IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CRAIG BEAUDRY,

Plaintiff-Appellee,

v.

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.

No. 33,618
Santa Fe County
Case No. D-101-CV-2011-00646

ORAL ARGUMENT REQUESTED

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

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

New Mexico Cases

Page

Cases from Other Jurisdictions

Page

Page

Other Authorities

STATEMENT OF COMPLIANCE

The body of this brief in chief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G), we certify that this brief is proportionally spaced and the body of the brief contains 10,803 words. This brief was prepared and the word count was determined using Microsoft Office Professional Plus 2010.

I. INTRODUCTION

The district court granted 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 "Companies") summary judgment on Appellee Craig Beaudry's breach of contract claim because it found that the Companies' termination of their business relationship with Beaudry was authorized, as a matter of law, by the parties' contract. The district court then allowed the jury to decide whether the Companies and Appellants Lance Carroll and Craig Allin, were liable for *prima facie* tort based on the Companies' exercise of those contractually authorized termination rights. The jury found that they were liable.

Beaudry's *prima facie* tort claim should never have been submitted to the jury.

First, a tort can only be based on the breach of a duty created by *law*, rather than by *contract*. *Kreischer v. Armijo*, 1994-NMCA-18, ¶6; 118 N.M. 671. In *Schmitz v. Smentowski,* 1990-NMSC-002, ¶35; 109 N.M. 386, the Supreme Court adopted a new "*remedy*, for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories." (Emphasis added.) The Court did not alter the requirement that torts must be based on the breach of a *legal* duty. Since *Schmitz*, the reported cases

have reaffirmed that torts cannot be based solely on the breach of a *contractual* right. *E.g.*, *Cottonwood Enters. v. McAlpin*, 1991-NMSC-044, ¶11; 111 N.M. 793. Beaudry's *prima facie* tort claim was based entirely on the allegedly unauthorized termination of the parties' *contract*. In short, Beaudry never satisfied the first requisite of a tort claim — breach of a *legal* duty.

Second, the Supreme Court has cautioned that *prima facie* tort should not be used to "evade stringent requirements of other established doctrines of law." *Schmitz,* 1990-NMSC-002, ¶63. Application of *prima facie* tort in the present case "evaded" multiple established doctrines of law, including: (i) the right not to contract with another, regardless of motive; (ii) the prohibition against using tort law to rewrite contracts; (iii) the absence of any recognized tort of "bad faith *performance* of contract;" and (iv) tort remedies cannot be invoked for a breach of the implied covenant.

Third, an essential element of *prima facie* tort is that the defendant have "an intent to injure the plaintiff." The "intent to injure" must be to a "*legally protected interest.*" A party to a lawfully terminated contract does not, as a matter of law, have a legally protected interest that the defendant can injure. *Hill v. Cray Research, Inc.*, 864 F. Supp. 1070, 1079 (D.N.M. 1991).

Fourth, *prima facie* tort requires "injury to the plaintiff." Again, the injury must be to a "legally protected interest," and a party to a legally terminated

contract does "not suffer injury to a legally protected interest." *Jackson vs. Freightliner Corp.*, 96 F.3d 1453, 1996 WL 500666 *2, (10th Cir. Sept. 5, 1996).

Fifth, *prima facie* tort requires that the defendant has acted without "*justification*". Where, as here, the complained-of conduct is, as a matter of law, authorized by contract, the conduct is also *justified*, as a matter of law. *Carreon v. Goodtimes Wood Prods., Inc.*, 2011 WL 9686895 *13 (D.N.M. March 22, 2011) holding ("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").

Sixth, *prima facie* tort cannot be based on the same allegations that are a basis for another of the plaintiff's claims; *prima facie* tort must be based on "factual allegations that are somehow unique." *Id.* Here, Beaudry's *prima facie* tort claim was based on the same factual allegations that formed the basis for his other claims, including his failed claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Seventh, the district court's interpretation of *prima facie* tort created an illogical and inequitable rule under which parties who properly perform their contracts can be subject to tort liability (including punitive damages) that parties who breach their contracts are not.

II. STATEMENT OF FACTS

A. The Parties

Appellee Beaudry was an insurance agent who contracted to sell insurance policies on behalf of the Companies under an Agent Appointment Agreement (the "Agreement") dated December 16, 2000. **[1 RP 17-19.]**

Appellant Lance Carroll contracted with the Companies to be a District Manager for the territory that included Beaudry's agency. **[4-23-13 Tr.-28:21-25; 6 RP 1435 ¶ 5; 7 RP 1468 ¶ 5.]**

Appellant Craig Allin served as the Companies' State Director in New Mexico. **[4-25-13 Tr. 180:8-22; 6 RP 1435 ¶ 7; 7 RP 1468 ¶ 7.]**

Farmers Group, Inc. ("FGI"), Tom Gutierrez (another insurance agent for the Contract Companies), and Christopher Kerr (the Division Marketing Manager), were also named as defendants but are not appellants. Beaudry's claims against FGI were dismissed and Gutierrez and Kerr were found not liable by the jury.

B. Beaudry's Agreement With The Companies

The Agreement specified that Beaudry was an "independent contractor." **[1 RP 19 ¶ J.]** The Agreement obligated Beaudry to "submit to the Companies every request or application for insurance for the classes and lines underwritten by the Companies and eligible in accordance with their Rules and Manuals." **[1 RP 17.]** It further provided that, "[a]ll business acceptable to the Companies and written by the Agent will be placed with the Companies," and that the Agent must "servic[e]

all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." **[1 RP 17 ¶¶ B.1 & B.2.]**

The Agreement was terminable upon three months' written notice and terminable for specified reasons on thirty days' written notice. One of the specified reasons was "[s]witching insurance from the Companies to another carrier." **[1 RP 17 ¶ C.]**

C. Beaudry Was Terminated For Breaching The Agreement

From 2000 through 2011, Beaudry operated an insurance agency in Taos, selling policies to the Companies' policyholders pursuant to the Agreement. **[4-23-13 Tr. 86:22-23, 92:1-7, 132:19-23.]** One of those policyholders was Moises Martinez. **[4-23-13 Tr. 104:16-105:8; 18 RP 4280-84; 19 RP 4539-43, 4603.]**

In September 2010, Beaudry placed one of Martinez's policies with a rival carrier, *i.e.*, CNA.[1] Appellants investigated and concluded that Beaudry's agency had breached the Agreement. Appellants elected to terminate the Agreement in accordance with the Companies' policy of terminating agents who place eligible business outside the Companies.[2]

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[1] **[*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.]**

[2] **[*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,** *(cont'd)*

By letter dated February 1, 2011, the Companies notified Beaudry that the Agreement would be terminated effective March 5, 2011. **[7 RP 1464; 4-26-13 Tr. 104:10-106:17.]** The termination date was later changed to March 24, 2011. **[20 RP 4715.]** Beaudry, therefore, received 51 days' notice of his termination — well in excess of the 30 days required for termination based on a breach of the Agreement.[3]

Beaudry's termination was considered by a Termination Review Board and ultimately upheld by the Companies. **[16 RP 3804, 3806, 3808; 4-24-13 Tr. 27:20-25.]**

III. PROCEDURAL HISTORY

A. Beaudry's Third Amended Complaint

On March 1, 2012, Beaudry filed the operative third amended complaint ("3AC") **[6 RP 1433-55]**, naming the Companies, FGI, Carroll, Gutierrez, Allin, and Kerr as defendants. The 3AC contained nine counts:

Count 1 tortious interference with contract;

Count 2 tortious interference with prospective contractual relations;

(cont'd from previous page)
115:2-119:16; 6 RP 1435-37, 1468-70; 16 RP 3772; 18 RP 4280-84; 20 RP 4703.]

