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BY SUSAN L. CARLSON
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No. 97826-3

(Washington Court of Appeals No. 36528-0-III)

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

DANIEL LYON,

Appellant,

v.

OKANOGAN COUNTY ELECTRIC COOPERATIVE,
INC., a Washington corporation, and PUBLIC UTILITY
DISTRICT NO. 1 OF DOUGLAS COUNTY, a public
utility district,

Respondents.

**RESPONDENT OKANOGAN COUNTY ELECTRIC
COOPERATIVE'S SECOND STATEMENT OF ADDITIONAL
AUTHORITIES**

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Attorneys for Respondent Okanogan County Electric Cooperative, Inc.

Under RAP 10.8, Respondents submit the following additional authorities on the issue of whether New Mexico “abolish[ed] its fire fighter’s rule” by the decision of the New Mexico Court of Appeals in *Baldonado v. El Paso Natural Gas Co.*, 143 N.M. 297, 176 P.3d 286, 288 (Ct. App. 2006) (opinion per Alarid, J., “disavow[ing]” the court’s adoption of the firefighters’ rule in *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322(Ct. App. 1984)) (Plaintiff’s Reply Brief at 6);

- Special concurring opinion of Sutin, J, in *Baldonado*, 176 P.3d at 308:

I agree with reversing the dismissal of Plaintiffs' claim of intentional infliction of emotional distress. I do not, however, agree that the fireman's rule should be addressed or that, if it is addressed, it should be abandoned. The fireman's rule does not cover intentional acts. It does not limit liability for intentional acts. As Judge Castillo states in her concurring opinion, we do not, therefore, have to address the fireman's rule to reach that issue. However, because Judge Alarid generally disavows the fireman's rule, I address the rule. I respectfully do not agree with the various rationales used by Judge Alarid to disavow the fireman’s rule.

- Special concurring opinion of Castillo, J, in *Baldonado*, 176 P.3d at 309:

I concur in the affirmance of the dismissal of Plaintiffs' claim for NIED [i.e., negligent infliction of emotional distress], and I concur in the reversal of the dismissal of Plaintiffs' claim for IIED [i.e., intentional infliction of emotional distress]. However, I cannot concur in the portion of Judge Alarid's opinion that disavows *Moreno*. The resolution of this case does not turn on the applicability of the fireman's rule as enunciated in *Moreno*; therefore, there is no reason to reach this issue because it has no effect on the outcome of the case.

• unanimous opinion of the New Mexico Supreme Court in *Baldonado v. El Paso Natural Gas Co.*, 143 N.M. 288, 176 P.3d 277, 278-79 (2007) (following grant of petition for writ of certiorari to review the decision of the Court of Appeals, *supra*):

The issue in this case is whether firefighters may recover damages for intentional infliction of emotional distress sustained in the course of responding to a fire. The answer to this question initially turns on whether the firefighter's rule, as adopted in *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322 (Ct.App. 1984), should continue as a part of New Mexico jurisprudence. The rule, which prohibits firefighters from suing for damages sustained while responding to a fire except where the owner or occupier of the land fails to warn of a known danger or misrepresents the nature of the hazards being confronted, was overruled by the Court of Appeals. In that opinion, one judge would abolish the rule entirely and two judges would prohibit firefighter litigation involving negligence claims. *See Baldonado v. El Paso Natural Gas Co.*, No. 24,821, 143 N.M. 297, 176 P.3d 286 (N.M.Ct.App. June 29, 2006). We adopt a policy-based approach to the firefighter's rule and hold that a firefighter may recover damages if such damages were proximately caused by (1) intentional conduct; or (2) reckless conduct, provided the harm to the firefighters exceeded the scope of risks inherent in the firefighters' professional duties.

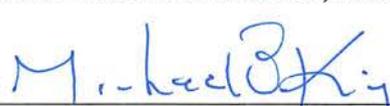
Copies of these authorities are attached for the Court's convenience.

Respectfully submitted this 14th day of January, 2020.

FORSBERG & UMLAUF, PS

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Attorneys for Respondent Okanogan County Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Via Appellate Portal, to the following:

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DATED this 14th day of January, 2020.

S/ Rozalynne Weinberg
Rozalynne Weinberg, Legal Assistant

143 N.M. 297

Court of Appeals of New Mexico.

