IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CRAIG BEAUDRY,

Plaintiff-Appellee,

v.

No. 33,618
Santa Fe County
CV 2011-646

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 ALLEN,

Defendants-Appellants.

ANSWER BRIEF

Civil Appeal from the First Judicial District Court
County of Santa Fe
The Honorable Sarah Singleton, District Judge

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ORAL ARGUMENT IS REQUESTED.

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Citations to Transcript of Proceedings

Citations are to the written transcript and record proper. They follow the format endorsed by our Supreme Court: The date of the hearing, followed by the abbreviation Tr. followed by the page number. The record proper is cited to the volume number, followed by the abbreviation RP, followed by the page number.

Statement of Compliance

The body of this *Answer Brief* exceeds the 35-page limit set forth in Rule 12-213(F)(3) NMRA.

As required by Rule 12-312(G) NMRA, I certify that this *Brief* uses a proportionally spaced typeface and that the body of the *Brief* contains 10,986 words, which is less than the 11,000 word maximum permitted by Rule 12-312(F)(3). This *Brief* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.

Jane B. Yohalem

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Nature of the Case

After a five day trial and nine hours of deliberation, a jury found that the Defendant contract companies ("Farmers") and Defendants Allin and Carroll, managing agents of Farmers, committed prima facie tort in terminating Plaintiff Craig Beaudry's Agent Appointment Agreement. The jury found, based on overwhelming evidence, that Defendants acted maliciously, with the intent to harm Beaudry, and without sufficient justification.

On appeal, Defendants, large corporations and their managers, have asked this Court to free them from the duty which our Supreme Court found to be a hallmark of civilized society - to refrain from intentionally causing harm to another unless a sufficiently weighty countervailing interest justifies that harm. Farmers contends on appeal that it should be allowed to terminate an agent with whom it has entered into a long-term relationship, relying on a technical violation of contract as a pretext, even if the real reason for the termination is spite, ill-will and greed, and even if the termination is not in the company's interest.

Plaintiff contends that the prima facie tort law of New Mexico was properly applied by the judge and the jury, consistent with this community's

standards of decency. Corporations, just like individuals, should be held responsible for their malicious, unjustified conduct. Therefore, the jury's verdict should be upheld.

Statement of Facts

A. Beaudry enters into an agreement with Farmers.

Craig Beaudry has worked as an insurance agent since the mid-1980's. In 1995, he opened his own insurance agency in Albuquerque. **4-23-13 Tr. 72-73.** In 1999, Beaudry decided that he wanted to build a family insurance agency in a small ski town where he and his wife could ultimately retire and have their children take over the business. ***Id.* 75, 79, 86.**

Beaudry contacted Farmers, meeting with Mr. Hopkins, then district manager for Santa Fe and Taos. **4-23-13 Tr. 76-77.** Hopkins encouraged Beaudry to become a Farmers agent. Hopkins warned Beaudry that it would take hard work to build an agency from scratch in a new town. He told Beaudry that if he worked hard, he could count on a steady income from commissions to support him in retirement. **4-23-13 Tr. 77-78.**

Hopkins stressed that Farmers encouraged its agents to bring their families into the business. He pointed to a provision in Farmers' standard

contract allowing an agent, with Farmers' approval, to transfer his agency to his children and told Beaudry there were lots of examples of agencies run by the children of an agent. *Id.* 82; **Def. Ex. 1.** This information was important to Beaudry as he (and his wife Deirdre (Dee)) decided to sign with Farmers. *Id.*; **4-26-13 Tr. 203.**

In talking to Hopkins and to others in Farmers' top management prior to signing the Agreement, Beaudry questioned the provisions governing Farmers' authority to terminate an agent's appointment. **4-23-13 Tr. 80-85.** Hopkins told him that Farmers only terminated "deadbeat" agents who didn't produce. *Id.* 81. Mr. Becker, then Farmers' sales manager for New Mexico, agreed with Hopkins. *Id.* 85-86. Beaudry testified that he relied on what he was told. **4-23-13 Tr. 85-86.**

B. <u>Farmers' Agent Appointment Agreement.</u>

Farmers' standard Agent Appointment Agreement emphasized that Beaudry would be an independent agent, not an employee of Farmers. He would receive as payment only the commissions and bonuses he earned by selling and servicing Farmers policies; there was no salary for his time or his labor. He was to provide all of the facilities necessary for his work. He was

given the authority to make his own decisions about the time, place and manner in which he worked, subject only to the requirement that his decisions comply with good business practices. **Def. Ex. 1 (13 RP 3085-88).**

C. **Beaudry opens a Farmers agency in Taos.**

By the end of 2000, Beaudry had moved his family to Taos and opened a Farmers agency. **4-23-13 Tr. 86.** Beaudry set up office space, bought furniture and equipment, put the necessary computer technology in place, and hired staff. The Beaudrys borrowed money from Farmers to buy office equipment. **4-26-13 Tr. 209-10.** Beaudry participated in lengthy training on Farmers' practices and procedures and trained his employees extensively on these practices and procedures as well. **4-23-13 Tr. 87, 231-34.** After renting office space for a number of years, the Beaudrys bought an office building to house their growing agency. **4-26-13 Tr. 209.**

Beaudry's wife Dee managed the office, supervising the agency's employees and ensuring that everything ran smoothly. She described her job as handling day-to-day operations so that Beaudry would be free to sell policies. **4-26-13 Tr. 182-83; 4-23-13 Tr. 126.**

D. Beaudry achieves extraordinary success.

Beaudry worked hard for over 11 years. He grew the agency from a start-up to an agency ranked in the top 1% of Farmers agencies nationwide. **4-23-13 Tr. 91-92**. He was awarded over 45 trophies by Farmers based on his productivity. ***Id.* 93; Pl. Ex. 17**. Carroll, Farmers' district manager for Taos and Santa Fe, agreed that Beaudry was a "stellar agent" who exceeded Farmers' production quotas right up to the day of his termination. **4-24-13 Tr. 32, 164-65** (identifying Beaudry as top performer in the district). When Farmers terminated his Agent Appointment Agreement in 2011, Beaudry had 2,400 policies in force and was running an office employing seven people. **4-23-13 Tr. 94, 134**.

Beaudry was a model agent. He followed Farmers' rules, being careful to place all eligible business with Farmers. He trained his staff to follow the rules. **4-23-13 Tr. 88-90, 231-33; 4-26-13 Tr. 207**. Even at trial in this matter, Beaudry's dedication to Farmers was never questioned by Farmers' management. **4-26-13 Tr. 83; 4-24-13 Tr. 166**.

E. Dee's illness and her absence from the office.

In 2010, Dee faced serious illness: after the loss of both kidneys and six years on dialysis, Dee's condition was touch and go. **4-23-13 Tr. 124; 4-26-13 Tr. 197**. It was no longer safe for her to be in Taos, far from a major medical center. **4-23-13 Tr. 124-25**. Twice in the previous six months she had to be air-lifted to hospitals in Denver and Albuquerque. *Id.*; **4-26-13 Tr. 197**.

After consulting with Defendant Carroll, the district manager, and Defendant Allin, the State executive director, about the seriousness of Dee's condition and the possibility of moving the agency to be near a major medical center, the Beaudrys decided instead to temporarily move Dee to Denver where she was treated with five to six hours of dialysis a day while she waited and hoped for a kidney transplant that could save her life. **4-23-13 Tr. 125; 4-26-13 Tr. 97-98; 4-29-13 Tr. 82.** Beaudry stayed in Taos, ran the agency, and commuted to Denver to help with Dee's care. **4-23-13 Tr. 125-26; 4-24-13 Tr. 49; 4-26-13 Tr. 197-98**.