[3] The undisputed evidence was that the Companies consistently invoked their termination rights when agents placed business improperly. **[4-24-13 Tr. 115:1-119:21, 206:2-207:13; 4-26-13 Tr. 92:6-112:2, 115:2-119:16.]**

Count 3 breach of contract;

Count 4 breach of the covenant of good faith and fair dealing;

Count 5 conspiracy;

Count 6 intentional infliction of emotional distress;

Count 7 *prima facie* tort;

Count 8 violation of the New Mexico Insurance Code, and

Count 9 punitive damages.

[6 RP 1433-55.]

B. Six Of Beaudry's Nine Counts Were Dismissed Or Voluntarily Abandoned.

On December 17, 2012, the district court:

- Dismissed Beaudry's intentional interference with prospective contractual relations claim (Count No. II) in its entirety;
- Dismissed Beaudry's intentional infliction of emotional distress claim (Count VI) in its entirety;
- Dismissed Beaudry's intentional interference with contract claims (Count I) against the Companies and FGI; and
- Dismissed Beaudry's conspiracy claim (Count V) as to the Companies and FGI.

[29 RP 7193-95.]

On the same day, the court rejected Appellants' argument that there was insufficient evidence to create a fact issue as to *prima facie* tort. **[29 RP 7193-**

95.][4]

On January 3, 2013, the district court dismissed Beaudry's claim for violations of the Insurance Code (Count VIII) finding Beaudry had waived any rights he might have otherwise had under the statute upon which the claim was based. **[28 RP 6703-05.]**

On January 8, 2013, the district court ruled that Beaudry's allegations of procedural errors in the TRB proceedings did not give rise to claims and limited inquiry into the TRB proceeding as to whether the proceedings were improperly restricted to procedural matters as opposed to giving Beaudry the chance to convince the Appellants that it was not in their best interest to terminate the Agreement. **[28 RP 6852-54.]**

On January 11, 2013, the district court dismissed all claims based on calculation of contract value under the Agreement. **[28 RP 6901-03.]**

On January 11, 2013, the district court dismissed Beaudry's breach of contract (Count III) and breach of the implied covenant of good faith and fair dealing (Count IV) claims to the extent they were based on allegations of delay and inaccuracy by Appellants related to Beaudry's U5 Form. **[28 RP 6898-900.]**

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[4] The Court's December 17, 2012 bench rulings are memorialized in a January 30, 2013 written order. **[29 RP 7193-95.]**

On January 14, 2013, the district court ruled that, as a matter of law, the Agreement was properly terminated according to its terms because Beaudry (through the conduct of his employee) breached the Agreement by placing the Martinez Plaza policy with CNA. **[28 RP 6926-30.]** Beaudry concluded that this ruling precluded his proceeding with his claim for tortious interference against the individual defendants (Count I), claim for breach of contract as to the Termination Review Board (Count III), and claim for breach of the covenant of good faith and fair dealing as to the Termination Review Board (Count IV). He voluntarily dismissed those claims subject to his right to renew them if the January 14 ruling were to be reversed on appeal. **[32 RP 7895-7930.]**

C. Appellants Renewed Their Motion For Summary Judgment As To Beaudry's *Prima Facie* Tort Count

After the district court's January 14, 2013 ruling that the Companies had lawfully terminated the Agreement, Appellants renewed their motion for summary judgment on Beaudry's *prima facie* tort claim. **[32 RP 7492-7527.]** In that motion, Appellants explained that the *prima facie* tort claim should be dismissed for multiple reasons, including:

- Beaudry's failure to identify a legal, as opposed to a contractual, duty that could even support a tort claim **[32 RP 7498-99]**;
- The district court's dismissal of the breach of contract and breach of the implied covenant counts meant that Beaudry had no "legally protected interest" that could be injured as required for *prima facie* tort **[32 RP 7495-98]**; and

- The dismissal of those counts also defeated Beaudry's ability to establish that his termination was "without justification." **[32 RP 7495.]**

In addition to disposing of Beaudry's *prima facie* tort claim, the renewed motion disposed of his conspiracy claim (because there would have been no predicate tort) and his punitive damages claim (because there would be no surviving claims upon which to base punitive damages).

In opposition, Beaudry argued he should be allowed to pursue *prima facie* tort because he "only has this claim left because all other traditional remedies have been dismissed, either expressly or implicitly, by the Court." **[31 RP 7641.]** This argument directly conflicted with precedent holdings that "*prima facie* tort should not be permitted to duplicate, or remedy a defect in, another established cause of action" and "should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs." *Yeitrakis v. Schering-Plough Corp.*, 804 F. Supp. 238, 249, 251 (D.N.M. 1992).

On March 26, 2013, the district court denied Appellants' renewed motion for summary judgment. **[3-26-13 T. 26-27:19.]**

D. The Case Proceeded To Trial Solely On Beaudry's Conspiracy And *Prima Facie* Tort Counts

The case proceeded to trial only on Beaudry's claims (i) against the individual defendants for conspiracy to commit *prima facie* tort (Count V) and (ii) against all defendants for *prima facie* tort (Count VII). Both counts were

"based on allegations that [the defendants'] lawfully terminated or lawfully took actions that resulted in the termination of Plaintiff's Agent Appointment Agreement with the intent to injure plaintiff and without justification." **[33 RP 7898.]**

The case was tried to a jury from April 22, 2013 through May 1, 2013. At the close of Beaudry's evidence, all Defendants moved for judgment as a matter of law. Appellants renewed their argument that *prima facie* tort does not apply to the lawful and authorized termination of a contract. Appellants also argued Beaudry had failed to establish all of the required elements of *prima facie* tort, including intent to injure a legally protected interest and lack of justification. **[4-29-13 Tr. 97:6-121:7.]**

The district court denied the Appellants' motions for judgment as a matter of law. **[4-29-13 Tr. 121:8-124:9.]**

E. The Pertinent Jury Instructions

1. Appellants' Proposed Instructions

Appellants proposed jury instructions that supplemented and modified the Uniform Jury Instructions ("UJIs").