Christopher Lee BALDONADO,
Winston E. Brasher, Jr., Lupe C.
Corona, Charles K. Crouch, Gladys
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Hicks, David R. Looney, Javier R.
Lopez, Ronald R. Macaluso, Mark A.
Olivo, Francisco M. Orozco, Dennis
Osborne, Kay Otero, Richard W.
Riddle, Saul Ray Sanchez, Marvin Keith
Schrock, Michael D. Shannon, Jason
E. Uptergrove, Tracy L. Uptergrove,
Kenneth Urquidez, and Willie Maxie
Wilson, Jr., Plaintiffs–Appellants,

v.

EL PASO NATURAL GAS
COMPANY, a foreign corporation,
Defendant–Appellee.

No. 24,821.

June 29, 2006.

Certiorari Granted, No. 29,941,
Sept. 13, 2006.

Synopsis

Background: Firefighters sued natural-gas company for negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED) sustained in course of response to pipeline explosion in which family of campers were either killed outright or later died from severe burns. The District Court, Chavez County, William P. Lynch, D.J., granted

gas company's motion to dismiss for failure to state claim. Firefighters appealed.

Holdings: The Court of Appeals, Alarid, J., held that:

[1] firefighters failed to state a claim for negligent infliction of emotional distress;

[2] the tort of intentional infliction of emotional distress does not require the defendant's outrageous conduct to have been directed at the plaintiff;

[3] the contemporaneousness of a plaintiff's perception of the injury to a third party, and the nature of a plaintiff's relationship to that third party, are not separate elements of the tort of intentional infliction of emotional distress; and

[4] firefighters stated a claim for intentional infliction of emotional distress.

Affirmed in part and reversed in part.

Sutin, J., filed a specially concurring opinion.

Castillo, J., filed a specially concurring opinion.

Court of Appeals affirmed, 143 N.M. 288, 176 P.3d 277, 2007 WL 4864231.

West Headnotes (11)

[1] Negligence

↔ Foreseeability

In New Mexico, the class of persons to whom a defendant owes a duty of care is determined by application of the principle of foreseeability. (Per Alarid, J., with two Judges specially concurring.)

[2] **Negligence**

↔ Public Policy Concerns

Negligence

↔ Foreseeability

In general, an actor owes a duty of care to those persons whose injuries are a foreseeable consequence of the actor's unreasonable conduct; however, even when a class of persons are foreseeable victims of an actor's negligence, the courts, for policy reasons, may insulate the actor from liability by declaring that the actor did not owe a duty to that class of victims. (Per Alarid, J., with two Judges specially concurring.)

1 Cases that cite this headnote

[3] **Torts**

↔ Torts

A defendant who seeks shelter from generally applicable rules of tort liability must demonstrate that the exception is justified by overriding policy considerations. (Per Alarid, J., with two Judges specially concurring.)

1 Cases that cite this headnote

[4] **Damages**

↔ Injury or Threat to Another;
Bystanders

Negligent infliction of emotional distress (NIED) is an extremely narrow tort that compensates a bystander who has suffered severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member. (Per Alarid, J., with two Judges specially concurring.)

2 Cases that cite this headnote

[5] **Damages**

↔ Injury or Threat to Another;
Bystanders

Negligent infliction of emotional distress (NIED) is considered a tort against the integrity of the family unit. (Per Alarid, J., with two Judges specially concurring.)

2 Cases that cite this headnote

[6] **Damages**

↔ Injury or Threat to Another;
Bystanders

An actor is not liable, based on negligent infliction of emotional distress (NIED), for severe emotional harm to foreseeable witnesses of the effects of the actor's negligence on third persons,

unless the witness-plaintiff has a close marital or family relationship with the third-person victim. (Per Alarid, J., with two Judges specially concurring.)

1 Cases that cite this headnote

[7] Damages

↔ Other Particular Cases

Firefighters who responded to natural-gas pipeline explosion and who witnessed the severe burns suffered by victims who were killed outright or who later died failed to state a claim for negligent infliction of emotional distress (NIED) against natural-gas company, in absence of allegation that firefighters had a marital or intimate family relationship with victims. (Per Alarid, J., with two Judges specially concurring.)