Dee's absence from the Taos office and worry about her illness placed great stress on Beaudry and his staff. **4-23-13 Tr. 125-26; 4-25-13 Tr. 204-05**. Dee's condition worsened while she was in Denver; Beaudry worried that she

was going to die. **4-25-13 Tr. 204-05.** Everyone at Farmers knew what was going on with Dee, including Carroll and Allin. **4-26-13 Tr. 197-98; 4-23-13 Tr. 125-26.**

The supervisory duties that were a large part of Dee's job as office operations manager could not easily be done remotely. Dee tried her best between treatments using a cell phone and e-mail. **4-23-13 Tr. 234-35; 4-26-13 Tr. 198.**

F. Farmers' response to Beaudry's efforts to stop poaching by new Taos agent Tom Gutierrez.

During this difficult period, Beaudry became aware that Tom Gutierrez, a new Farmers agent in Taos, was poaching the Beaudry agency's policies (poaching means cancelling policies written by another agent and rewriting them or transferring them so the new agent receives the commissions). **4-23-13 Tr. 96.** Dee testified that, in a little over a year, Gutierrez's poaching cost the Beaudry agency the commissions on 135 policies. **4-26-13 Tr. 193-94; Pl. Ex. 16.**

It was Defendant Carroll's responsibility to stop Gutierrez from poaching; he conceded as much at trial. **4-24-13 Tr. 38; 4-26-13 Tr. 194-95.** Poaching violated Gutierrez's Agent Appointment Agreement and was

grounds for termination. **4-24-13 Tr. 42; 4-25-13 Tr. 81-82**. Several of Farmers' top managers testified that poaching was "not in the best interest of the companies or its agents." **4-26-13 Tr. 81-82; 4-24-13 Tr. 37.**

Despite this clear prohibition on poaching, Beaudry's complaints about Gutierrez's poaching were ignored by Carroll. **4-23-13 Tr. 99; 4-26-13 Tr. 192-95**. Instead of stopping the poaching, Carroll made excuses for Gutierrez. Carroll knew about and even approved transfers of Beaudry's policies to Gutierrez. **4-26-12 Tr. 194-95; Pl. Ex. 16**.

Carroll had a personal interest in Gutierrez's success. Part of Carroll's job was recruiting new agents. **4-24-13 Tr. 36-37.** Carroll admitted at trial that he was falling behind and was under a lot of pressure from Farmers to meet recruitment goals. ***Id.* 36-37, 160-62**. Carroll was not credited for a new recruit until the recruit completed a two-year probationary period and became a career agent. If Gutierrez failed to make it as a career agent, Carroll would personally have to pay back a portion of the subsidies given to Gutierrez by Farmers. Carroll's performance rating would be downgraded. **4-24-13 Tr. 38-39.**

When it became clear that Carroll would do nothing to stop Gutierrez's poaching, Beaudry complained up the chain of command, going first to Chris Kerr, the Division Marketing Manager, and then, when Kerr was not helpful, to Craig Allin, the New Mexico state director. Allin told Beaudry to go back to Carroll and Kerr and again ask them for help. Dissatisfied with this response, Beaudry took the matter to Allin's superior, Roy Smith, Farmers' regional vice-president. **4-23-13 Tr. 98-102; Pl. Ex. 28.**

Within days of Beaudry's complaint to Smith, Beaudry received a phone call from Allin. **4-23-12 Tr. 102.** This call was a big deal. Allin had only called Beaudry directly two or three times in the 11 years Beaudry worked for Farmers. ***Id.* at 104.** Allin told Beaudry that he had heard from Roy Smith about Beaudry's complaint. ***Id.* 102.** Switching to a low, threatening voice, Allin then said, "You shouldn't have done it that way." ***Id.* at 102, 104.**

G. **April Granger's mistake on the Martinez Plaza insurance.**

When Hopkins retired and Carroll replaced him, Carroll assigned a problem client, Mr. Martinez, to Beaudry. **4-23-13 Tr. 105**. Shortly after Dee's illness forced her to move to Denver and around the same time Beaudry was trying to stop Gutierrez's poaching, one of Mr. Martinez's two commercial

policies (a ski shop) came up for renewal. A fire in the shop the previous year had led to a big loss for Farmers. Farmers refused to renew the policy. *Id.* 105-07.

Farmers allows its agents to place any business Farmers turns down with other companies. **4-23-13 Tr. 107-08**. Consistent with Farmers' rules, Beaudry sold Mr. Martinez a Travelers insurance policy for his ski shop. The Travelers policy had a lower premium than Martinez's Farmers policy. *Id.*

Martinez began to complain about the price of his remaining Farmers policy on a property called Martinez Plaza. He wanted a cheaper premium. **4-23-13 Tr. 109**. He repeatedly marched into the Beaudry agency and loudly and angrily demanded that the agency get him a lower price. **4-23-12 Tr. 109-10; 236-38**. No amount of explanation persuaded him that his deal with Farmers was his best option. **4-23-12 Tr. 115**.

Farmers' Agent Appointment Agreement prohibited an agent from canceling a Farmers insurance policy and placing it with another insurer. **Def. Ex. 1.**

Martinez was working with April Granger, an inexperienced employee who had been with the Beaudry agency for about a year. **4-23-12 Tr. 229-30.**

When neither Beaudry nor Granger was able to convince Martinez to stay with Farmers, Beaudry told Granger to get a quote from CNA, an insurer he was sure would refuse coverage for Martinez Plaza. **4-23-13 Tr. 110-12, 114.** Beaudry's plan was to show Martinez that his Farmers policy was his best bet. *Id.* **111, 117.** Beaudry made it clear to Granger that the idea was to keep Martinez Plaza with Farmers - that she should get a quote from another company and nothing more. *Id.* **110-11, 174, 177.**

Granger got a quote from CNA, as instructed by Beaudry. Pressed by Martinez (who Granger testified intimidated her), and without Beaudry's knowledge or consultation with Dee (who was in Denver by then), Granger got a temporary binder from CNA and helped Martinez cancel his Farmers coverage. **4-23-13 Tr. 118-19, 236-37, 238-41.** Beaudry testified that Granger's actions were contrary to his instructions and plainly a mistake: the rule in the industry is that a commercial policy is never canceled until a policy is in hand to replace it. **4-23-12 Tr. 118-19.**

As Beaudry anticipated, when CNA inspected Martinez Plaza a few weeks later, it declined coverage based on the absence of sprinklers in the building. **4-23-12 Tr. 242.** Had Granger simply asked for a quote and waited, as she had been instructed, Beaudry's plan would have worked as intended:

Martinez would have seen the advantage of his Farmers coverage and would have stayed with Farmers without ever having been insured elsewhere. *Id.* **117**.

As it was, Granger immediately had the Farmers policy reinstated. **4-23-13 Tr. 244.** (Farmers routinely allows cancelled policies to be reinstated within 60 days. **4-24-13 Tr. 49; 4-23-13 Tr. 120.**) Martinez never paid a cent to CNA. **4-23-13 Tr. 117**. By November 2, 2010, just weeks after Granger got the CNA quote, the Martinez Plaza policy was back with Farmers (with the very same policy number) and Martinez was no longer demanding different and cheaper coverage. Martinez Plaza continued to be insured by Farmers at the time of trial. **4-23-12 Tr. 121, 255-56; 4-25-13 Tr. 86-87**.

H. Gutierrez accuses Beaudry of twice placing Farmers' business with another company.

On the very day the Martinez Plaza policy was reinstated with Farmers, Gutierrez (who was friendly with Martinez) obtained from Martinez the Travelers policy on his ski shop and the CNA documents on Martinez Plaza. **4-25-13 Tr. 87, 123**.