First, because the UJI did not specify that the complained-of act had to be *lawful*, Appellants submitted a slightly revised jury instruction concerning *prima facie* tort. **[33 RP 7982-82.]** Second, Appellants requested an instruction that

"[a]ny Defendant acting pursuant to a legitimate business interest cannot be liable for *prima facie* tort." **[33 RP 7986.]** Third, Appellants sought a jury instruction that the jury was not to substitute its own judgment for Appellants' business judgment in making termination decisions. **[33 RP 7987.]** The district court rejected all of those requests. **[*Id.*; 4-29-13 Tr. 20:24-33:22.]**

Appellants requested an additional jury instruction clarifying the role of punitive damages because New Mexico law does not provide any other procedural safeguards for defendants (such as requiring clear and convincing evidence). Specifically, Appellants asked the district court to instruct the jury that when awarding punitive damages, they should also consider the deterrent effect the compensatory damage award will have. **[33 RP 7993.]** The district court rejected this instruction. **[*Id.*; 4-29-13 Tr. 20:24-33:22.]**

Appellants requested jury instructions on whether the Agreement was terminable at will (and limiting damages accordingly) and a special verdict form that allowed the jury to determine whether the Agreement was terminable at will. **[33 RP 7977-79, 7994-95.]** The district court rejected those instructions and declined to give the special verdict form. **[*Id.*; 4-29-13 Tr. 20:24-33:22; *compare* 33 RP 7999-8015 (Def's Proposed Instructions) *with* 33 RP 8017-48 (Jury Instructions Given).]**

2. The Jury Instructions Given By The Court

The district court instructed the jury that:

> In this case, you will hear evidence about the termination of Plaintiff's Agent Appointment agreement. The Court has ruled as a matter of law that Defendants had the legal right to terminate Plaintiff's Agent Appointment Agreement because of acts of Plaintiff's employee. . . relating to the canceling of a Farmer insurance policy on the Martinez Plaza and the submission and temporary placement of such insurance with CNA, another insurer. *You are instructed to accept as true the fact that the Defendants had the legal right to terminate the Plaintiff's Agent Appointment Agreement.*

[33 RP 8016 (emphasis added).]

The district court then effectively nullified what it had just said by instructing the jurors that they could impose liability on Appellants for exercising their "legal right" to terminate the Agreement:

> Plaintiff claims damages from each Defendant on the basis that such Defendant intended to cause Plaintiff harm and succeed in doing so. In order to recover damages from any Defendant on this claim, Plaintiff must show as to that Defendant:
>
> 1. That Defendant intentionally terminated or intentionally took actions that resulted in the termination of Plaintiff's Agent Appointment Agreement;
>
> 2. That Defendant intended those actions to harm Plaintiff;
>
> 3. That Defendant's act was a cause of Plaintiff's harm; and

4. The Defendant's conduct was not justifiable under all the circumstances.

Defendants state that they were justified in acting on the basis that Plaintiff breached the contract when his agency canceled a Farmers insurance policy on the Martinez Plaza and submitted and placed such insurance with CNA, another insurer and Defendant Contract Companies state they have a zero tolerance policy for that type of breach.

Each Defendant's justification must be balanced to determine if it outweighs any motive of Defendant to injure Plaintiff. In determining whether Defendant's act was justifiable or not under the circumstances, you must weigh the following factors:

1. The nature and seriousness of the harm to Plaintiff;

2. The fairness or unfairness of the means used by that Defendant;

3. That Defendant's motive or motives; and

4. The value to that Defendant or to society in general of the interests advanced by that Defendant's conduct.

[33 RP 8020-21.]

The district court further instructed the jurors that, if they found liability, they could award, as *prima facie* tort damages, all of the same contract-based amounts that Beaudry had sought under his by-then-dismissed breach of contract and breach of the implied covenant claims, and emotional distress damages:

If you should decide in favor of Craig Beaudry on any of his claims of prima facie tort, then you must fix the amount of money damages which reasonably and fairly compensate him for any of the following elements of damages proved by

Mr. Beaudry to have resulted from the wrongful conduct as claimed. Craig Beaudry' s claims for damages are:

loss of past earnings

loss of future earnings

emotional distress damages, both past and future.

[33 RP 8028.]

Finally, the district court instructed the jury that, if it found Appellants' exercise of their "legal rights" to terminate the Agreement constituted *prima facie* tort, the jury could award punitive damages for the exercise of those "legal rights":

In this case, Plaintiff seeks to recover punitive damages from the Contract Companies. You may consider punitive damages only if you find that Plaintiff should recover compensatory damages.

If you find that the conduct of Tom Gutierrez, Lance Carroll, Christopher Kerr, Craig Allin or the conduct of Farmers Group, Inc., acting as agent for the Contract Companies was malicious you may award punitive damages against the Contract Companies.

Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your consideration. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

[33 RP 8032.]

F. The Jury Found For Beaudry Solely On The *Prima Facie* Tort Claim

On May 1, the jury found *in favor of* all defendants on the conspiracy claim.

The jury found *in favor of* Gutierrez and Kerr on the *prima facie* tort claim.

The jury found *against* the Companies, as well as Carroll and Allin, on the *prima facie* tort claim and awarded $1 million in compensatory damages. The jury also awarded $2.5 million in punitive damages against the Companies only. **[33 RP 8070-72.]**

G. Post-Trial Motions

Appellants filed three post-trial motions:

(1) a motion to vacate or remit the punitive damage award and a renewed motion for judgment as a matter of law that the *prima facie* tort claim was legally deficient **[35 RP 8322-38]**;

(2) a renewed motion for judgment as a matter of law or a new trial because the *prima facie* tort claim was not supported by the evidence **[33 RP 8194-200; 34 RP 8201-321]**; and

(3) a motion to vacate or remit the punitive damage award **[34 RP 8347-62].**

The district court denied all three post-trial motions. **[38 RP 9284-92.]**

On February 14, 2014, Appellants filed a timely notice of appeal. **[38 RP 9295-96.]**

IV. STANDARDS OF REVIEW

Appellate courts review *de novo* a district court's denial of motions for summary judgment and directed verdict. *See McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-22, ¶36, 143 N.M. 740; *Wilson v. Fritschy*, 2002 - NMCA- 105, ¶10, 132 N.M 785.

Appellate courts also review *de novo* the constitutionality of a punitive damage award by "mak[ing] an independent assessment of the record." *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021 ¶¶ 17-19, 132 N.M. 401.

V. ARGUMENT

A. Beaudry's *Prima Facie* Tort Claim Evaded The Stringent Requirements Of Multiple Established Doctrines Of Law

In *Schmitz*, the Court cautioned that *prima facie* tort should not be used to "evade stringent requirements of other established doctrines of law." 1990-NMSC-002, ¶63. The cases since *Schmitz* have reiterated and refined this restriction. *Prima facie* tort should not be permitted to duplicate, or remedy a defect in, another established cause of action. *Yeitrakis*, 804 F. Supp. at 249. In addition, the doctrine "should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs." *Id.* at 251. Nor should it be used "to shadow

other more traditional causes of action, only to gain meaning in the event that those traditional causes of action prove "defective." *Hill*, 864 F. Supp. at 1079.

1. Beaudry's *Prima Facie* Tort Claim Evaded The Established Doctrine That Tort Claims Must Be Based On The Breach Of A Legal Duty

Torts do not create legal duties. Rather, torts provide remedies for the breach of legal duties. For example, the tort of trespass does not create property rights; rather, it provides a means to remedy the breach of the legal duty not to violate property rights. Similarly, *prima facie* tort does not create a new legal duty.

As explained in *Schmitz*, *prima facie* tort "provides a *remedy* for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories." *Schmitz*, 1990-NMSC-002, ¶35 (emphasis added).

(a) A Tort Can Only Be Based On A Duty Created By Law, Not Upon An Obligation Which Arises Solely From Contract

"Courts have long followed the rule that 'the difference between a tort and contract action is that a breach of contract is a failure of performance of a duty arising or imposed by agreement; whereas a tort is a violation of a duty imposed by law.'" *Kreischer*, 1994-NMCA-118, ¶6. This difference was explained, in *Cottonwood Enterprises*, 1989-NMSC-064, ¶11, in an opinion written by Chief Justice Sosa, who was a member of the Court that decided *Schmitz* a year earlier:

> "[T]he tort of negligence must be based upon a duty other than one imposed by the contract. *Cf. Stern v. Farah Bros.*, 17 N.M. 516, 529, 133 P. 400, 404 (1913) (where there is no legal duty except that arising from contract, there can be no election between an action on contract and one in tort since in such case there is no cause of action in tort)."

