is founded upon the recognition that the conditions triggered by a breach of lawful contract—when negotiated at arm's-length[4]—should generally operate to disincentivize breach, which allows reliance

[4] It is worth noting that remedies already exist in the law for illegal, unconscionable and oppressive contracts such as contracts of adhesion, usurious contracts,

by the parties. See generally Avery Wiener Katz, The Option Element in Contracting, 90 Va. L. Rev. 2187, 2192 (comparing typical contracts to option contracts, "It is a basic principle of the common law that promises are generally not legally enforceable unless they are given in exchange for consideration – some payment, performance, or counterpromise that flows back to the promisor or his designee. . . . [O]ne commonly accepted component of the concept is the element of bargain – that is, promises should presumptively be enforceable if they are made as part of a deliberate and arm's-length economic exchange."). See also id. at 2198 ("In ordinary contracts as interpreted under modern legal doctrine, promisors have a duty not to create unreasonable doubt about their contractual performance, both because certainty of performance is part of what the promisee has bargained for and because excessive doubt disrupts the promisee's ability to prepare for performance and to make appropriate reliance investments."). Accordingly, what Appellee would assert as a "injury" to establish *prima facie* tort—the imposition of a negative consequence specifically set forth in the Agreement—is actually a necessary component of every contract; the counterbalance to consideration. For instance, in a mortgage contract, the "injury" of consequences arising from default

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contracts which pose unlawful restraints on trade, contracts with improper provisions such as excessive liquidated damages, and contracts in which consent is improperly obtained by fraud, mistake, duress, or undue influence.

under the loan, including foreclosure and loss of the property, is necessary to secure the parties' agreement and respective consideration. Under the normal order of such relationships, the lender can anticipate that if the borrower breaches the contract by halting mortgage payments, the remedies set out in the contract will help to restore the lender's consideration. See e.g., Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 544 (Mo. Ct. App. 1986) (italics added) (emphasis in original):

> [T]he banker call for Ingram collateral (even if a mistake business judgment) and the consequent call of the note when due and resort to the setoff collection remedy after maturity of the obligation were all exercises of contract right, honest in fact. As such, they do not bespeak intent to injure. The intent to injure a *prima facie* tort suitor must prove is an actual intent to injure the suitor, and not merely an intent to act.

See also Schmitz, 1990-NMSC-002, at ¶ 58 (comparing Centerre Bank of Kansas City, N.A. v. Distribs., Inc., 705 S.W.2d 42, 54 (Mo. Ct. App. 1985) ("The counterclaimants demonstrated that the bank knew that by calling its note it would put the corporation out of business, and presented evidence of personal animus toward the corporation's new owners. The court expressed doubt regarding the evidence of intent to injure, but . . . determined that the bank was justified in calling the loan because it was acting to protect its valid business interest."). Under Appellee's interpretation, however, the borrower could stop payments,

thereby breaching the contract, and then sue the lender for *prima facie* tort (including punitive damages) if the lender attempted to enforce the terms of the mortgage. Appellee's assertion of the law completely disrupts the fundamental paradigm of contract law, and creates an illogical and inequitable rule under which parties who properly perform their contracts can be subject to severe tort liability (including punitive damages) that parties who breach their contracts are not. Not only would this remove the disincentive for a party to breach a contract, but it would destroy any incentive for a party to enter into a contract in the first place.

II. APPELLEE'S REQUESTED APPLICATION OF *PRIMA FACIE* TORT CONTRADICTS EXISTING BODIES OF SUBSTANTIVE LAW.

In addition to the law in the area of contracts, Appellee's interpretation would invade upon and alter the substantive law in other areas. For example, New Mexico law generally upholds the employment-at-will doctrine of employment law, which applies by analogy to the Contract Companies' lawful termination of Appellee's contractual relationship for a reason spelled out in the Agreement. In Schmitz, the New Mexico Supreme Court instructed "that *prima facie* tort should not be used to evade stringent requirements of other established doctrines of law," and gave as its first example a Missouri case holding that "*prima facie* tort cannot be used to avoid employment at will doctrine." 1990-NMSC-002,