Gutierrez then wrote an e-mail to Carroll accusing Beaudry of twice placing Farmers-eligible insurance with another company. **Pl. Ex. 5.** He

asked Carroll to terminate Beaudry's contract. Gutierrez followed up with a phone call to Carroll, and then forwarded the Martinez Travelers and CNA documents to Carroll. **4-25-13 Tr. 90, 159.**

When Beaudry and other Taos agents reported poaching, Carroll had told them to stop tattling. **4-24-13 Tr. 68.** Not so with Gutierrez's accusations against Beaudry; Carroll embraced them. Carroll immediately contacted Kerr, his newly hired immediate superior. **4-24-13 Tr. 55.** Kerr asked Carroll to investigate the allegations. **4-25-13 Tr. 15.**

I. Carroll ambushes Beaudry.

Carroll did nothing to investigate Gutierrez's allegations against Beaudry. He never called Beaudry or Dee to get their side of the story; he did not talk to Martinez; he did not check with CNA to see if a policy was purchased. **4-24-13 Tr. 54-55, 59-61.**

On November 12, 2010, ten days after Gutierrez's e-mail, Carroll met with Beaudry for a routine performance review. He never mentioned the Martinez policies. He told Beaudry that his agency couldn't do any better – to keep up the good work. **4-24-13 Tr. 57.** Carroll congratulated Beaudry on winning a ski trip to Tahoe, even though he knew Beaudry would be terminated before he could take the trip. **4-23-13 Tr. 127.**

Carroll and Kerr set up a meeting with Beaudry five days later, on November 17, 2010. They did not tell Beaudry that his job was in danger because of the Martinez transactions. **4-24-13 Tr. 57.** They led Beaudry to believe they would discuss Gutierrez's poaching. **4-24-13 Tr. 128.**

They spent the first hour of the meeting discussing the poaching, although Carroll had no intention of doing anything about it. **4-23-13 Tr. 128.** Then, in the middle of the meeting, Carroll slapped the Martinez paperwork on Beaudry's desk. He demanded an explanation for what he claimed was the placement of two of Martinez's policies with other insurers. **4-24-13 Tr. 58; 4-23-13 Tr. 128-34.**

Beaudry was floored. **4-26-13 Tr. 199.** He described it as an ambush. **4-23-13 Tr. 131.**

Beaudry explained that Farmers had refused to renew the policy on Martinez's ski shop. He was therefore permitted to seek insurance elsewhere for Martinez. Beaudry tried to explain what had happened with Martinez Plaza, leaving the meeting briefly to ask Granger to pull up the policy. **4-23-13 TR. 130; 4-24-13 Tr. 199.** Beaudry told Carroll and Kerr that he had sought a quote from CNA knowing that CNA would refuse to insure the property and that Martinez would end up staying with Farmers. He explained that

Martinez was a "show me" kind of guy and he was trying to prove to him that he should stay with Farmers. **4-26-13 Tr. 199-200**. Beaudry told Carroll and Kerr that Martinez Plaza had, in fact, been reinstated to Farmers – with the same policy number and premium. *Id.*; **4-23-13 TR. 130**. The entire discussion lasted only 10 minutes. **4-24-13 Tr. 180.**

Beaudry's explanation seemed to have satisfied Carroll and Kerr. They did not reprimand Beaudry or tell him he had done anything wrong. There was no hint that the few weeks Martinez Plaza had been with CNA could result in the termination of Beaudry's contract. **4-23-13 Tr. 131; 4-26-13 Tr. 200; 4-24-13 Tr. 180.**

Although Beaudry and Dee offered repeatedly to provide additional information about how Martinez Plaza ended up briefly with another insurer, they were told by Carroll that he had everything he needed. **4-26-13 Tr. 200-01; 4-29-13 Tr. 204** (Carroll admits he never asked for more information and never told Beaudry his job was on the line).

J. **Carroll and Allin engineer Beaudry's termination.**

Beaudry and Dee thought it was a closed issue: a minor mistake by one of their less experienced employees. **4-26-13 Tr. 201**. In fact, Carroll and Kerr had decided to go ahead with the termination of Beaudry's agent agreement

- their minds were made up. **4-24-13 Tr. 181.** Kerr, brand new to his job, consulted repeatedly with Allin. *Id.* **216.** Allin recommended that Beaudry be terminated. **4-25-13 Tr. 213; 4-24-13 Tr. 183-84.** It was during this period that Allin talked to Kerr about how Beaudry had gone over his head with his poaching complaint. **4-24-13 Tr. 185.** Kerr commented at trial that Allin is "a big believer in the chain of command." *Id.*

The three, Allin, Carroll and Kerr, together prepared recommendations that were sent on to Mr. Gockel - the headquarters executive who had to sign off on the termination. **Pl. Exs. 7 and 9; 4-24-13 Tr. 59-60; 4-25-13 Tr. 216-19; 4-26-13 Tr. 22-23.**

The primary memo was written by Carroll. **Pl. Ex 7.** It begins by saying that Beaudry "switched the Insurance for Moises Martinez on two commercial policies that were insured with Farmers to other carriers, specifically CNA and Travelers." *Id.* Carroll, Allin and Kerr all knew that statement was incorrect: one of the two policies had been cancelled by Farmers. Beaudry had no alternative but to place it elsewhere. **4-24-13 Tr. 62-63, 189; 4-25-13 Tr. 217-19.** Buried further down in the memo is a cursory acknowledgment that there was no violation as to the ski shop policy. **Pl. Ex. 7.**

Three times the memo repeats that Beaudry admitted "switching" at the November 17, 2010, meeting. **Pl. Ex. 7; 4-24-13 Tr. 191.** That too was untrue, as Kerr admitted in his testimony. *Id.*

Carroll's memo does not report Beaudry's explanation that he had sought the CNA quote simply to make a point, knowing that Martinez would be forced to stay with Farmers. **4-24-13 Tr. 186; Pl. Ex. 7.**

The second memo forwarded to headquarters (to Keith Gockel) recommending Beaudry's termination is less than a quarter of a page long. It neglects to mention that the Martinez policy was returned to Farmers. **Pl. Ex. 9.**

Neither these memos nor Allin's subsequent e-mail to Gockel recommending Beaudry's termination informed Gockel about Dee's illness, the resulting disruption in the office and the stress on Beaudry and his staff. **4-26-13 Tr. 62, 79-80; Pl. Exs. 7, 9, 10.** Gockel was not told that the brief placement of Martinez Plaza with another company was an employee's mistake, and not something Beaudry had countenanced. **4-26-13 Tr. 79-80, 81; Pl. Exs. 7, 9, 10.** Gockel was not told that Beaudry had complained to Carroll, Kerr and Allin about the poaching of his policies by Gutierrez immediately before the events leading to his termination. Nor was he told that Carroll,

Kerr, and Allin had done nothing to assist him in countering the poaching, even after being directed to do so by Roy Smith, the regional manager. **4-26-13 Tr. 79-80, 81; Pl. Exs. 7, 9, 10.** Gockel was not told that Beaudry had no notice of the allegations in advance of the November 17th meeting. Nor was he told that Beaudry had never been given an opportunity to respond apart from the 10-minute discussion at that meeting. **Pl. Exs. 7, 9, 10; 4-25-13 Tr. 194.**

It was undisputed that Gockel's review was entirely dependent on the information he was provided: he was not authorized or expected to conduct an investigation and assumed that a thorough investigation underlay the recommendations made to him. **4-26-13 Tr. 79-80.** Ultimately it is the state executive director's recommendation which controls. **4-26-13 Tr. 63, 80-81.** Here, of course, the state executive director was Craig Allin.

K. Farmers always exercises discretion in deciding whether to terminate an agent.

Beaudry's Agent Appointment Agreement did not mandate termination; it only stated that Farmers "may" terminate the contract in the event of an agent's breach. **Def. Ex. 1.** Keith Gockel, the headquarters executive who approved Beaudry's termination and who was knowledgeable

about the terms of the Farmers' standard Agent Appointment Agreement testified that Farmers only terminates an agent for cause, and with a good business reason. **4-26-13 Tr. 77-78**. He directly contradicted Carroll and Allin's claim that they had no choice but to terminate Beaudry. **4-24-13 Tr. 67; 4-26-13 Tr. 13, 70-72, 77.** According to Gockel, Farmers *always* looks at all the circumstances in deciding whether to terminate an agent. **4-24-13 Tr. 70-72, 77.**

Gockel's testimony was reinforced by examples of agents who had not been terminated despite clear breaches of the Agent Appointment Agreement. Indeed, the record showed that Gutierrez got a second and then a third chance after committing underwriting violations, at least one of which involved making "material misrepresentations", a serious breach specifically listed as cause for termination. **4-25-13 Tr. 75-77; Pl. Ex. 3; Pl. Ex. 1**.