See also Bernalillo County Deputy Sheriffs Ass'n v. County of Bernalillo, 1992-NMSC-009, ¶13; 114 N.M. 695 ("Only where a duty recognized by the law of torts exists between the plaintiff and defendant distinct from a duty imposed by the contract will a tort action lie for conduct in breach of the contract." (*quoting Preferred Mktg. v. Hawkeye Nat'l Life Ins. Co.*, 452 N.W.2d 389, 397 (Iowa 1990) (*citing* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 92 (5th ed. 1984) (separate duty apart from contractual duty required to give rise to tort action)).

In *Kreischer*, the plaintiff contracted with a corporation to remodel his home. When the remodeling was not completed, the plaintiff filed a breach of contract suit against an officer of the corporation, but not against the corporation itself. 1994-NMCA-118, ¶3. The court dismissed the case because the plaintiff did not have a contract with the officer, meaning the officer could only be liable in tort, not in contract. *Id.* ¶7. The Court of Appeals affirmed explaining that, although plaintiff's claims were "couched in tort language, the gravamen of the complaint was essentially the failure of Defendant to complete the construction work in accordance with the contract." *Id.* ¶5. "The mere titling of the cause of

action as one for gross negligence did not change its nature. . . . The difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising or imposed by agreement; whereas, a tort is a violation of a duty imposed by law.'" *Id.* ¶6 (*quoting Tamarac Dev. Co. v. Delamater, Freud & Assoc., P.A.*, 675 P.2d 361, 363 (Kan. 1984)); *accord Bernalillo County Deputy Sheriffs Ass'n*, 1992-NMSC-065, ¶13 (breach of the contractual duty to pay overtime wages did not give rise to an independent action in tort).

(b) Beaudry Never Identified – Much Less Established – A Duty Which Did Not Arise Solely From Contract

Returning to the present case, Beaudry never identified – much less established – a duty created by law (as opposed to one created solely by contract) that Appellants breached. The gravamen of Beaudry's *prima facie* tort claim was for breach of a contractual duty, *i.e.*, wrongful termination of the Agreement. **[RP 001452-53 ¶¶ 80-85; RP 008020-21, 28.]** But for the Agreement, there would have been nothing for Appellants to "wrongfully terminate." Beaudry did not allege that Appellants violated any duties imposed by law separate and apart from those created by the Agreement. The only allegedly wrongful conduct that was submitted to the jury was Appellants' termination of the Agreement. Without the breach of a duty created by law, there was nothing which *prima facie* tort could remedy.

(c) *Schmitz* Nowhere Held Or Suggested *Prima Facie* Tort Can Be Based On Conduct That Is Authorized By A Contract

Schmitz arose out of a three-way land exchange among Schmitz, the Mocks, and the Edmondsons. 1990-NMSC-002, ¶34-7. As a part of the transaction, a note for monies that Schmitz owed to the Mocks was made payable to Smentowski, a straw man who had no personal interest in the note, and held title in trust for the Mocks. Smentowski was instructed to forward Schmitz' payments on the note to the Edmondsons to cover the mortgage payments that they were owed by the Mocks. *Id.* ¶3.

Smentowski later obtained a loan from the Bank, which knew that Smentowski did not have any beneficial interest in the note. Nonetheless, the Bank took possession of the note in an effort to deceive the bank examiners into thinking that the Smentowski loan was backed by more collateral than was actually the case. Smentowski defaulted on the loan. The Bank then directed Schmitz to make payments on the note into court, rather than to the Edmondsons. *Id.* ¶4. The Bank's wrongful demand set off a chain of harmful events including threatened foreclosures and forced borrowings. *Id.* Schmitz filed an interpleader action to determine to whom he should make payment. *Id.* ¶5. The Mocks answered and cross complained against the Bank for negligence, fraud, and conspiracy to defraud. *Id.*

The Mocks did not allege that they had any contractual relationship with the Bank. *Id. passim.* The Bank did not claim that its conduct was contractually authorized. *Id.* The trial court found that the Bank's knowing diversion of monies that should have gone to the Mocks was wrongful, but did not satisfy the requirements of any recognized tort. *Id.* The court then granted the Mocks' motion to add a claim for *prima facie* tort. *Id.* The case was submitted to the jury on the Mocks' claims for (i) negligence and (ii) *prima facie* tort. *Id.* ¶6. The jury found in favor of the Mocks on both of those claims. *Id.*

On appeal, the Supreme Court affirmed, explaining that *prima facie* tort "provides a *remedy* for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories." *Id.* ¶35 (emphasis added). Stated differently "the activity complained of be otherwise lawful and otherwise not fit into any other established tort category. . . ." *Id.* ¶ 38. In short, *prima facie* tort addresses breaches of legal duties for which there is no existing tort remedy. The *Schmitz* decision nowhere suggested the tort applies to conduct that is authorized by contract. To the contrary, the Court cautioned that *prima facie* tort

- "should not be used to evade stringent requirements of other established doctrines of law." *Id.* ¶63; and
- "cannot be used to avoid [the] employment at will

doctrine." *Id.*

(d) *Schmitz* Was Based On Authority From Jurisdictions That Hold *Prima Facie* Tort Does Not Apply To Conduct That Is Expressly Authorized By Contract

In *Schmitz* the Court traced the development of *prima facie* tort in New York and Missouri. *Id.* ¶¶35-48. The highest courts of both of those states have held that *prima facie* tort does not apply to wrongful termination claims by at-will employees. *See Dake v. Tuell*, 687 S.W.2d 191, 192 (Mo. 1985) (*en banc*) (holding discharged at-will employees cannot maintain a suit for wrongful discharge by "cloaking their claims in the misty shroud of *prima facie* tort"); *Murphy v. Am. Home Prods Corp.*, 448 N.E. 2d 86 (N.Y. 1983) (holding that the *prima facie* tort doctrine cannot be used to circumvent the at-will employment doctrine).

The at-will employment "rule rests upon the concept of freedom of contract" and has been described "as permitting an employer to discharge, 'for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.'" *Vigil v. Arzola*, 1983-NM-082, ¶17; 102 N.M. 6822 (citations omitted).

Schmitz relied on *Lundberg v. Prudential Ins. Co. of Am.*, 661 S.W.2d. 667, 668, 691 (Mo. Ct. App. 1983), an at-will employment termination case in which the Missouri Court of Appeals affirmed a directed verdict in favor of the employer because the employer had "the right to terminate [the plaintiff] 'at any time,

without cause or reason, or for any reason,'. . . exercise of [that] *contractual right*, absent attenuating circumstance non-existent in this case, is neither unfair nor morally offensive when measured by obtaining societal standards." *Id.* at 671 (emphasis added).