[8] Damages

↔ Elements in General

The elements of intentional infliction of emotional distress (IIED) are: (1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff's mental distress was extreme and severe; and (4) there was a causal connection between the defendant's conduct and the plaintiff's mental distress. (Per

Alarid, J., with two Judges specially concurring.)

7 Cases that cite this headnote

[9] Damages

↔ Nature of Conduct

The tort of intentional infliction of emotional distress (IIED) does not require the defendant's outrageous conduct to have been directed at the plaintiff. (Per Alarid, J., with two Judges specially concurring.)

5 Cases that cite this headnote

[10] Damages

↔ Injury or Threat to Another;
Bystanders

The contemporaneousness of a plaintiff's perception of the injury to a third party, and the nature of a plaintiff's relationship to that third party, are not separate elements of the tort of intentional infliction of emotional distress (IIED); rather, they are factors that may be considered in determining whether a plaintiff otherwise has satisfied the stringent elements of the tort. (Per Alarid, J., with two Judges specially concurring.)

[11] Damages

↔ Other Particular Cases

Firefighters who responded to natural-gas pipeline explosion, and who witnessed the severe burns

suffered by victims who were killed outright or who later died, sufficiently alleged outrageous conduct on the part of natural-gas company, as element for stating a claim of intentional infliction of emotional distress (IIED); firefighters alleged that company, based on cost-benefit analysis regarding renovations that would have made the aging pipeline system safer, renovated less than five percent of pipeline system, and that company, on system-wide basis, departed from applicable state, federal, and industry standards of care with respect to design, construction, maintenance, inspection, and operation of pipeline. (Per Alarid, J., with two Judges specially concurring.)

2 Cases that cite this headnote

Attorneys and Law Firms

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McCormick, Caraway, Taylor & Riley, LLP, John M. Caraway, Carlsbad, NM, El Paso Natural Gas Company, Michael S. Yauch, Tekell, Book, Matthews & Limmer, Kenneth Tekell, Houston, TX, for Appellee.

OPINION

ALARID, Judge.

299** {1} This case presents us with an opportunity to reconsider our decision in *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322 (Ct.App.1984) in which we adopted the “fireman's rule.” We disavow *Moreno* to the extent it created an exception to generally applicable rules for determining the persons to whom an actor owes a duty of care. We also consider and reject Plaintiffs' attempt to expand the scope of the tort of negligent infliction of emotional distress. We consider and reject Defendant's attempt to engraft additional elements onto the tort of intentional infliction of emotional distress. Lastly, we conclude that the count of Plaintiffs' complaint ***300** *289** asserting intentional infliction of emotional distress adequately pleads the element of outrageous conduct. We affirm the district court's dismissal of Plaintiffs' negligent infliction of emotional distress claim and reverse the dismissal of Plaintiffs' intentional infliction of emotional distress claim.

BACKGROUND

{2} In the early morning hours of August 19, 2000, a fifty-year-old, thirty-inch-diameter, high-pressure¹ natural gas pipeline owned and operated by Defendant–Appellee, El Paso Natural Gas Company, ruptured near the Pecos

River south of Carlsbad, New Mexico. At the time of the rupture, twelve members of an extended family were camped in the vicinity of the pipeline. The escaping natural gas ignited, creating an enormous fireball that engulfed the campsite. All twelve family members, including young children, either were killed outright or died later from severe burns. The burns suffered by the victims were undeniably horrific. The survivors who were conscious were visibly in excruciating physical and emotional agony. The following description of one victim's condition gives a sense of the scene as alleged in the complaint.

1 Atmospheric pressure under standard conditions is 14.7 psi. *Merriam-Webster's Collegiate Encyclopedia* 107 (Mark A. Stevens ed., 2002). According to the complaint, the pipeline was being operated at 837 psi at the time of the rupture, thereafter dropping to 377 psi.

[She] [said] her babies were dead but that she wanted to go look for them. Her face was burned; her hair was gone—melted; her ears were burned.... [She] [said] “the babies aren't there, that her babies are dead.”

[Her] hair clips were melted onto her head. She had no hair and parts of her skin were peeling from her head. The skin on her hands was coming off. [You] could tell [she] was suffering because of her moaning and crying.