Another instance particularly relevant to Beaudry's termination concerned a Taos agent whose employee was found to have embezzled funds. Even though Farmers claimed that the law of agency required it to hold Beaudry responsible for the mistake made by April Granger, his employee, another Taos agent whose employee embezzled money from Farmers was not terminated. **4-23-13 Tr. 123-24; 4-25-13 Tr. 38** (Allin told Kerr that Beaudry is

responsible for the actions of his employee). Beaudry testified, without contradiction, that he was not aware of another instance where an agent was terminated for the misconduct of one of the agent's employees, rather than the agent's own misconduct. *Id.* **122-23**.

L. Beaudry's abrupt termination.

On February 1, 2011, out of the blue, Beaudry got a telephone call from Kerr. Kerr told him he was terminated and gave him 30 days to close the agency. When Beaudry asked why, Kerr said he had breached his contract, with no further explanation. **4-23-13 Tr. 132-33**. Beaudry's written termination letter similarly gave as the reason for termination "breach of contract," with no explanation. **Pl. Ex. 12**.

Beaudry was devastated. He felt that he was not given a chance. He told his staff that he had 30 days to close the agency; all seven staff members lost their jobs. **4-23-13 Tr. 133-34**. Beaudry's Agent Appointment Agreement had a non-compete clause preventing him from contacting any of his Farmers clients for a year. **Def. Ex. 1.** He honored that provision. **4-23-13 Tr. 139.**

Ten days later, Beaudry got a note from Carroll congratulating him on his "tremendous achievement" in winning a lifetime award. **Pl. Ex. 18**. Carroll knew Beaudry had been terminated: he was listening silently on the

line when Kerr called Beaudry. **4-24-13 Tr. 208.** Beaudry felt that Carroll was delighting in his pain. **4-23-13 Tr. 137.** Carroll also made a point of telling the Beaudry's, as they considered their uncertain financial future, that any attempt to rebuild was doomed because their reputation had been irreparably "tainted." **4-26-13 Tr. 204.**

Beaudry felt betrayed by the Farmers family; he had worked hard and built a successful agency. He had been devoted to Farmers. **4-23-13 Tr. 135; 4-26-13 Tr. 211.** He was in shock at first, so depressed he could not work, was not interested in his usual activities, and suffered nightmares. **4-23-13 Tr. 141; 4-25-13 Tr. 206-08; 4-26-13 Tr. 211.** The events described here have affected every aspect of his and Dee's life. *Id.*

M. <u>Allin restricts the Termination Review Board.</u>

The termination notice was not the end of Farmers' termination process. Beaudry requested review of the decision by a Termination Review Board ("TRB"). **4-23-13 Tr. 137.** Bill Tobin, a highly successful Farmers agent, was contacted to be a member of the TRB, along with Allin, who ran the hearing, and one other agent. **4-24-13 Tr. 16-17, 19; 4-25-13 Tr. 182.**

Allin took Tobin aside the morning of the hearing to tell him that the hearing would be "a procedural-type event." Tobin testified that Allin

repeated this directive when the hearing started. **4-24-13 Tr. 18-20.** Allin limited the TRB to determining if Farmers had followed proper procedures. He would not permit the TRB to decide whether Beaudry's termination was appropriate or whether it was in Farmers' best interest. **4-24-13 Tr. 17-19; 4-25-13 Tr. 182-83.** (Allin denied at trial having limited the TRB's review. He was impeached by his own previous admission. **4-25-13 Tr. 182-83.**)

At the conclusion of the hearing, Tobin told Allin that he did not think that terminating Beaudry was appropriate or in Farmers' best interest. **4-24-13 Tr. 21-22.** That opinion, of course, was irrelevant under the ground rules set by Allin. Allin proceeded with the termination.

Allin was required to file a report on the hearing for a final review by Farmers. Allin did not disclose that the TRB did not review the merits of the termination. **4-25-13 TR. 185.**

N. **Dividing the spoils.**

Carroll and Allin ignored Farmers' rules requiring that the distribution of an agent's commissions await the final review of the TRB decision. They immediately divided up Beaudry's commissions and hired a new agent. **4-25-13 Tr. 186-87; 4-24-13 Tr. 70-71, 173-75.**

The new agent instantly improved Defendant Carroll's lagging performance as a recruiter. **4-24-13 Tr. 70-71**. With Allin's approval, Carroll gave half of Beaudry's orphaned policies to Gutierrez – a total of 1200 policies, including all 340 commercial policies. **4-24-13 Tr. 71, 171.** These policies insured Gutierrez's success and avoided any risk to Carroll of having to pay back Gutierrez's subsidies. **4-24-13 Tr. 77; 4-25-13 Tr. 186**. Gutierrez's annual income more than doubled. **4-25-13 Tr. 96**. Defendant Allin profited as well from the commissions previously paid out to Beaudry. **4-25-13 Tr. 187-88**.

ARGUMENT

I. Prima Facie Tort Recognizes a Duty to Avoid Intentionally Injuring Another without Justification.

Farmers argues that the prima facie tort doctrine adopted by our Supreme Court in *Schmitz v. Smentowski*, 1990-NMSC-002, 785 P.2d 726 ("*Schmitz*"), "does not create a new legal duty", but merely provides a remedy for violation of a previously recognized statutory or contractual duty. In other words, according to Farmers, Beaudry must identify a violation of a legal duty imposed by statute or contract to state a claim. **BIC 1, 18-20.**

Defendants' argument is based on a fundamental misunderstanding of intentional torts in general and prima facie tort in particular. Modern prima facie tort theory originates in the thinking of Justice Oliver Wendell Holmes. *Porter v. Crawford & Co.*, 611 S.W.2d 265, 269 (Mo. Ct. App. 1980); *Schmitz*, ¶52. Holmes viewed tort law as imposing certain duties for reasons of public policy. Holmes believed that all of tort law could be understood by focusing on the duty of a defendant to avoid causing injury to another: strict liability imposed an absolute duty to avoid causing injury; negligence imposed a duty to avoid foreseeable harm; and intentional torts imposed a duty to avoid injury which is certain or substantially certain to follow from the defendants'

conduct. Vandevelde, *The Modern Prima Facie Tort Doctrine,* 79 Ky. L.J. 519, 522 (1990). Justice Holmes' view of tort law has since been adopted by commentators and courts across the country. *Id.* 520.

Holmes' description of the theory of prima facie tort, found in *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) is often cited as the source of the term "prima facie tort." *Schmitz,* ¶52. Holmes stated in *Aikens* that: "[p]rima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, ... requires a justification if the defendant is to escape." *Id.* In other words, even if conduct does not violate a contract or a statute or a duty already defined by a traditional tort, if an otherwise lawful act is done with malicious intent to injure the plaintiff, and without sufficient justification, it follows *prima facie* that the conduct is actionable in tort. *See Porter*, 611 S.W.2d at 269; Vandevelde, *The Modern Prima Facie Tort Doctrine,* 79 Ky. L.J. at 523.

In 1990, our Supreme Court recognized this theory of tort liability in New Mexico, calling it "prima facie tort." *Schmitz,* ¶35. The Court embraced Justice Holmes' ideas, recognizing prima facie tort as a cause of action "for wrongs intentionally and maliciously committed" which are not within the

scope of another traditional intentional tort. *Schmitz*, ¶52; Restatement (Second) of Torts, §870 (1977).