Lundberg, in turn, relied on *Porter v. Crawford & Co.*, 611 S.W. 2d. 265 (Mo. Ct. App. 1980), the case in which Missouri first adopted *prima facie* tort. In *Porter*, the defendant wrongfully stopped payment on a check causing a number of plaintiff's checks to bounce causing his being assessed penalties for not having sufficient funds and suffering the taint of being a deadbeat. 611 S.W. 2d at 267. The defendant's conduct did not, however, fall within any existing tort. The *Porter* court adopted the *prima facie* tort doctrine so there would be a remedy. *Id.*

The defendant in *Porter* moved for reconsideration citing *Loewenberg v. De Voigne*, 123 S.W. 99 (Mo. Ct. App. 1909) for the proposition that "no amount of bad intent can render a lawful act actionable in damages." *Porter*, 611 S.W.2d at 273. In *Loewenberg*, the court explained that even the "malicious" exercise of a contractual right is not actionable regardless of the motive and even "proof that the thing done was done from the worst of motives will not make the matter complained of actionable." 123 S.W.2d at 98; *accord Smith v. Price's Creameries,* 1982-NMSC-102, ¶24; 98 N.M. 541 ("Even if defendant terminated the contract in bad faith, plaintiff cannot recover . . . .").

The *Porter* court denied the motion for reconsideration finding *Loewenberg* distinguishable because it "is a *contract* action, not one in tort. . . ." *Porter*, 611 S.W.2d at 273 (emphasis in original).

(e) The Rationale For Retroactive Application of *Prima Facie* Tort Doctrine Confirms That The Doctrine Does Not Apply To Contract-Based Conduct

Following *Schmitz*, a dispute arose over whether *prima facie* applied retroactively. The Supreme Court ultimately ruled that it did. *See Beavers v. Johnson Controls World Servs*, 1994-NMSC-094, ¶39; 118 N.M. 391.[5]

The Court began by explaining that for a decision not to be retroactive, it must establish a new principle of law by overruling clear precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Id.* ¶26.

The Court found that *Schmitz* established a new principal of law that was not clearly foreshadowed by previous decisions. *Id.* The Court then turned to the "subfactor of reliance — a factor that is so important in retroactivity analysis that

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[5] In the almost 25 years that have elapsed since *Schmitz*, *Beavers* is the only reported case in this State where a final judgment based on *prima facie* tort has been affirmed on appeal. The *prima facie* tort claim in *Beavers* was not based on conduct authorized by contract. Beavers did not allege wrongful termination or any other contract based claim. *Beavers v. Johnson Controls World Services, Inc.*, 120 N.M. 343, 901 P.2d. 761 (N.M. Ct. App. 1995).

we think it deserves recognition almost independent from the recognition given to the element 'newness' in the first factor." *Id.*

The Court explained both that "[t]he reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which *rules of contract and property law* may underlie the negotiations between or among parties to a transaction" and that "*[s]tare decisis* considerations are at their zenith in contract- and property-law settings" whereas "the purposes of tort law do not give rise, generally, to reliance-based conduct." *Id.* ¶¶28 & 30 (emphasis added). The Court further stated: "In the specific context of *prima facie* tort, it is hard to imagine that a potential defendant plans his or her conduct with rules of liability or non-liability in mind." *Id.* ¶31

The Supreme Court held that *Schmitz* applied retroactively because *prima facie* tort does not apply where parties rely on the terms of a contract to govern their conduct and to avoid liability. *Id.* ¶¶38, 39.

That is precisely what happened in the present case. Appellants relied on the Agreement's specification of the parties' rights and obligations. They went to pains to confirm that Beaudry's conduct violated the Agreement and justified termination under the terms of the Agreement. They scrupulously followed the Agreement's termination requirements. The district court found that they complied with those

requirements as a matter of law. It is difficult to postulate a clearer example of "reliance-based conduct," (*id.* ¶30-31) to which *prima facie* tort does not apply.

2. Beaudry's *Prima Facie* Tort Claim Evaded The Established Doctrine That Parties Have The Right Not To Contract With Others, Regardless of Motive

Freedom of contract has long been a key pillar of New Mexico law. "[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; *see also United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, ¶13; 108 N.M. 467.

Freedom of contract grants each party the right to refuse to do business with another party, and requires that the exercise of that right will not give rise to a claim for tortious interference with prospective contractual relations "*regardless of the motive for [the] decision.*" *Quintana* v. *First Interstate Bank of Abuquerque*, 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.* ¶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").

Accordingly, based on freedom of contract, courts interpreting New Mexico law have properly held that *prima facie* tort is inapplicable to the termination of both at-will employees and independent contractors. *See Schmitz,* 1990-NMSC-002, ¶63; *Ewing v. State Farm Mut. Auto. Ins. Co.*, 6 F. Supp. 2d 1281, 1291 (D.N.M. 1998).[6] This proper interpretation of New Mexico law existed before the trial of this case. The district court cannot make new law, and interfere with the freedom of contract principle by allowing plaintiff to pursue a *prima facie* tort claim.[7]

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[6] As in the present case, *Ewing* involved an insurance company whose agents were independent contractors. The plaintiff in *Ewing* alleged prima facie tort based on gender discrimination, which resulted in her not being appointed as an independent contractor agent. The *Ewing* court found no basis for this claim. *Id.*

[7] The district court ruled that the Agreement was ambiguous as to whether it was terminable by either side without cause. **[24 RP 5713-19.]** This ruling is irrelevant if this Court finds that *prima facie* tort does not apply to conduct that is authorized by contract. But, should this Court reach this ruling, the district court's finding was nonetheless erroneous. The Agreement contains differing termination provisions depending upon the circumstances. **[1 RP 17 ¶ C.]** The ruling ignored the rule that all parts of a contract should be given meaning. **[24 RP 5713-19.]** The ruling also ignored that parol evidence is never admissible to contradict an express contract term. *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶10, 112 N.M. 504. The district court's ruling was reversible error because, if the court had properly found the Agreement is to be terminable by either side without cause, it would have been dispositive of Beaudry's *prima facie* tort claim – and thus his

(cont'd)

The Tenth Circuit has specifically held that, under New Mexico law, *prima facie* tort cannot be used to modify the absolute right of businesses to choose with whom they want to do business. *Jackson v. Freightliner Corp.*, 1996 WL 500666 (unpublished). In *Jackson*, Freightliner refused — without explanation — to approve Jackson's purchase of a distributorship in Albuquerque. *Id.* *2. Jackson filed suit alleging, *inter alia*, tortious interference with prospective contractual relations and *prima facie* tort. *Id.* The district court granted Freightliner's motion to dismiss. The Tenth Circuit affirmed, finding that Jackson had failed, as a matter of law, to plead facts showing that Freightliner had acted without justification as required for *prima facie* tort:

> . . . . Freightliner Corp. was *justified* in withholding consent, not merely because its actions might produce some economic benefit, but because it had an absolute right to choose the individuals with whom it wished to have contractual relations, in this case, a manufacturer-dealer relationship, and it determined a relationship with Mr. Jackson was not desirable.

(cont'd from previous page)

entire case. *See, e.g., Yeitrakis*, 804 F. Supp. at 248; *accord Hill v. Cray Research, Inc.*, 864 F. Supp. 1070, 1079 (D. N.M. 1991), cited with approval in *Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶35, 138 N.M. 70. Moreover, even after erroneously finding the Agreement ambiguous, the district court erred again in refusing to submit the "ambiguity" to the jury for resolution. Since the district court ultimately found that the Agreement was properly terminated as a matter of law, there is no need for this Court to reach the without cause termination issues, although they would provide additional grounds for reversal were the Court to do so.

