FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

New Mexico Supreme Court Eliminates Foreseeability from Tort Duty Analysis

By Jennifer F. Thompson & Deborah J. La Fetra***

On May 8, 2014, the New Mexico Supreme Court significantly altered the state's tort law duty analysis in *Rodriguez v. Del Sol Shopping Center Associates, L.P.*[1] This ruling held that foreseeability may not be considered in deciding whether a tort duty exists.[2] Rather, courts must articulate and rely on specific public policy rationales.[3]

I. Background

In March 2006, Rachel Ruiz suffered a seizure while driving her mechanically-defective pick-up truck in the Del Sol Shopping Center in Santa Fe, New Mexico.[4] Doctors had advised Ruiz not to drive on account of her medical condition.[5] And she was aware that her truck had mechanical problems, including sudden acceleration and loss of brake control.[6] Ruiz nonetheless drove the vehicle and lost consciousness after having a seizure while driving along a 600-foot entrance straightaway in the shopping center's parking lot.[7] While she was unconscious, Ruiz's truck accelerated, vaulted a six-inch curb narrowly missing a concrete support pillar, crossed a ten-foot wide sidewalk, snapped a metal handrail, and crashed through the floor-to-ceiling glass wall of the Concentra Medical Clinic.[8] The truck eventually stopped inside the health center after striking and killing three people and injuring six others.[9]

Ruiz was imprisoned after pleading no contest to three counts of vehicular homicide and six counts of great bodily injury by vehicle.[10] The surviving victims and the decedents' estates filed premises liability actions against the owners and operators of the shopping center and the medical clinic, alleging they were negligent in maintaining the parking lot and in failing to erect physical barriers between the parking lot and the health clinic.[11] Two separate district courts awarded summary judgment to the defendants, finding they owed no duty to the plaintiffs to protect against this type of occurrence because it was unforeseeable as a matter of law.[12]

The Court of Appeals of New Mexico consolidated the cases for appeal and affirmed the district court's finding of no duty, but under a different rationale.[13] It adopted a policy-driven duty analysis, relying on the Restatement (Third) of Torts, and a 2010 New Mexico Supreme Court decision, *Edward C. v. City of Albuquerque*,[14] which held that "[f]oreseeability . . . is but one factor to consider when determining duty and not the principal question."[15] Rather, courts should focus primarily on "the . . . activity in question, the parties' general relationship to the activity, and public policy considerations."[16]

The court of appeals followed that directive and held that the general duty of care which the owners and occupiers of businesses owe to visitors while inside buildings does not encompass the duty to protect them from runaway, third-party vehicles.[17] The court reasoned that the nature of the activity—providing services to the public in a shopping center—bore no inherent relation to the risk that a vehicle would collide with patrons inside a business.[18] And it found no public policy support in state law for requiring the owners and occupiers of shopping

... continued page 5

New Mexico Supreme Court Eliminates Foreseeability from Tort Duty Analysis

Continued from page 2...

whether a duty had been breached, not whether it existed in the first place.[31] The court also criticized the lower court's approach to defining public policy by looking to the shopping center's compliance with the state's building code. The court held that statutory compliance with safety standards was relevant only to the factual question of whether the defendants acted reasonably under the circumstances; a question for the jury.[32]

III. Implications

By holding that foreseeability plays no role in a court's duty determination, the New Mexico Supreme Court adopted the Restatement (Third) of Torts' approach to duty.[33] It also opened a new chapter in the long-standing debate over foreseeability traceable to Justice Cardozo's 1928 decision in *Palsgraf v. Long Island Railroad Company.*[34] There, Cardozo's ruling—that the railroad owed no duty to Mrs. Palsgraf to protect her from falling scales because she was not a reasonably foreseeable plaintiff—prompted Justice Andrews to decry the majority's use of foreseeability as inherently arbitrary.[35] He noted in dissent: "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[36] More recently, the U.S. Court of Appeals for the Sixth Circuit criticized Cardozo's approach in *Palsgraf* for failing to articulate "any clear standard regarding what makes a projected harm too improbable to be foreseeable."[37] As a result, "[c]ourts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable . . ."[38] Others have criticized courts' use of foreseeability in determining duty for obscuring value judgments based on policy considerations.[39]

But in spite of these critiques, most jurisdictions continue to recognize that foreseeability plays some role, even if a limited one, in defining tort duties.[40] And every jurisdiction, except one, to consider premises liability under facts similar to *Rodriguez*, found that defendant business owners owed no duty to plaintiffs to prevent harm caused by runaway third-party vehicles crashing into buildings.[41] Hence, *Rodriguez* represents a significant departure from traditional tort duty jurisprudence. Its practical effect will be to limit courts' ability to make no duty determinations as a matter of law, and to increase the number of tort liability cases that reach New Mexico juries.

**Jennifer F. Thompson is a staff attorney in PLF's property rights practice group. She advocates for landowners' constitutional rights to the productive use and enjoyment of property.*

***Deborah J. La Fetra directs PLF's Free Enterprise Project, focusing on limiting the expansion of civil liability and protecting the freedom of contract.*

Endnotes

1 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014)

2 *Id.* at *1, ¶ 1.

3 *Id.*

4 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2013-NMCA-020, ¶¶ 1, 3, 297 P.3d 334 (2012), *rev'd* Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014).