The Court recognized, however, that not every intentionally caused harm gives rise to an actionable tort. *Schmitz*, ¶40. To identify those harms that do give rise to a cause of action in prima facie tort, our courts were directed to apply a flexible, fact-specific balancing test: "The activity complained of is balanced against its justification and the severity of the injury, weighing the injury, the culpable character of the conduct, and whether the conduct is justifiable under the circumstances." *Lexington Ins. Co.*, 1997-NMSC-043, ¶11, 945 P.2d 992; *Schmitz*, ¶¶42-44; *Martinez v. Northern Rio Arriba Elec. Co-op, Inc.*, 2002-NMCA-083, ¶26, 51 P.3d 1164.

Farmers' claim that it has violated no legal duty because it did not violate its contract with Beaudry misses the point. It is not the exercise of the lawful right to terminate Beaudry's contract which creates the tort: the tort is created by Farmers' breach of its duty to avoid purposely injuring another person without sufficient justification. *Porter*, 611 S.W.2d at 273; *Beavers v. Johnson Controls World Services, Inc.*, 1995-NMCA-070, ¶32, 901 P.2d 761.

In other words, even though the court found that the termination of Beaudry's contract was authorized under the principles of contract law, if

Farmers used the contract as cover for an action taken with malicious intent to harm Beaudry, Farmers is liable in prima facie tort unless it had a sufficient justification for its actions. There is no doctrine which provides that just because conduct is authorized by contract (or, for that matter, by statute),[1] a company or a person can engage in that conduct with actual intent to harm someone. That behavior is not acceptable in a civilized society.

II. The Courts of Both New Mexico and Missouri Have Applied Prima Facie Tort to Conduct That is Expressly Authorized by Contract.

Stating what is essentially the same argument in a slightly different way, Farmers next claims that no New Mexico or Missouri prima facie tort case suggests that prima facie tort can be based on conduct which is expressly authorized by contract. **BIC 21-23, 24, 32.**

Farmers is wrong. The courts of both New Mexico and Missouri have applied the prima facie tort doctrine both to conduct authorized by contract and by statute. Indeed, both *Porter* and *Schmitz*, the initial cases adopting the prima facie tort doctrine in Missouri and New Mexico respectively, considered and rejected Farmers' argument.

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[1]Indeed, a requirement of prima facie tort is that the conduct complained of must be lawful. *Schmitz*, ¶37.

In *Porter*, the defendants argued that they could not have committed a tort because the act which injured the plaintiff, stopping payment on a check, was authorized by statute. The Missouri Court of Appeals rejected this argument, explaining that "[i]t is not the lawful exercise of the lawful right to stop payment which creates the tort": it is the fact that this otherwise lawful, authorized act was done with intent to injure and without sufficient justification. *Id.*

Similarly in *Schmitz*, the conduct found to be tortious by our Supreme Court was authorized by a combination of statute and contract. *Schmitz*, ¶21. The defendant Bank in *Schmitz* lawfully took possession of a note as security for a loan. When Smentowski defaulted on the loan, the Bank lawfully directed that the payments due on the note be made to the court. Our Supreme Court held that the Bank was liable in prima facie tort, despite having acted lawfully under its loan contract and under the Uniform Commercial Code (UCC), because it exercised its contractual rights in bad faith, with the knowledge that the plaintiff, the beneficial owner of the note, would be injured by its conduct. *Schmitz*, ¶¶21, 66.

Both *Schmitz* and *Porter*, then, are perfect examples of the focus of the law of intentional torts, in general, and of prima facie tort, in particular, on the

defendant's motive to harm the plaintiff and on the lack of a sufficient justification for such maliciously motivated conduct. The fact that the conduct was explicitly authorized by contract or by statute, standing alone, is not a sufficient justification.

Since *Schmitz*, this Court and our Supreme Court have continued to apply the prima facie doctrine to conduct authorized by contract. In *Kitchell v. Public Service Co. of New Mexico*, 1998-NMSC-051, 972 P.2d 344, for example, our Supreme Court applied the principles of prima facie tort to defendant PNM's conduct in terminating Kitchell's employment contract. Although the Court found that Kitchell's contract plainly authorized PNM to terminate his employment, this did not end the Court's inquiry. *Id.* ¶¶15, 18. The Court went on to determine whether the evidence in the record supported the plaintiff's claim that PNM's conduct satisfied the elements of prima facie tort. The Court ultimately granted summary judgment to PNM. It did so because there was no evidence whatsoever that PNM acted with an intent to injure Kitchell, not simply because the contract authorized the termination. *Kitchell*, ¶18.

In *Portales Nat. Bank v. Ribble*, 2003-NMCA-093, 75 P.3d 838, this Court overturned a grant of summary judgment to the defendant Bank in a case

where the Bank's conduct was authorized by a series of loan contracts entered into between the Bank and the plaintiffs. As is the case here, the plaintiffs had breached the terms of their contract with the Bank (in *Ribble*, the plaintiffs had breached several contracts). Although the Bank was, therefore, authorized by contract to return the plaintiffs' overdrawn checks and charge a fee, this Court noted that the Bank was not required to do so; it had discretion as to whether to enforce the contract term. Finding that the evidence was sufficient to convince a reasonable jury that the Bank President had exercised his discretion with an intent to harm the plaintiffs and without sufficient justification, this Court remanded for trial on plaintiffs' prima facie tort claim. *Id.* ¶9; *see also Costello v. Shelter Mut. Ins. Co.*, 697 S.W.2d 236 (Mo. Ct. App. 1985).

In conclusion, then, both the principles of law underlying prima facie tort and the decisions of the courts of both New Mexico and Missouri directly contradict Farmers' claim that conduct authorized by contract can never be the basis of a prima facie tort.

III. The At-Will Employment Doctrine and the Law Governing Prospective Contractual Relations are Irrelevant to This Case.

Throughout its **BIC**, Farmers relies on the law of at-will employment and prospective contractual relations to argue that: (1) its motive in terminating Beaudry does not matter; (2) it is free to enter into a contractual relationship with whomever it pleases; and, (3) Beaudry had no legally protected interest in his relationship with Farmers, and therefore, suffered no "injury." All three of these contentions rely on Farmers' unfounded assumption that its Agent Appointment Agreement is an at-will employment contract and that, as such, the contract establishes nothing more than an interest in a prospective relationship. Restatement (Second) of Torts, § 766, cmt. g; *Kelly v. St. Vincent Hosp.*, 1984-NMCA-130, ¶26, 692 P.22d 1350.

Once again, Farmers is wrong. Neither the at-will employment doctrine nor the law governing prospective or future contractual relations is relevant to this appeal.

A. Farmers Tried This Case as a For-Cause Termination of an Agency Agreement.

Farmers has neither preserved nor adequately briefed the contract construction issues which underpin its at-will employment argument and its companion claim that an at-will contract creates only an interest in a prospective contractual relationship.

Early in this case, Farmers sought a summary judgment ruling that Beaudry's Agent Appointment Agreement could be terminated at-will, for any reason or no reason. **13 RP 3106.** Subsequently, Farmers sought, in the alternative, a ruling that it had the legal right to terminate Beaudry's Agent Appointment Agreement for cause because of the acts of Plaintiff's employee April Granger in canceling a Farmers insurance policy and temporarily placing Martinez Plaza with CNA. **16 RP3808; 19 RP 4517, 4530-31.** Farmers informed the court that, if it ruled for Farmers on this motion, its alternative motion claiming that the Agent Appointment Agreement allowed termination at-will would be moot. **16 RP 3810, 3821; 17 RP 4153; 19 4518, 4530, 4531.**

The court, relying on both the language of the contract and extrinsic evidence of the intent of the parties, ruled that the Agent Appointment Agreement's termination provisions were ambiguous. The court left open for

consideration by the jury whether the parties to the contract intended at the time of contracting for termination to be at-will. **24 RP 5713-19.**

Relying on the law of agency, the court then ruled that Farmers had a contract right to terminate Beaudry for cause based on April Granger's conduct, even if that conduct was contrary to Beaudry's instructions. **28 RP 6926, 6929.**

Following these two rulings and consistent with having informed the court that its at-will employment claim would be mooted by a ruling that Beaudry's termination was lawful under the contract, Farmers chose to try the case exclusively as a for-cause termination case. At Farmers' request, the court took the extraordinary step of instructing the jury at the outset of the trial that Farmers had the legal right to terminate Beaudry's Agent Appointment Agreement because of April Granger's actions regarding the Martinez Plaza policy. **33 RP 8016; 4-23-13 Tr. 70.**

At the last minute, just before the jury retired, Farmers asked the court for two instructions which it described as instructions on at-will termination. No foundation had been laid before the jury in the evidence or in Farmers' opening to prepare the jury to construe the contract. **4-23-13 Tr. 38-67.** The district court refused to give these instructions on the basis that Farmers had

from start to finish litigated the case based on the court's summary judgment ruling that Farmers had a legal right to terminate Beaudry for cause. **4-30-13 a.m. Tr. 32:20-22** ("[i]f you wanted the Jury to determine contract you shouldn't have moved for summary judgment, which I granted you").