at ¶ 63 (citing Lundberg v. Prudential Ins. Co. of Am., 661 S.W.2d 667, 671 (Mo. App. 1983)). See also Hill v. Cray Research, 864 F. Supp. 1070, 1079 (D.N.M. 1991) ("[T]he New Mexico Supreme Court . . . specifically referred with approval to the law of Missouri where *prima facie* tort cannot be used to avoid the employment at will doctrine."). Therefore, under well-established New Mexico law, a plaintiff may not advance a claim for wrongful termination of an at-will employment "under the guise of *prima facie* tort," because that "would emasculate the doctrine of employment terminable at will." E.E.O.C. v. MTS Corp., 937 F. Supp. 1503, 1516 (D.N.M. 1996). See also Yeitrakis v. Schering-Plough Corp., 804 F. Supp. 238, 249 (D. N.M. 1992):

> There may be some indication that the New Mexico legislature, in giving effect to its proclaimed interest in greater job security, might be inclined to modify the at will doctrine. But, to date, it has not addressed the matter and it is not for this Court to engage in piecemeal judicial tinkering in an area so peculiarly suited to comprehensive legislative consideration. Thus, in New Mexico, the at will doctrine continues to permit termination for reasons other than those specifically proscribed and those that do not fall within one of the two narrow exceptions previously discussed . . . The Court therefore concludes . . . that *prima facie* tort is unavailable to remedy the termination of an at will employee, even where he is terminated for bad cause.

Accordingly, the court in Yeitrakis recognized that such drastic revisions to the existing legislative landscape were in the province of the legislature, and not the judiciary. The same applies here, even though Appellee was an independent

contractor terminated for cause under the Agreement. The employment-at-will doctrine is premised on an implied contract allowing termination with or without cause. Thus, an employer can lawfully terminate that employment relationship without having a jury second-guess its business judgment. There is no plausible rationale for prohibiting a *prima facie* tort claim when the employer terminates an at-will relationship (as New Mexico unequivocally does), but allowing a *prima facie* tort claim when (as here) a business lawfully terminates another type of contract relationship pursuant to its express terms.

III. APPELLEE'S REQUESTED APPLICATION OF *PRIMA FACIE* TORT CREATES A HOSTILE BUSINESS ENVIRONMENT IN NEW MEXICO FOR INDIVIDUALS AND BUSINESSES, AND THEREBY STIFLES ECONOMIC GROWTH AND INVESTMENT.

While a few of the nation's states recognize *prima facie* tort claims, many have rejected it. See generally Kenneth J. Vandevelde, The Modern Prima Facie Tort Doctrine, 79 Ky. L.J. 519, 525-528 (1990/1991) (listing various jurisdictions and their general approach to *prima facie* tort). In any event, none—other than New Mexico, should Appellee's interpretation be adopted and validated—fail to recognize that legitimate business interests (and, specifically, the simple, legal enforcement of a bargained contract by its own terms) constitute valid justification sufficient to defeat a *prima facie* tort claim.

A. Appellee's Interpretation of Prima Facie Tort Would Produce a Chilling Effect on Commerce and Business in New Mexico.

Enforceable contracts are the bedrock of a functioning economy that creates business opportunities and jobs. Permitting the imposition of nebulous tort liability against parties who lawfully enforce the terms of their negotiated contracts will destabilize that bedrock foundation and have a chilling effect on commerce in New Mexico. Parties should be permitted to rely on contractual expectations and take advantage of their contractual rights "without feeling the chill that *prima facie* torts may bring." See Mosley v. Titus, 762 F. Supp. 2d 1298, 1333-34 (D.N.M. 2010) (italics added). To subject parties (and their employees and agents) to punishment for exercising those rights and expectations would encourage breach of contract and "may create mischief" with contracts statewide. See id. Similarly, parties should (within the legal parameters defined by statute and case law) be permitted to exercise their rights to contract and work with—or refrain from contracting and working with—any other party. See, e.g., Ewing v. State Farm Mut. Auto. Ins. Co., 6 F. Supp. 2d 1281, 1291 (D.N.M. 1998) ("it is unlikely [*prima facie* tort] was meant to interfere with a company's prerogative to select its employees or independent contractors.").