[One witness] ... saw [her] and she took his breath away. Her lips had pulled back and her teeth were exposed. There was no hair on the right side of her head and her right eye was swollen shut. She had charred tissue all over her face and swelling to her neck.... [S]he kept asking for her babies. [Her husband, himself fatally burned] told

her they were dead, that he had watched them die.... [Y]ou could not tell she had a right ear; her nose was probably two-thirds gone.... Her left pupil was reactive to light but was disfigured. You could see she was in pain and hurting. Her right eye was completely swollen shut and could not be pried open; there was no palpable mass underneath it; if there was an eye, you could not tell. Her clothes, including her underwear, had melted to her.... He administered pain medications, but ... did not believe it touched her pain level.

(References to the record omitted).

{3} Plaintiffs are professional or volunteer members of local fire departments who responded to the explosion. Plaintiffs were not involved in putting out the fire and they do not allege that they suffered physical injuries at the time; rather each Plaintiff alleges that, as a result of witnessing severe injuries in the course of rendering assistance to the surviving victims of the explosion, he or she has suffered severe, debilitating emotional distress.

{4} Plaintiffs brought suit against Defendant. Plaintiffs' complaint asserted eight claims for relief, including the two claims that are the subject of this appeal: negligent infliction of emotional distress and reckless or intentional infliction of emotional distress. Defendant filed a motion to dismiss pursuant to Rule 1–012(B)(6) NMRA. Defendant argued that all of Plaintiffs' claims were barred by the fireman's rule as adopted by this Court in *Moreno*, 102 N.M. at 373, 695 P.2d at 1322. In addition, Defendant argued that Plaintiffs failed to state a claim for negligent infliction of emotional distress because they did not allege that they contemporaneously witnessed the injuries to

the victims and because the victims were not members of Plaintiffs' families. Defendant further argued that Plaintiffs failed to state a claim for intentional infliction of emotional distress because Defendant's conduct as alleged by Plaintiffs was not outrageous and was not directed at the victims or Plaintiffs either with the intent to cause emotional harm or in *301 **290 reckless disregard of the likelihood of emotional harm.

{5} The district court granted Defendant's motion, dismissing all counts of Plaintiffs' complaint.

DISCUSSIONThe Fireman's Rule

[1] [2] {6} In New Mexico, the class of persons to whom a defendant owes a duty of care is determined by application of the principle of foreseeability. *Herrera v. Quality Pontiac*, 2003–NMSC–018, ¶ 20, 134 N.M. 43, 73 P.3d 181 (discussing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)). In general, an actor owes a duty of care to those persons whose injuries are a foreseeable consequence of the actor's unreasonable conduct. *Id.* However, even when a class of persons are foreseeable victims of an actor's negligence, the courts, for policy reasons, may insulate the actor from liability by declaring that the actor did not owe a duty to that class of victims. *Id.* ¶ 26; *Lozoya v. Sanchez*, 2003–NMSC–009, ¶ 15, 133 N.M. 579, 66 P.3d 948.

{7} The fireman's rule states the limited duty owed by owners and occupiers of land to firemen² responding to an emergency on the owner's or occupier's premises. *Moreno*, 102

N.M. at 376, 695 P.2d at 1325. Under the fireman's rule, an owner or occupier of a premises does not owe a general duty of reasonable care to firemen who foreseeably may be called to respond to a fire on the owner's or occupier's premises; instead, the owner or occupier owes the limited duty to warn firemen of “hidden perils, where the owner or [occupier] knows of the peril and has the opportunity to give warning of it,” *Id.* at 378, 695 P.2d at 1327 (quoting *Clark v. Corby*, 75 Wis.2d 292, 249 N.W.2d 567, 570 (1977)) (quotation marks omitted), and to refrain from misrepresenting to firemen the nature of the hazard presented by the condition of the premises, *id.*, (citing *Lipson v. Superior Court of Orange County*, 31 Cal.3d 362, 182 Cal.Rptr. 629, 644 P.2d 822, 828–29 (1982)).

2 No New Mexico case has considered whether other classes of emergency or public safety personnel fall within the fireman's rule.