The court also refused the instruction proffered by Farmers because it was inconsistent with New Mexico law governing the construction of contracts. **4-30-13 a.m. Tr. 33:5-7.** The record shows that the court was correct: Farmers never proffered an instruction consistent with New Mexico law on the construction of a contract. *See* **32 RP 7754**; *compare* UJI 13-825-828. It is settled law that in order to preserve an error regarding the trial court's failure to give a jury instruction, a defendant is required to tender a legally correct statement of the law. *State v. Denzel B.*, 2008-NMCA-118, ¶18, 192 P.3d 260.

Although Farmers may wish that it had tried this case differently, it cannot switch horses on appeal. *Gracia v. Bittner*, 1995-NMCA-064, ¶1; 900 P.2d 351 (recognizing that an appellant would often prefer to appeal the case they wished they had tried, rather than the one they did try).

In addition to failing to preserve its claim that the contract is at-will in the district court, Farmers has also failed to comply with this Court's

requirements for briefing this issue on appeal. Farmers' entire argument concerning the construction of the contract is found in two footnotes: **BIC 28 n.7, 40 n.10**. Farmers' footnotes meet none of this Court's requirements for clearly stating its issues on appeal, for explaining how the issues were preserved, for reviewing the relevant evidence and proceedings, and for presenting a coherent argument with supporting authority. Rule 12-213(A) NMRA; *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶70, 309 P.3d 53 ("[t]o present an issue on appeal for review, an appellant must submit argument and authority as required by rule; we will not review unclear arguments, or guess at what [a party's] arguments might be"). In fairness to both Plaintiff and to this Court, this Court should reject Farmers' invitation (found at the end of footnote 7) to address what it refers to as its "without cause termination issues."

Nor should Farmers be permitted to brief these issues for the first time in its reply brief: these are issues which turn on the application of New Mexico contracts law to the facts in the record revealing the intent of the parties at the time the contract was made. Plaintiff would be severely prejudiced by his inability to respond to such an argument. *Doe v. City of Albuquerque*, 1981-NMCA-049, 631 P.2d 728 (holding that the reply brief is not

the place to set forth the substance of the evidence and argument for the first time and refusing to consider the argument).

B. As a Matter of Both Law and Public Policy, Farmers' Invitation to Extend the At-Will Employment Doctrine to the Relationship at Issue Here Should Be Rejected by this Court.

Farmers' brief (and the brief of its amicus) argue that public policy requires the expansion of the exception for at-will employment mentioned by our Supreme Court in *Schmitz* to include all employment contracts and long-term agreements between a principal and an agent. Indeed, Farmers BIC simply assumes, without discussion or argument, that its relationship with Beaudry is subject to the prima facie tort law arising in the context of either at-will employment relationships or prospective contractual relationships. *See* **BIC 23-24, 27-31, 35-37** (citing, virtually without exception, prima facie tort cases arising in an at-will employment or a prospective contractual relationship).

Farmers' argument is out of touch with current public policy and modern society's standards of behavior.

The employment at-will doctrine recognizes that when there is a simple contract for employment which is "not supported by any consideration other

than performance of duties and payment of wages" the employer is free to discharge the employee, "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong." *Vigil v. Arzola*, 1983-NMCA-082, ¶¶13, 17, 699 P.2d 613. An important element of the at-will employment doctrine is that "there is no cause of action in tort for abusive or wrongful discharge of an at-will employee." *Yeitrakis v. Schering-Plough Corp.*, 804 F. Supp. 238, 249 (D. N.M. 1992). It is for this reason that many courts find the at-will employment doctrine inconsistent with prima facie tort. *Id.*

The at-will employment doctrine has been harshly criticized as out of step with our modern industrial society. The doctrine rests on the idea of mutuality of obligation which dates back to the industrial revolution: since an employer cannot force an employee into labor, neither should an employee have the power to force an employer to retain him. *Vigil v. Arzola*, ¶17.

So far, our courts and Legislature have responded to the criticism of the at-will employment doctrine by strictly interpreting it and by making limited exceptions, rather than by eliminating it altogether.[2] *Id.* ¶18. Society

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[2]The New Mexico courts have adopted the doctrine of breach of an implied contract of employment and the tort of retaliatory discharge

apparently remains willing, with some very important exceptions, to accept that simple employment - the exchange of labor for wages - creates no expectation of job security. *Hill v. Cray Research, Inc.*, 864 F. Supp. 1070 (D. N.M. 1991).

The principal-agent relationship at issue here, however, is entirely different than the at-will employment relationship. Apart from requiring cause for termination of the contract, an obvious difference, Farmers' Agent Appointment Agreement creates a relationship between a principal (Farmers) and an independent agent (Beaudry) which does not involve the exchange of either time or labor for wages. **Def. Ex. 1.** Instead of wages, Farmers pays a commission based on the number and type of policies the agent has sold. This commission continues to be paid monthly indefinitely, so long as a policy remains on the agent's books. The agent is expected to start his own business from scratch, hire his own staff, find and rent or purchase his own office, complete required training (without payment for his time) and gradually

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as exceptions to the employment at-will doctrine. *Forrester v. Parker*,1980-NMSC-014, 606 P.2d 191; *Vigil v. Arzola*, 1983-NMCA-082. Exceptions adopted by our Legislature include NMSA 1978, §28-1-1 (2000) (Human Rights Act); §10-16C-1 (2010) (Whistleblower Protection Act); §1-20-13 (voting and political beliefs); §38-5-18 (jury service).

build his agency, accumulating clients and policies. **Def. Ex. 1.** *See Costello,* 697 S.W.2d 236 (treating an insurance company-independent agent agreement differently from an at-will employment contract for purposes of prima facie tort). This is not "an employment contract ... not supported by any consideration other than performance of duties and payment of wages", the only kind of contract subject to the at-will employment doctrine. *See Melnick v. State Farm Mut. Auto. Ins. Co.,* 1988-NMSC-012, ¶14, 749 P.2d 1105.

The interests of the plaintiff and of society in the continuation of a long-term principal-agent relationship are different, both as a matter of law and public policy, than they are in a simple exchange of labor for pay. The relationship requires a significant investment of time and money by the agent before he can expect a return. At the heart of Farmers' Agent Appointment Agreement is an expectation of a secure relationship, continuing into the future, that is not present in the daily exchange of labor for pay. Otherwise, the agent would not be willing to invest the resources necessary to create a successful Farmers agency nor would Farmers be willing to invest in the agent's training.

The expansion of the employment at-will doctrine to the type of relationship Farmers had with Beaudry would be inconsistent with New

Mexico public policy. Both our Legislature and our courts have recognized the unfairness and the consequences to society of the employment at-will doctrine and have indicated an intent to promote the financial security of New Mexicans by severely limiting the application of that doctrine. *See* p. 37, n.2, *supra.*

For all of these reasons, then, Beaudry's interest in his relationship with Farmers is entitled to the protection of prima facie tort.