Id. *5 (emphasis added).[8]

Jackson is based on *Quintana*, where the plaintiffs sued a Bank for tortious interference with prospective contractual relations for refusing to approve their purchase of property which was mortgaged to the Bank. 1987-NMCA-062, ¶11. Plaintiffs alleged that the refusal was in retaliation for an earlier law suit between the parties, rather than for legitimate economic concerns. The district court granted the Bank's motion to dismiss plaintiffs' claim for tortious interference. The Court of Appeals affirmed explaining that, absent conditions that were not present there, "the Bank was free to reject plaintiffs as mortgagors." *Id.* ¶12. The Court further explained: "The Bank's privilege to refuse to do business with plaintiffs existed regardless of the motive for its decision. The fact that the Bank may have denied consent because of the earlier lawsuit is immaterial." *Id.* (citation omitted).

Similarly, in *Smith,* the defendant granted the plaintiffs a wholesale distributorship and terminated it barely six months later. Plaintiffs sued, asserting various theories, including unconscionability and violation of the implied covenant of good faith. 1982-NMSC-102, ¶1. The district court entered summary judgment in favor of the defendant. The Supreme Court affirmed, explaining that the distributorship agreement gave the defendant the right to terminate "for any

[8] The same rule formed the basis for the holdings in the Missouri cases that have previously been discussed in Section A(1)(c), *supra.*

reason." 1982-NMSC-102, ¶4. The Court further found:

- "Contractual provisions relating to termination or cancellation of an agreement not arrived at by fraud, or unconscionable conduct, will be enforced by law." *Id.* ¶23;

- There was no need for "inquiry into [the defendant's] motives in seeking to terminate the contract" since the Court had no power to modify the "cancellation 'for any reason'" provision. *Id.*; and

- "Even if defendant terminated the contract in bad faith, plaintiff cannot recover . . . ." *Id.* ¶24 (*quoting Phillips Machinery Co. v. LeBlard, Inc.*, 494 F. Supp. 318 (W.D. Okla. 1980).

Over the years, the courts and the legislature have imposed a number of limitations on the freedom of contract in general, and the at-will employment doctrine in particular. *Yeitrakis*, 804 F. Supp. at 247-248. These limitations include decisions based upon "race, sex, religion and national origin, age, union activity, application for workers' compensation benefits, or jury service. . . ." *Id.* They also include the implied covenant of good fair dealing, retaliatory discharge, (*Hill*, 864 F. Supp. at 1077), and unconscionability. 1982-NMSC-102, ¶14.[9]

The only one of those many limitations that Beaudry claimed had any application to the termination of the Agreement was the implied covenant of good faith and the district court granted summary judgment in favor of Appellants as to that claim. **[27 RP 6926-30.]** Appellants had the right to terminate the Agreement

[9] Section 762 of the Restatement of Torts imposes three additional limitations which were adopted in the *Quintana* decision. 1987-NMCA-062, ¶9.

regardless of motive. The district court erred in allowing Beaudry to evade that established right through the cause of action for "*prima facie* tort."

3. Beaudry's *Prima Facie* Tort Claim Evaded The Established Doctrine That Tort Law Cannot Be Used To Rewrite Contracts

Another established doctrine is that "parties should not be allowed to use tort law to alter or avoid the bargain struck in the contract. The law of contract provides an adequate remedy." *AmRep Southwest, Inc. v. Shollenbarger Wood Treating, Inc.*, 1995-NMSC-020, ¶28; 119 N.M. 542; *see also Smith*, 1982-NMSC-102, ¶¶24-26 (affirming summary judgment for the defendant and rejecting Plaintiffs claim that a question of fact existed as to whether contract between the parties had been terminated in good faith").

The district court erred in using *prima facie* tort as the vehicle for allowing the jury to rewrite the Agreement to impose a "proper motive" limitation on Appellants' termination rights.

4. Beaudry's *Prima Facie* Tort Claim Evaded The Established Doctrine That Tort Remedies Are Not Available To Remedy A Breach Of The Covenant Of Good Faith And Fair Dealing

While New Mexico recognizes a claim for breach of the implied covenant of good faith and fair dealing with respect to contracts that are not terminable at-will, that claim sounds in contract and is not subject to tort remedies are not available to remedy a breach of the implied covenant. *See Bourgeous v. Horizon Healthcare*

Corp., 1994-MSC-038, ¶17; 117 N.M. 434 ("tort remedies are not available for breach of the implied covenant in an employment contract"). "[T]he duty to not act in bad faith or deal unfairly becomes part of the contract and the remedy for its breach is on the contract itself." *Id.*; *see also U.S. ex rel. Custom Grading, Inc. v. Great Am. Ins. Co.*, 952 F. Supp. 2d 1259, 1269 (D.N.M. 2013) (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'"). The implied covenant cannot be used to nullify "an express provision" in a contract. *Kropinak*, 2001-NMCA-081, ¶5. Here, the district court allowed Beaudry to use *prima facie* tort to evade both (i) his burden of proving a breach of the implied covenant and (ii) the contract-damages-only limitation for a breach of the implied covenant. That resulted in Beaudry's being awarded substantial damages, including punitive damages, for the lawful exercise of a contractual right.

B. Beaudry Failed As A Matter Of Law To Satisfy At Least Four Of The Five Essential Elements Of *Prima Facie* Tort

In *Schmitz*, the Court explained that *prima facie* tort has four essential requirements:

(1) an intentional, lawful act by defendant;

(2) an intent to injure the plaintiff;

(3) injury to the plaintiff; and

(4) the absence of justification or insufficient justification for the defendant's acts.

Schmitz, 1990-NMSC-002, ¶37.

Later cases have imposed a fifth requirement: the claim must be based on "factual allegations that are somehow unique" that are not shared with any of the plaintiff's other counts. *See Carreon,* 2011 WL 9686895 *13.

Beaudry failed, as a matter of law, to satisfy at least four of the five.

1. Beaudry Failed As A Matter Of Law To Satisfy The Intent To Injure Requirement

Since *Schmitz* there have been a number of cases in which the plaintiff attempted to base *prima facie* tort on a contractual duty. The courts have rejected those attempts because, if the defendant has breached the contract, then the defendant's conduct is not "lawful" and the first *prima facie* tort element cannot be satisfied. *Hill*, 864 F. Supp. at 1078-1079. Alternatively, if the defendant has *not breached*, then the "intent to injure" element cannot be satisfied as a matter of law because the "intent to injure" "must be [to] *a legally protected interest* of the plaintiff." *Id.* at 1079 (emphasis in original).

Comment e to Section 870 of the Restatement (Second) of Torts explains why "injury" must be to a *legally protected interest*:

> [T]he words "injury" and "harm" are used with different meanings in this Restatement. Harm denotes "the existence of loss or detriment in fact of any kind"; injury denotes "the invasion of any legally protected interests of another." The use of the term, injury, in this Section means that the harm must be to a legally protected interest of the plaintiff.

Restatement 2d Torts § 870 Cmt. e.

In *Schmitz* the Supreme Court cautioned that *prima facie* tort "cannot be used to avoid [the] employment at-will doctrine." 1990-NMSC—002, ¶63. As one subsequent decision pithily noted, "*prima facie* tort and the at-will doctrine do not mix." *Yeitrakis*, 804 F. Supp. at 249. There is an "inconsistency between. . . the long-standing legal principal permitting discharge of an employee for bad cause or without cause where employment is terminable at will and the demands of *prima facie* tort to examine the intent of the defendant employer." *Id.* at 248. While the at-will doctrine produces "sometimes harsh results, particularly for the employee. . ., the New Mexico courts have evinced no intention of abandoning the doctrine." *Hill*, 864 F. Supp. at 1077. *Prima facie* tort, therefore, cannot be used to evade the at-will doctrine. *Id.*; *see also*, *Yeitrakis*, 804 F. Supp. at 249. ("*[P]rima facie* tort is unavailable to remedy the termination of an at will employee, even where he is terminated for bad cause."); *E.E.O.C. v. MTS Corp.*, 937 F. Supp. 1503, 1516 (D.N.M. 1996) ("To permit Plaintiff-Intervener to advance such a claim under the guise of *prima facie* tort would emasculate the doctrine of employment terminable at will — a position the *Schmitz* court clearly rejected.").