Appellee's interpretation to the contrary would produce a chilling effect, not only on business relationships in general, but on economic development and

investment in the state. In addition to the uncertainty and unreliability that would permeate all contractual relations, as described above, Appellee's interpretation would introduce a significantly increased need for litigation with regard to any and all aspects of contractual enforcement. Clearly, this would create a hostile and unfriendly business environment that would diminish the already low rates of economic growth and development in the state – both from within New Mexico and from other states.

B. Appellee's Interpretation of *Prima Facie* Tort Creates a Vacuum of Guidance Regarding Acceptable Conduct in Business Relationships.

As discussed above, Appellee's interpretation of *prima facie* tort robs businesses and their employees of the ability to engage in lawful work-related duties without fear of incurring extreme monetary damages levied against employees at various levels of seniority. The law would no longer provide reliable guidance on how to conduct oneself in the business world as an employer, employee, agent, contractor, sub-contractor, vendor, or consumer, with regard to contracts – a fundamental aspect of all business relationships. Moreover, employers and all employees would need to assess the costs of defense and risks of liability for *prima facie* tort against the need to enforce major (and even minor) breaches of contract, before taking any action pursuant to the contract. This would

impact the ability of a business (and its employees) to operate with efficiency. Even something as simple as terminating a vendor contract, rental agreement, or service contract could have devastating consequences for a business and its employees. As discussed above, the repercussions of Appellee's requested interpretation of *prima facie* tort would impact various areas of commerce that rely on contracts and legally-defined business relationships, including employer/employee relations, contractor/subcontractor relations, lender/borrower relations, tenant/landlord relations, seller/purchaser relations, and general person/person or business/business relationships.

C. Appellee's Interpretation of *Prima Facie* Tort Would Cause Businesses to Incur, and Pass On to Consumers, Increased Costs of Doing Business.

If Appellee's interpretation of *prima facie* tort is permitted to stand, the costs of doing business in New Mexico will certainly rise due to the increased need for businesses to: engage in more litigation, hire counsel, and obtain legal advice, enter into inflated settlements, pay excessive jury awards (including, as here, potentially astronomical punitive damages), obtain enhanced insurance coverage, and refrain from taking measures that could increase efficiency and productivity if it meant enforcing or terminating a contract (employment contract, service contract, vendor contract, contractor/subcontractor agreement, rental agreement,

etc.). All of these additional expenditures will potentially increase costs for consumers and employees as well. In addition, businesses would likely become more skeptical of engaging in moderate or higher risk endeavors or innovation, as well as entering into relationships with individuals or entities that posed higher financial risks, which could further stratify the public and impact the economic climate in New Mexico. Businesses, consumers, employers, employees, and individuals throughout the state would suffer. This burden would be particularly onerous on small and mid-sized businesses, whose already challenged profit margins would be further burdened by other businesses declining to risk contracting with them and/or the cost of obtaining legal advice or defending *prima facie* tort lawsuits for simply enforcing their bargained-for contractual rights.

D. Appellees' Interpretation of Prima Facie Tort Would Discourage Business and Economic Investment in New Mexico.

If Appellee's interpretation of *prima facie* tort is affirmed, the resulting uncertainty in the business climate, increase in overall costs, and increase in litigation would inhibit New Mexico's ability to grow businesses of all sizes in New Mexico, and jeopardize the very existence small and mid-sized businesses. This would also severely hamper New Mexico's ability to attract—and retain—out-of-state companies to invest and establish headquarters, satellite locations, manufacturing facilities, or any other business presence here in New Mexico.

The encouragement of business in New Mexico is an important goal of the state. See generally Susana Martinez, Governor of New Mexico, State of the State Address, at 3-5 (Jan. 20, 2015) (available at http://www.governor.state.nm.us/uploads/PressRelease/191a415014634aa89604e0b4790e4768/2015_State_of_the_State_Address.pdf) (discussing the importance of growing businesses of all size, and increasing investment, to the prosperity of the state). Unfortunately, New Mexico currently experiences a relatively negative reputation for its business climate. For instance, in a 2014 study by the U.S. Chamber of Commerce Foundation on the perception of the general business climates of various states, New Mexico ranked 31st in the nation for business climate, down 7 places from its ranking in 2013. See generally U.S. Chamber of Commerce Foundation, Enterprising States 2014 Study (available at http://www.uschamberfoundation.org/sites/default/files/legacy/foundation/Enterprising%20States%202014_0.pdf).