IV. When the Injury to Beaudry, Farmers' Motive, and the Justification and Social Utility of Farmers' Conduct are Balanced, the Balance Weighs Heavily in Favor of the Plaintiff.

Our Supreme Court in *Schmitz* adopted the balancing approach to prima facie tort sanctioned by the Restatement (Second) of Torts § 870. *Schmitz*, ¶46. Contrary to the Defendants' claim that the mere assertion of any business interest is sufficient to avoid liability for prima facie tort (**BIC 12,**), our Court has firmly rejected the requirement that an intent to injure the plaintiff must be the sole motivation for the action. *Schmitz*, ¶45-47. Instead, if a defendant offers a purpose other than to injure the plaintiff – a justification for the act – "that justification must be balanced to determine if it outweighs the bad

motive of the defendant in attempting to cause injury." *Schmitz*, ¶46; Restatement (Second) of Torts §870, cmt. c.

In determining whether a prima facie tort has been committed, our courts weigh the severity of the injury, the culpable character of the conduct, and the defendant's bad motives against the justification for the conduct, to determine whether, under the circumstances, the offered justification outweighs the bad motive. *Schmitz*, ¶¶40, 46.

A. Standard of Review.

In conducting this balancing test in a case like this which is appealed following trial, this Court does not reweigh the evidence. *Beavers*, 1995-NMCA-070, ¶19; *citing Kiphart v. Community Fed. Sav. & Loan Ass'n*, 729 S.W.2d 510, 515 (Mo. Ct. App. 1987). Instead, drawing all inferences in favor of the prevailing party (here, the Plaintiff) and disregarding all conflicting evidence, this Court independently analyzes whether the conduct in question justified submission to a jury. *Id.; Gonzales v. N.M. Dept of Health*, 2000-NMSC-029, ¶18, 11 P.3d 550.

B. The Balance.

1. The nature and seriousness of the harm.

The balancing test begins by examining the nature and seriousness of the harm caused by the defendant's conduct. Not all harm qualifies as an "injury" for purposes of prima facie tort. The harm must be "of sufficient nature and seriousness that legal redress is appropriate." Restatement (Second) of Torts, §870, cmt. e.

The evidence presented to the jury here documented significant economic and emotional harm to Beaudry. The jury found that Beaudry suffered injury in the amount of $1 million, most of it in the value of the commissions he had built up over an eleven-year period of hard work as a Farmers agent. Beyond the monetary loss, Beaudry lost his dream of building a family business and of being able to comfortably live and eventually retire on the commissions he had earned. A lifetime of hard work and careful planning was upended at a time when advancing age and his wife's illness prevented him from starting over and recouping what he had lost. His confidence and physical and mental health were severely damaged. The decision to terminate his contract without notice and without giving him an opportunity to defend himself sullied his reputation and made it extremely

difficult to continue to live and work in Taos, a small town where word of trouble travels fast.

The severity of the harm caused by depriving a person of their means of livelihood is well recognized. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (describing loss of a livelihood as a "serious menace to ... health, morals and welfare" falling "with crushing force upon the ... worker and his family"). Coming at a time when Beaudry's wife was close to death, the blow was especially crushing.

Farmers does not attempt to minimize the harm to Beaudry. **BIC 36.** Farmers' only claim relevant to this prong of the balancing test is that Beaudry had no legally protected interest in his relationship with Farmers, in the commissions which he accumulated over the years, in his relationships with his clients, or in his reputation because the at-will employment doctrine applies. Farmers' argument was addressed in Section III, *supra.*

2. Malicious intent.

The second question is whether the evidence is sufficient so that a reasonable jury could conclude that both Carroll and Allin[3] were motivated out of a desire to harm Beaudry, not merely out of an intent to do the act resulting in the claimed injury. Restatement (Second) of Torts, §870 cmt. b.

There is overwhelming direct and circumstantial evidence in the record at trial here of actual intent to harm Beaudry by both Carroll and Allin. The evidence includes the secrecy and speed with which both Carroll and Allin proceeded; their failure to investigate the allegations; Carroll's strategy of surprising Beaudry at the November 17, 2010, meeting in Taos, and then refusing his and Dee's repeated offers to address any concerns; Carroll and Allin's careful crafting of the reports and e-mails to the central office, excluding the many mitigating factors that would have undermined the termination decision; their blatant disregard of Farmers' own policy providing that all of the circumstances be taken into account before an agent is terminated; and the contrast between their protection of Gutierrez's

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[3]Farmers' liability turns primarily on Carroll and Allin's conduct. Farmers ratified their conduct, stipulating that they were acting for Farmers at all times.

poaching and their attack on Beaudry. Taken together, this conduct is plainly indicative of an intent to harm Beaudry.

Carroll and Alllin's disregard for every mitigating factor, and their conduct in hiding those factors from reviewers, merits special mention. Mitigating factors include the fact that the contract violation occurred through an employee's mistake, rather than a purposeful act by Beaudry; the disruption in the Beaudry agency at the time due to Dee Beaudry's life-threatening illness; Beaudry's good faith intent to keep Mr. Martinez's business with Farmers; and the success of Beaudry's plan in keeping the Martinez Plaza policy with Farmers. Carroll and Allin had a choice whether to terminate Beaudry; they chose to terminate him for an infraction which was caused by Beaudry's inexperienced employee at a time when Beaudry's mind wasn't really on the store, and all for what? An insured who ended up staying with the company, just as Beaudry intended, and who was with the company on the day of trial.

Carroll and Allin's greed to take over valuable commissions earned by Beaudry or to award them to their favorites does not qualify as a justification for their conduct. On the contrary, conduct concerned solely with one's personal economic well-being, without privilege, and to the exclusion of the

harm caused, shows such utter disregard for the other parties' interests that it is treated by our courts as evidence of a specific intent to injure. *Schmitz*, ¶66; *see also Ribble*,¶ 9.

Allin's orchestration of the Termination Review Board proceeding, denying the Board the opportunity to review the merits of Beaudry's termination, is particularly powerful evidence. Carroll and Allin's careful structuring of each action they took to hide the true circumstances suggests that they were well aware that their conduct was wrongful. *Ribble*, 20003-NMCA-093, ¶7 (intent to injure is supported by evidence that the defendant knew the act was wrongful at the time he did it).

In the context of all the evidence, it was reasonable, as well, for the court and the jury to take seriously Allin's threat in response to Beaudry's going over his head to lodge a complaint about poaching. The evidence showed that Allin was angry enough to mention it to Kerr weeks later, around the time they were together deciding whether to terminate Beaudry.

Even Carroll's comments after Beaudry's termination, "congratulating" him on being an award-winning agent and later emphasizing how his reputation had been ruined, comments which, standing alone, might simply

be seen as insensitive, suggest, in context, that Carroll had an actual intent to harm Beaudry and delighted in his success.

3. **The means.**

The next factor, the means employed by Carroll and Allin, include surprising Beaudry with the allegations and later with the termination itself; never giving Beaudry an adequate opportunity to explain to any decisionmaker what had actually happened; preparing incomplete and misleading reports designed to make it appear that there had been more than one similar contract violation, when both were well aware there had been only one; failing to consider the many mitigating factors which would have supported a decision not to terminate the contract; not revealing those factors to the central office reviewer; never mentioning Dee's serious illness or its impact on Beaudry and the agency; and refusing to allow the Termination Review Board to consider whether Beaudry's termination was in Farmers' best interests. Plainly these means are less than fair and honest.

4. **Farmers' justification.**

Counterbalanced against this evidence of significant harm, malicious motive and improper means is Farmers' claim that it had a legitimate business interest in terminating Beaudry's appointment because it always terminated

agents who breached a term of Farmers' Agent Appointment Agreement. This claimed justification, however, was undercut by Farmers' admission at trial that it *always* exercises discretion before terminating an agent, considering whether, under all of the circumstances, termination is justified by the agent's conduct and by Farmers' business interests.