Prima facie tort has similarly been found inapplicable to the termination of an independent contractor. *See Ewing*, 6 F. Supp. 2d at 1291 ("Although *prima*

facie tort can occur in a workplace setting, it is unlikely that it was meant to interfere with a company's prerogative to select its employees or independent contractors." (citations omitted)).

That same rationale also applies to Appellants' termination of the Agreement in the present case. The district court's ruling that the Agreement was lawfully terminated, rendered Beaudry's *prima facie* tort claim defective, as a matter of law, because he no longer had the *legally protected interest* needed to satisfy the "intent to injure" element.

2. Beaudry Failed As A Matter Of Law To Satisfy The Injury To The Plaintiff Requirement

Another essential element of *prima facie* tort is that defendant's acts have resulted in "injury to the plaintiff." *Schmitz*, 1990-NMSC-002, ¶61.

As discussed, the "injury" must be to a "legally protected interest." *Hill*, 864 F. Supp. at 1078-1079. A plaintiff has no "legally protected interest" in a properly terminated contract. *Id.* at 1077-79. The Tenth Circuit has specifically held that, under New Mexico law, the legally protected interest needed for *prima facie* tort cannot be satisfied where defendant has a contractual right not to do business with the complaining party. *Jackson*, 1996 WL 500666, at *3 (unpublished).

3. Beaudry Failed As A Matter Of Law To Satisfy The Absence Of Justification Requirement

Another essential element of *prima facie* tort is that the defendant's acts be

without "justification." *Schmitz*, 1990-NM-002, ¶37. Conduct which is authorized by contract, is also "justified" for purposes of *prima facie* tort. *Carreon*, 2011 WL 9686895. In *Carreon*, the plaintiff sued GTWP for multiple claims including breach of contract and *prima facie* tort. The court found that there were triable issues of fact which precluded summary judgment in favor of GTWP on the breach of contract claim. On the other hand, the court granted summary judgment on the *prima facie* tort claim, explaining "if GTWP was in breach of contract the remedy for that breach lies in contract, not tort. If GTWP was not in breach of contract, its legal position was justified and cannot be the basis of a claim for *prima facie* tort." 2011 WL 9686895, at *13. *See also Jackson*, 1996 WL 500666 *5 (prima facie tort claim dismissed where the defendant "was *justified* in withholding consent . . . because it had an absolute right to choose the individuals with whom it wished to have contractual relations . . . ." (emphasis added)).

4. Beaudry Failed As A Matter Of Law To Satisfy The Unique Factual Allegations Requirement

Decisions after *Schmitz* have imposed a fifth *prima facie* tort requirement: "[A] plaintiff cannot simply base such a claim [*i.e.*, a claim for *prima facie* tort] on the same allegations that support his other claims; the *prima facie* tort cause of action is useful only when there are factual allegations that are somehow unique, that do not give rise to another tort or contracts claim, but that demand redress." *Carreon*, 2011 WL 9686895 *13. *See also Healthsource, Inc. v. X-Ray Assocd. of*

New Mexico, P.C., 2005-NMCA-097, ¶36; 138 N.M. 70, cert. denied, 2005-NMCERT-7, 138 N.M. 146.

The purpose of *prima facie* tort is to offer relief "where the actor's otherwise lawful conduct cannot be brought within other more traditional categories of liability." *Hill*, 864 F. Supp. 1080. The requisite absence of other remedies does not exist where there is "not merely an overlapping but an identical factual basis for . . . 'both the *prima facie* tort claim' and 'all of the alleged causes of action.'" *Id.* The lack of differing factual bases "alone is sufficient to" justify summary judgment disposing of a *prima facie* tort claim. *Id.*

Beaudry's *prima facie* tort claim (Count VII) incorporated all of the preceding seventy-eight paragraphs of his complaint. **[7 RP 1452-53 ¶¶ 79-85.]** These included the entirety of the factual allegations in his claims for breach of contract (Count III) and breach of the covenant of good faith and fair dealing (Count IV). (*Id.*) The only additional factual allegation in the *prima facie* tort count was an assertion that Appellants intended to injure Beaudry by delaying the issuance of, and failing to correct misinformation on, a U-5 securities form. **[7 RP 1452 ¶ 82.]**

The U-5 securities allegations were not, however, "somehow unique" to the *prima facie* tort count. Beaudry asserted the same allegations in both his breach of contract (Count III) and breach of the implied covenant of good faith and fair

dealing (Count IV) counts. Moreover, prior to trial the district court dismissed both of those counts to the extent they were based on Form U-5. **[28 RP 6898-900.]** The jury was specifically instructed that Appellants' termination of the Agreement was the only conduct that could constitute *prima facie* tort. **[33 RP 8020-21.]**

The district court erroneously allowed the jury to consider a *prima facie* tort claim that was not based on any "factual allegations that are somehow unique, that do not give rise to another tort or contracts claim. . . ." *Carreon*, 2011 W.L. 9686895 *13.

C. Affirmance Of The Judgment Would Mean That Parties Who Properly Perform Their Contracts Face Greater Exposure Than Those Who Breach Them

If the judgment in this case is affirmed and becomes part of the law of this State, the certainty and predictability of contracts will be seriously undermined. No one entering a contract will know whether some jury will later decide that they do not think the bargain struck was fair or they do not feel a party enforced its contractual rights with the right frame of mind.

The consequences of trying to conduct business in such a world are well illustrated by the result in the present case. The Agreement's termination at-will provision limits compensatory damages for *breach* of the Agreement to three

months of commissions.[10] Nevertheless, the Companies found themselves on the receiving end of an adverse multi-million dollar judgment for having *complied* with the Agreement's termination provisions. Moreover, Appellants Lance Carroll and Craig Allin, who were not parties to the Agreement, are the subject of a million dollar judgment for having done what they were authorized, as a matter of law, to do under the Agreement. If this is really the way things are going to work in New Mexico, cautious individuals will need to hire their own independent counsel to advise them of the consequences of discharging their job responsibilities even where they scrupulously comply with all relevant contractual requirements.

Ironically, the danger will arise only where the contract has been properly performed and there has been no violation of the implied covenant. When an individual breaches a contract (actually or anticipatorily), or violates the implied covenant, obtains consent improperly (fraud, mistake, duress, undue influence), or otherwise violates the law (unconscionability, illegality, excessive liquidated damages, and unlawful restraint of trade), the plaintiff will be able to assert a variety of theories of recovery ranging from breach of contract, to breach of the implied covenant, to rescission, reformation, or separate antitrust action.

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[10] As noted, the district court found the Agreement ambiguous as to whether it was terminable at will, but refused to allow the jury to resolve the issue.

It will be only when the individual's conduct fully comports with both the language of the contract and the implied covenant of good faith that a would-be plaintiff will be able to invoke *prima facie* tort as a lifeline.