When viewed under the more focused lens of tort liability and litigation, the broader business community's perception of New Mexico is even less favorable. In 2012, the U.S. Chamber of Commerce conducted a study to "explore how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses." See U.S. Chamber Institute for Legal Reform, 2012 State Liability

Systems Survey Lawsuit Climate Ranking the States, at 4 (available at https://www.uschamber.com/2012-state-liability-systems-survey-lawsuit-climate-ranking-states). "Participants in the survey were comprised of a national sample of 1,125 in-house general counsel, senior litigators or attorneys, and other senior executives who indicated that they are knowledgeable about litigation matters at companies with at least $100 million in annual revenues." Id. In the category of overall treatment of tort and contract litigation, New Mexico was ranked 44th in the nation. Id. at 14. In the category of damages, New Mexico was also ranked 44th in the nation. Id. at 17. Clearly, New Mexico's stated goals of business and economic development cannot be achieved without positively changing the perception of the state in the business community nationwide, beginning with contract enforcement and the tort liability and litigation environment in the state. Applying *prima facie* tort in the manner requested by Appellee would create an environment that is even more anti-business and that even further discourages investment in the state.

E. Appellee's Interpretation of *Prima Facie* Tort Would Create the Need for Increased Litigation and Unnecessarily Overburden the Judiciary.

Given the significant risks associated with a party's enforcement or termination of a contract under *prima facie* tort, Appellee's interpretation would

highly increase the demand for litigation. As described above, upon a breach of contract, the non-breaching party would need to immediately obtain legal counsel and file a lawsuit in order to protect its ability to enforce or terminate that contract. Even the act of pursuing litigation for the breach could be argued by the breaching party as a *prima facie* tort; however, any action taken in an attempt to enforce the contract through non-judicial means would likely place the non-breaching party at greater risk. Not only would this race to the courts encourage bad faith filings by breaching parties of a "catch-all" *prima facie* tort claim, it would leave non-breaching parties—who simply wish to enforce or terminate their contracts in a lawful manner that complies with the express terms of such contracts—with little choice than to file a preemptive breach of contract claim. This would also result in a rise in anticipatory breaches of contract. In addition, due to the subjective nature of the intent/motive element of *prima facie* tort, as discussed above, there would likely be an increased need for litigation to proceed to trial rather than be addressed on dispositive motions. Clearly, all of these factors would clog and burden an already overloaded court system and drain scarce judicial resources.

This new landscape would not only severely impact large businesses and corporations, but business of all sizes, their employees, agents, and contractors, as well as the people of New Mexico. As noted above, Appellee's interpretation

would impact insurance agent contracts such as the Agreement at issue here, as well as simple real estate contracts, mortgages, tenancies, employment contracts allowing termination only for cause, sales contracts and service contracts of all types, and all other types of contracts. In turn, this would create an untenable situation for most New Mexicans going about their daily lives. There is no good or legitimate reason to validate and enact such a policy and a plethora of reasons why it should be eliminated.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Association of Commerce & Industry of New Mexico respectfully requests that this Court order reversal of the district court judgment, and grant such other and further relief as may be just and proper.

STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae Association of Commerce & Industry of New Mexico requests oral argument. Oral argument may assist the Court in understanding the interests of ACI and the business community in New Mexico, assessing legal and policy concerns that impact the business community in New Mexico, and disposing of the merits of this appeal.

Dated: February 16, 2015.

Respectfully submitted,

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I HEREBY CERTIFY that on February 16, 2015, a true and correct copy of the foregoing *AMICUS CURIAE* BRIEF BY THE ASSOCIATION OF COMMERCE & INDUSTRY OF NEW MEXICO was served by email and first-class mail, postage prepaid and addressed to:

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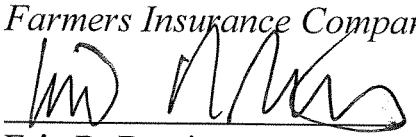

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