{8} The fireman's rule is an exception to the general rules that determine the persons to whom a defendant owes a duty of ordinary care. *See* 5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 27.14 at 266 (2d ed.1986) (observing that “if recovery is to be denied to the firefighters in all cases, it must be on some basis other than the absence of probable harm, proximate cause, or the other elements of an ordinary negligence action”). More particularly, the fireman's rule is an exception to the rescuer's doctrine as set out in *Govich v. North American Systems, Inc.*, 112 N.M. 226, 814 P.2d 94 (1991). In *Govich*, our Supreme Court held that a “person or entity creating [a] peril owes an independent duty of care to the rescuer, which arises from a policy, deeply imbedded in our social fabric, that fosters rescue attempts.” *Id.* at 232, 814

P.2d at 100. As a leading commentator has observed, “states that apply the firefighters' rule are in effect saying that the rescue doctrine is inapplicable” to firefighters. 1 Dan B. Dobbs, *The Law of Torts* § 287 at 777–78 (2000); *Neighbarger v. Irwin Indus., Inc.*, 8 Cal.4th 532, 34 Cal.Rptr.2d 630, 882 P.2d 347, 351 n. 2 (1994). “The firefighter's rule evolved as an exception to the rescue doctrine: A rescuer *who could otherwise recover* cannot do so if she is performing her duties as a professional firefighter.” *Espinoza v. Schulenburg*, 212 Ariz. 215, 129 P.3d 937, 939 (2006) (emphasis added).

{9} The fireman's rule began as a particular application by American³ courts of the common law premises liability categories of invitee, licensee, and trespasser. Firemen were held to be licensees, to whom the owner of premises owed a limited duty of care—to “refrain from affirmative or willful acts that work an injury.” *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182, 184 (1892) *overruled in part*, *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881, 886 (1960). Negligence in causing *302 **291 the fire does not breach the limited duties owed the firefighter-invitee. *Moreno*, 102 N.M. at 377, 695 P.2d at 1326 (observing that “the view that there is no liability to a fireman for negligence in causing a fire is a statement of the fireman's rule as it originally existed”).

3 Courts in the United Kingdom have noted the adoption of the fireman's rule by various American jurisdictions, but have expressly rejected it: “the American ‘fireman's rule’ has no place in English law.” *Ogwo v. Taylor*, [1988] A.C. 431, 432 (H.L.1987) (appeal taken from England).

{10} By the time we adopted a fireman's rule in *Moreno*, the underlying rationale for the rule

had shifted from the limited duty owed by an owner of a premises to a licensee to so-called “primary” assumption of the risk and to “public policy.” *E.g.*, *Carson v. Headrick*, 900 S.W.2d 685, 688–89 (Tenn.1995) (noting that rationale for the fireman's rule has changed over time). In *Moreno*, we expressly disavowed reliance upon a premises liability rationale for the fireman's rule. 102 N.M. at 377, 695 P.2d at 1326. Citing the California Supreme Court's decision in *Walters v. Sloan*, 20 Cal.3d 199, 142 Cal.Rptr. 152, 571 P.2d 609, 612 (1977), we justified a fireman's exception to the general rules governing liability for negligence in starting a fire on the ground of assumption of risk: “confronting a known peril with full realization of the risk.” *Moreno*, 102 N.M. at 376–77, 695 P.2d at 1325–26 (internal quotation marks and citation omitted).

{11} We recognized that assumption of risk has been used in two senses. *Id.* at 378, 695 P.2d at 1327 (citing *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971)). In one sense assumption of risk “ ‘is in reality nothing more than contributory negligence’ and is to be governed by the principles pertaining to contributory [and subsequently, comparative] negligence.” *Moreno*, 102 N.M. at 382, 695 P.2d at 1331 (quoting *Williamson*, 83 N.M. at 340, 491 P.2d at 1151). In its other, “primary” sense, assumption of risk is “shorthand for a judicial declaration of no duty of ordinary care, or no breach of that duty, depending on the circumstances of a particular relationship between the parties.” *Yount v. Johnson*, 1996–NMCA–046, ¶ 19, 121 N.M. 585, 915 P.2d 341. *Moreno* relied on assumption of risk in this no-duty sense. 102 N.M. at 378, 695 P.2d at 1327.