If the law of contracts is to be "tortified," that process should start with the creation of a tort of bad faith *breach* of contract. New Mexico courts have consistently refused to create such a tort outside the insurance context. *See, e.g., Bourgeous,* 1994-NMSC-038, ¶17 (rejecting claim tort remedies for breach of the implied covenant in an employment contract). Despite that refusal, the district court in this case created a *de facto* tort of "bad faith *performance* of contract," which only applies to defendants who are not in breach. The district court's creation is both bad law and bad policy.

D. The Punitive Damage Award Is Unconstitutional

1. The Contract Companies Were Denied Required Safeguards

Punitive damage awards are subject to due process restrictions requiring courts to provide procedural safeguards — for good reason. *Pac. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Due process limitations on punitive damages are paramount because although "[punitive damages] serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The lack of protection

in civil cases compounds "concerns over the imprecise manner in which punitive damages systems are administered," particularly since "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* With defendants such as the Contract Companies, "[e]mphasis on the wealth of the [supposed] wrongdoer increase[s] the risk that the award [is] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993).[11]

The jury instructions given did not adequately protect the Contract Companies. The district court rejected the Contract Companies' proffered instruction providing further clarification as to punitive damages, particularly when the compensatory damages are high. **[4-30-13 morning Tr. 30:9-32:8; 33 RP 8012.]** The resulting prejudice was compounded because the district court allowed evidence of the Contract Companies' wealth to be presented to the jury. Indeed, Beaudry's counsel was well aware that corporate wealth would poison the jury,

[11] The *Haslip* court was critical of allowing punitive damages based on a "preponderance of the evidence" standard, but found that it did not violate due process in that case because the "lesser standard. . . was buttressed. . . by the procedural and substantive protections outlined" in the opinion. *Id.* at 23 n.11. The "lesser standard" was not so buttressed here.

capitalizing on it in closing argument when he emphasized the collective net worth of the Contract Companies and urged the jurors to punish Farmers, a wealthy, out-of-state, corporation. **[4-30-13 afternoon Tr. 20:3-19, 59:8-60:22.]** And it was very effective. The jurors' bias against large corporations materialized in the excessive punitive (and compensatory) damage awards. But "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427 (criticizing Utah Supreme Court's upholding of excessive award based partially on State Farm's assets "which, of course, are what other insured parties . . . must rely upon for payment of claims"). The Contract Companies were deprived of the safeguards needed to make an award of punitive damages constitutional in *Haslip*.

2. The Award Does Not Comport With The *Gore* Guideposts.

To further protect defendants from punitive damages run wild, the Supreme Court has set out three "guideposts" to guard "[e]lementary notions of fairness enshrined in. . . constitutional jurisprudence. . . that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996). Those guideposts are:

(1) the degree of reprehensibility of the defendant's conduct;

(2) the ratio between compensatory and punitive damages and

(3) a comparison of the punitive damages with criminal or civil penalties that can be imposed for similar conduct. *Id.* at 575. The punitive damage award here does not withstand scrutiny.

The jury's punitive damage award cannot be reconciled with the first, and most important, guidepost — reprehensibility of the defendant's conduct. *Id.* at 575 (reprehensibility is "most important indicium of the reasonableness of a punitive damages award"); *accord Campbell*, 538 U.S. at 419. There are five factors for evaluating reprehensibility, all of which weigh against the punitive damages awarded here. *Id.* at 419.

1. Whether "the harm caused was physical as opposed to economic." *Id.* Beaudry presented no evidence that he suffered physical harm.

2. Whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." *Id.* Beaudry's Agreement was terminated, in accordance with its terms, because he breached it. This does not implicate health or safety issues for Beaudry or anybody else.

3. Whether "the target of the conduct had financial vulnerability." *Id.* Again, Beaudry, a sophisticated and experienced insurance agent, presented no evidence that he was uniquely vulnerable. To the contrary, he established that he earned significant income as a Farmers agent and Beaudry's own expert testified that 40 percent of his business was with companies other than Farmers and therefore not impacted by his termination. **[4-26-13 Tr. 157:1–6.]**

4. Whether "the conduct involved repeated actions or was an isolated incident." *Campbell*, 538 U.S. at 419. The termination of Beaudry's Agreement was a one-time occurrence, and Beaudry's evidence was limited to his particular circumstances,

and therefore the lawful but allegedly tortious conduct here is incapable of repetition.

5. Whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* Beaudry never argued that the termination of his Agreement involved trickery or deceit. And, as set forth above, Beaudry failed to prove that the Contract Companies (or their agents) bore any malice toward Beaudry.

"The existence of *any one* of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; *and the absence of all of them renders any award suspect.*" *Id.* (emphasis added). There is a presumption that compensatory damages make a plaintiff whole, "so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* No such "further sanctions" are appropriate here.

As to ratio, the second guidepost, the punitive damage award here is 2.5 times the $1,000,000 compensatory damages award. This is unconstitutionally excessive, particularly given the already substantial size of the compensatory damages. While the United States Supreme Court has declined "to impose a bright-line ratio in which a punitive damages award cannot exceed," "few awards exceeding a single-digit ratio... will satisfy due process" and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to

compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. The *Campbell* court described the jury's $1,000,000 compensatory award (the same as this case) as "substantial," particularly because the award was mostly emotional distress damages, which "already contain [a] punitive element" because "there is no clear line of demarcation between punishment and compensation" in emotional distress awards. *Id.* at 426 (*quoting* Restatement 2d Torts § 908, Cmt. c.)

The district court compounded the constitutional error by upholding the award (in part) on the basis that seven of Beaudry's employees lost their jobs when Beaudry's Agreement was terminated. **[1-22-14 Tr. 9:1-7.]** Consideration of the purported harm suffered by non-parties expressly violates the Supreme Court's holding in *Philip Morris USA v. Williams*, 549 U.S. 346, 353-354 (2007) (violation of due process to punish the defendant for harm to non-parties).

The third *Gore* guidepost, "the disparity between the punitive damages award" and civil or criminal penalties for comparable conduct, most poignantly highlights why no punitive damages should be awarded here. *Campbell*, 538 U.S. at 428 (*quoting Gore*, 517 U.S. at 575). There are no civil or criminal penalties with which to compare this punitive damage award because (for obvious reasons) *legal* termination of a contract according to its terms violates no law and is not

punishable at all. The district court erred in expressly not even considering this factor. **[1-22-14 Tr. 9:18-10:9.]**

VI. CONCLUSION

For the foregoing reasons, the judgment should be reversed with instructions to enter judgment in favor of the Appellants.

STATEMENT REGARDING ORAL ARGUMENT

Defendants/Appellants request oral argument. Oral argument may assist the Court in understanding the record and facts, assessing the positions of the parties and disposing of the merits of this appeal.

Respectfully submitted,

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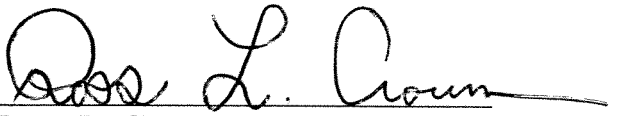
By: 

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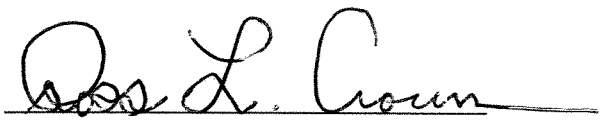

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