5 *Id.* ¶ 3.

6 *Id.*

7 *Id.* ¶¶ 3-4.

8 *Id.* ¶ 4.

9 *Id.*

10 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., 2013-NMCA-020, ¶ 5, 297 P.3d 334 (2012), *rev'd* Nos. 33,896, 33,949, 2014 WL 1831148 (N.M. May 8, 2014).

11 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148, at *1, ¶ 2 (N.M. May 8, 2014).

12 *Id.*

13 Rodriguez, 2013-NMCA-020, ¶ 1.

14 *Id.* Edward C. v. City of Albuquerque, 2010-NMSC-043, 241 P.3d 1086 (N.M. 2010), *overruled by* Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *1, ¶ 3.

15 Edward C., 2010-NMSC-043, ¶ 18.

16 Rodriguez, 2013-NMCA-020, ¶ 10 (quoting Edward C. 2010-NMSC-043, ¶ 14).

17 *Id.* ¶¶ 14-21, 29.

18 *Id.* ¶¶ 15-17.

19 *Id.* ¶¶ 18-22.

20 Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P., Nos. 33,896, 33,949, 2014 WL 1831148, at * 9, ¶ 24 (N.M. May 8, 2014).

21 *Id.* * 1, ¶ 1.

22 *Id.*

23 *Id.* The Court noted that courts may consider foreseeability, but only when ruling as a matter of law on breach or causation because no reasonable jury could have found either that the defendant breached his or her duty, or that the breach caused the plaintiff's damages. *Id.* * 9, ¶ 24.

24 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *3, ¶¶ 8-11 (comparing the foreseeability-driven approach of Chavez v. Desert Eagle Distributing Co., 2007-NMCA-018, 151 P.3d 77, with the Restatement-approved policy-driven approach in Gabaldon v. Erisa Mortgage Co., 1997-NMCA-120, 949 P.2d 1193).

25 *Id.* *3, ¶ 9.

26 *See id.* *4, ¶ 11.

27 *Id.* *7, ¶ 19.

28 *See id.* *4, ¶ 12.

29 *Id.*

30 *Id.* *5, ¶ 13. The Court explained:

> Since remoteness [of the incident] invites a discussion of particularized facts, we do not approve of using remoteness as the basis for a policy determination. A determination of no duty based upon the foreseeability, improbability, or remote nature of the risk is inconsistent with the Restatement approach, which provides that only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *Id.*

31 *Id.* *5, ¶ 15.

32 Rodriguez, Nos. 33,896, 33,949, 2014 WL 1831148, at *6, ¶ 17; *id.* *7, ¶ 19.

33 *See* Restatement (Third) of Torts: Physical & Emotional Harm, § 7, comment j ("Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.").

34 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

35 *Id.* at 340-41, 344-45. *Id.* at 352 (Andrews, J., dissenting).

36 *Id.* at 352 (Andrews, J., dissenting).

37 James v. Meow Media, Inc., 300 F. 3d 683, 691 (6th Cir. 2002).

38 *Id.*

39 *See*, *e.g.*, J. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 938 (2005) ("Foreseeability often operates as a proxy for decisions of policy that have little to do with foreseeability's other conceptual purposes [which include] moral responsibility . . . behavioral modification and economic efficiency.").

40 According to the California Supreme Court, for example, the determination of whether a duty exists, involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. Wiener v. Southcoast Childcare Ctrs., Inc., 32 Cal. 4th 1138, 1145, 12 Cal. Rptr. 3d 615, 620 (2004) (quoting Rowland v. Christian, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100 (1968)); *see also* Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co., 393 S.W.3d 379, 399 (Tex. Ct. App. 2012) ("We consider several related factors, including the risk, foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant."); Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1101 (Ill. 2012) ("[W]e have repeatedly stressed that the existence of a duty turns, not only on foreseeability alone, but in large part on public policy considerations.").

41 *See* Rodriguez, 2013-NMCA-020, ¶ 28. The only state supreme court to rule otherwise is Illinois. *See* Marshall v. Burger King, 856 N.E. 2d 1048, 1051, 1065 (2006).

Supreme Court of Ohio Upholds Challenge to the Application of Zoning Restrictions

Continued from page 4...

ernmental regulations that can change overnight."[23] Such a result "would eliminate the constitutional protections that people must be afforded…."[24] The appellate court's decision to the contrary had thus "ignore[d] well-settled land-ownership rights in this country."[25]

III. Dissenting Opinion

Had the appellate court ignored well-settled law? Not according to the dissent, which emphasized that (until now), a nonconforming use could be established only if "the property [was] actually . . . *used in that [nonconforming] manner*" at the time the zoning restriction was put in place.[26] Here, the Boices had *used* the vacant lot only as a side yard to their residential lot; they had never begun construction, and they had not even requested a variance until 26 years after the zoning ordinance was enacted.[27] The Boices' expectation that their property would always remain buildable was just that—an expectation, not a vested right.[28]

IV. Conclusion

The crux of this dispute is the interpretation of "use." As noted above, the majority rejected the notion that construction must begin before property owners may obtain a vested right in a "legal use."[29] The dissent disagreed with what it described as the "majority's transformation of 'expectations' into a legally cognizable 'use[,]' "[30] and argued that the majority's rationale marks a "drastic change" in