{12} Many occupations—e.g., oil field roustabout, construction worker, convenience store clerk—require employees to confront an appreciable risk of physical injury or death in order to carry out their jobs; yet, New Mexico courts have not recognized special no-duty rules shielding defendants who injure employees engaged in these inherently risky occupations.⁴ The rationale for denying a duty of care running to firemen that we relied on in *Moreno*—confronting a known risk—simply “proves too much.” *Walters*, 142 Cal.Rptr. 152, 571 P.2d at 617 (Tobriner, C.J., dissenting). In addition, an assumption-of-risk rationale is inconsistent with the rescuer doctrine. In *Govich*, the rescuer-plaintiffs entered the premises even though “smoke billowed forth.” 112 N.M. at 228, 814 P.2d at 96. The Supreme Court held that “except in rare cases in which reasonable minds cannot differ,” the reasonableness of a rescuer’s decision to confront an emergency presents questions of proximate cause and comparative fault to be decided by juries on the facts and circumstances of each particular case. *Id.* at 233, 814 P.2d at 101. We view *Govich* as having implicitly rejected the application of primary assumption of risk to rescuers as a class.

4 We recognize of course, that in contrast to third-party defendants, the liability of employers is generally regulated by workers’ compensation law. Our workers’ compensation regime preserves the right of employees to sue “any person other than the employer or any other employee of the employer” for damages. NMSA 1978, § 52–5–17(A) (1990); *Montoya v. AKAL Sec., Inc.*, 114 N.M. 354, 838 P.2d 971 (1992).

{13} In *Moreno*, we expressly relied on the reasoning of the California Supreme Court in *Walters* to support our assumption-of-risk rationale. *Moreno*, 102 N.M. at 376, 695 P.2d

at 1325. Subsequently, the California Supreme Court has qualified its approach to assumption of the risk:

It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity ... “consents to” or “agrees to assume” the risks inherent in the activity.... But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity ... an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the *303 **292 activity ... even where the participating individual is aware of the possibility that such misconduct may occur.

A familiar example may help demonstrate this point. Although every driver of an automobile is aware that driving is a potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily chooses to drive does not thereby “impliedly consent” to being injured by the negligence of another, nor has such a person “impliedly excused” others from performing their duty to use due care for the driver’s safety. Instead, the driver reasonably expects that if he or she is injured by another’s negligence, i.e., by the breach of the other person’s duty to use due care, the driver will be entitled to compensation for his or her injuries. Similarly, although a patient who undergoes elective surgery is aware that inherent in such an operation is the risk of injury in the event the surgeon is negligent, the patient, by voluntarily encountering such a risk, does not “impliedly consent” to negligently

inflicted injury or “impliedly agree” to excuse the surgeon from a normal duty of care, but rather justifiably expects that the surgeon will be liable in the event of medical malpractice.

Knight v. Jewett, 3 Cal.4th 296, 11 Cal.Rptr.2d 2, 834 P.2d 696, 705–06 (1992). Relying on *Knight*, the California Supreme Court subsequently repudiated *Walters* to the extent *Walters* relied upon a fireman's voluntary acceptance of a known risk of injury as a basis for the fireman's rule: “the [fireman's] rule cannot properly be said to rest on the plaintiff firefighter's voluntary acceptance of a known risk of injury in the course of employment, and we disregard that element of the justification for the rule.” *Neighbarger*, 34 Cal.Rptr.2d 630, 882 P.2d at 354.

[3] {14} Following the lead of the California Supreme Court, we retreat from reliance on an assumption-of-risk rationale to justify a fireman's rule. If we are to sustain the fireman's rule, it must be because public policy justifies treating firemen differently from other employees injured on the job and from other classes of rescuers. In canvassing public policy rationales for the fireman's rule, we bear in mind that:

In recent decades, our courts have moved forcefully towards a public policy that defines duty under a universal standard of ordinary care, a standard which holds all citizens accountable for the reasonableness of their

actions. The movement has been away from judicially declared immunity or protectionism, whether of a special class, group or activity.

Yount, 1996–NMCA–046, ¶ 4, 121 N.M. 585, 915 P.2d 341. A defendant who seeks shelter from generally applicable rules of tort liability must demonstrate that the exception is justified by “overriding policy considerations.” *Walters*, 142 Cal.Rptr. 152, 571 P.2d at 616 (Tobriner, C.J., dissenting).