A reasonable jury could well find it not credible that Farmers terminated such a productive agent, one whose loyalty to Farmers was unquestioned, simply because that agent's inexperienced employee made a mistake. The evidence that the Martinez Plaza policy was back with Farmers and there had been, at most, a few weeks lost premiums; that Farmers likely would have lost Martinez as an insured absent Beaudry's plan to retain him; the evidence that Farmers had never terminated any agent before based on the actions of an agent's employee, rather than the agent himself, also support a reasoned belief that Farmers had no legitimate business interest in terminating Beaudry.

5. **The public interest**.

Indeed, the only "justification" consistently offered at trial by Farmers was the same it now argues on appeal: that business simply cannot proceed without managers having absolute authority to terminate an agency

relationship based on a technical breach of a contract term, regardless of how malicious the motive. Contrary to Farmers and their amicus's claim that business in New Mexico will collapse if prima facie tort is applied to the conduct at issue here, sound New Mexico public policy supports the application of prima facie tort.

First, Defendants' claim that the imposition of prima facie tort will leave managers without any clear standard and will disrupt expectations in the commercial world, simply is not true. Our Supreme Court addressed this very argument in *Beavers v. Johnson Controls World Servs*, 1994-NMSC-094, 881 P.2d 1376. The defendants in that case, much like the Defendants here, argued that the business world "reli[es] on [the] absence of potential liability" for malicious conduct.

The Court responded by pointing out that prima facie tort does not impose a new or unexpected standard on businessmen: it is a standard that has long been accepted by this society. *Id.* ¶39; *Beavers*, 1995-NMCA-070, ¶32 (concluding that in a civilized society, no manager could fairly believe that he has "the *right* to injure [an employee or agent] through malicious and intentional conduct").

Second, Defendants claim that applying prima facie tort will destabilize contractual relationships. This too is wrong. On the contrary, as this Court has previously stated and as the facts of this case illustrate, malicious conduct - the intentional doing of a wrongful act with knowledge the act was wrongful - "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships." *Bogle v. Summit Investment Co., LLC,* 2005-NMCA-023, ¶29, 107 P.3d 520.

Farmers also objects to the award of tort damages, claiming that it is unfair because, had Farmers merely breached its contract with Beaudry, its damages would be less. There is no unfairness: prima facie tort requires that the jury be convinced that the defendant acted maliciously. Malicious conduct is far more blameworthy than mere breach of contract. Even in a breach of contract case, malicious conduct would justify additional damages. *Id.*

Although under other circumstances, Farmers would be justified in terminating an agent who breached a contract provision, its motive to harm Beaudry together with the offensive and unfair means it used to prevent him from defending himself, the severe injury to him, and the absence of a

justification, all supported the trial court's submission of the prima facie tort case to the jury.

V. Farmers' Maliciously Committed Acts Do Not Fit Within the Contours of Other Accepted Torts.

Farmers also argues that, because Beaudry's complaint relied on a unified statement of facts followed by counts in contract and tort, including prima facie tort, the complaint failed to satisfy the "unique factual allegations" requirement. **BIC 37-39.**

The "unique factual allegations" requirement is not the sort of special pleading requirement suggested by Farmers' brief. *See Hagebak v. Stone*, 2003-NMCA-007, 61 P.3d 201 (holding that a complaint may rely on the same factual allegations to support a number of claims); *Schmitz*, ¶48 (prima facie tort can be pleaded in the alternative, consistent with modern pleading practice). Instead, the term "unique factual allegations" is used by our courts as shorthand for the requirement that prima facie tort "provide a remedy for intentionally committed acts that do not fit within the contours of accepted torts." *Id.* The question is whether, when the facts are fully developed, a prima facie tort claim is duplicative of another tort. *Hagebak v. Stone*, 2003-NMCA-007.

It is apparent in this case that no established doctrine of law aside from prima facie tort provides a cause of action. Farmers' brief raises as an alternative only the covenant of good faith and fair dealing.[4] **BIC 32-33**. It is readily apparent, however, that a cause of action for breach of the covenant of good faith and fair dealing was ruled out by the district court's holding that the conduct of Farmers' managers was authorized by a contract term. **28 RP 6926;** *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶17. Beaudry, therefore, did not have a cause of action either for breach of contract or for breach of the implied covenant of good faith and fair dealing.

Under the unique facts of this case, the intentional, malicious conduct of Carroll and Allin, conduct ratified by Farmers prior to trial, was actionable solely in prima facie tort. All other torts were properly ruled out.

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[4]Farmers also attempts to apply the products liability rule that favors allowing joint tortfeasors to address liability for a faulty product by agreement. **BIC 33**. The relevance of this products liability doctrine to an intentional tort like prima facie tort is frankly difficult to fathom.

VI. The Jury's Punitive Damages Award Fully Complies with Due Process.

Defendants are entitled to both procedural and substantive due process in the award of punitive damages. They received both in this case.

A. Procedural Due Process.

Our Supreme Court has held that jury instructions identical to those given here meet the standard for procedural due process set forth in *Pac. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). *Aken v. Plains Elec. Generation & Transmission Co-Op, Inc.*, 2002-NMSC-021, ¶13, 49 P.3d 662. The jury here was instructed that they "may" award punitive damages; that the purpose of punitive damages is to punish and deter others from similar wrongful conduct; that the jury should act toward the ends of reason and justice; that they must examine the nature and enormity of the wrong, and consider aggravating and mitigating circumstances. **33 RP 8032.** The jury was admonished as well that it should give fair and unprejudiced treatment to the Defendant corporations, treating them the same as they would an individual. **33 RP 8033.**

Defendants were not entitled to have the jury instructed that "the purpose of compensatory damages is to deter future conduct" (**33 RP 8012**),

as they argue at **BIC 42**: this is not a correct statement of the law in New Mexico. The jury was instructed, consistent with New Mexico law, that compensatory damages are solely for the purpose of reasonably and fairly compensating the plaintiff. **33 RP 8028**.

B. Substantive Due Process.

The jury's award of punitive damages fully comports with the *Gore* guideposts. *BMW v. N. Am. v. Gore,* 517 U.S. 559 (1996).

As Defendants admit, the most significant factor in considering the constitutionality of a punitive damages award is "the degree of reprehensibility of the defendant's conduct." *Id.* 575. As set forth in this brief, there was ample evidence that Defendants engaged in predatory behavior that took advantage of Beaudry when he was at his most vulnerable. Despite Defendants' claim to the contrary, corporations, like individuals, are liable for punitive damages when they act maliciously,[5] with an intent to cause harm.

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[5]The jury was instructed that it could award punitive damages only if it found the Defendants' conduct "malicious," the most reprehensible scienter. **33 RP 8032.**

The second important *BMW* factor, the ratio of punitive to compensatory damages, also supports the award here. Beaudry was found by the jury to have suffered a total of $ 1 million in compensatory damages, including lost commissions and bonuses and mental distress. Weighing the loss of a year's income because of the non-compete clause, the loss of a business built over many years, the damage to reputation, and the severe depression Beaudry suffered, the trial judge found that the injury to Beaudry was somewhere in the middle in terms of the type and extent of harm suffered. **1-22-14 Tr. 8-10.** The court, therefore, found the jury's punitive damages award (a 2.5 multiple) reasonable.

Although there is not a ready comparison with civil or criminal penalties, the New Mexico courts have concluded that this final criterion is of little importance. *Aken*, 2002-NMSC-021, ¶25 (noting it is "ineffective and difficult to employ").

CONCLUSION

For the reasons stated above, this Court should uphold both the district court's decision to send this case to the jury and the jury's well-supported prima facie tort and punitive damages verdict.

ORAL ARGUMENT IS REQUESTED.

Oral argument is requested to address the Court's questions and concerns in what is a relatively complicated case.

Respectfully submitted,

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CERTIFICATION

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