{15} The various policy rationales advanced as support for the fireman's rule have been collected and critiqued in treatises on tort law. *E.g.*, Dobbs, *supra*, § 285; Harper et al., *supra*, at 262–66. Additional trenchant judicial criticism of the fireman's rule can be found in dissenting opinions in *Walters*, 142 Cal.Rptr. 152, 571 P.2d at 614 (Tobriner, C.J., dissenting), and in *Berko v. Freda*, 93 N.J. 81, 459 A.2d 663, 668 (1983) (Handler, J., dissenting). In a jurisdiction like New Mexico, which has subsumed secondary assumption of risk under contributory negligence and has abrogated distinctions in the standard of care applicable to licensees versus invitees, *Ford v. Bd. of County Comm'rs*, 118 N.M. 134, 137, 879 P.2d 766, 769 (1994), formal support for the fireman's rule is “shaky” at best. Dobbs, *supra*, at 772.

{16} In our view, the rationales offered for the fireman's rule do not amount to “overriding policy considerations” justifying the perpetuation of an exception to the

general rules governing tort liability. As the law now stands, tort law is the only mechanism by which an injured fireman can recover many items of damages, including damages for pain and suffering and loss of enjoyment of life. *Gutierrez v. City of Albuquerque*, 1998–NMSC–027, 125 N.M. 643, 964 P.2d 807 (contrasting workers' compensation benefits *304 **293 with items of damages recoverable in torts); Harper et al., *supra*, at 263–64 (observing that compensation by way of tort damages “far exceeds the limited amounts payable under any present or likely future system of public compensation”; concluding that the fireman's rule should not bar public safety officer's tort recovery). We are persuaded that the implementation of a fireman's rule should be accomplished, if at all, by the legislature as part of a global solution that takes into account factors that are beyond the courts' control, including the nature and amount of workers' compensation or other benefits covering duty-related injury.

{17} We recognize that we are joining what currently is a distinct minority. *Moody v. Delta Western Inc.*, 38 P.3d 1139, 1140–41 (Alaska 2002) (collecting authorities). We are persuaded, however, that support for the fireman's rule is distinguished more by its quantity than its quality. Recently, the South Carolina Supreme Court declined to adopt a fireman's rule:

[T]hose jurisdictions which have adopted the firefighter's rule offer no uniform justification therefor, nor

do they agree on a consistent application of the rule. The legislatures in many jurisdictions which adhere to the rule have found it necessary to modify or abolish the rule. The rule is riddled with exceptions, and criticism of the rule abounds.... In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties. We are not persuaded by any of the various rationales advanced by those courts that recognize the firefighter's rule. The more sound public policy—and the one we adopt—is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.

Minnich v. Med-Waste, Inc., 349 S.C. 567, 564 S.E.2d 98, 103 (2002).

{18} We decline to perpetuate a rule that unjustly singles out firemen and denies them the benefit of generally applicable principles of tort liability. Unless and until a fireman's rule is

enacted by our legislature, the fireman's rule no longer has a place in New Mexico law.

Motion to Dismiss NIED and IIED Claims: Standard of Review

{19} Having concluded that Defendant is not immunized by the fireman's rule, we next consider whether Plaintiffs otherwise state a claim for relief. Plaintiffs appeal from the district court's dismissal of their claims for negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED).

{20} Because this appeal arises from an order dismissing a complaint for failure to state a claim upon which relief may be granted, we apply the following standards:

A motion to dismiss pursuant to [Rule] 1-012(B)(6) tests the legal sufficiency of the complaint. In reviewing an order granting a motion to dismiss, we accept as true all facts properly pleaded. A complaint is subject to dismissal under [Rule] 1-012(B)(6) only if under no state of facts provable thereunder would a plaintiff be entitled to relief.... Under this standard of review only the law applicable to such claim is tested, not the facts which support it.

Rummel v. Edgemont Realty Partners, Ltd., 116 N.M. 23, 25, 859 P.2d 491, 493 (Ct.App.1993) (citations omitted).

Negligent Infliction of Emotional Distress

[4] [5] [6] [7] {21} Plaintiffs' NIED claim is clearly deficient. Plaintiffs allege emotional distress caused by Plaintiffs' perception of the undeniably horrifying injuries suffered by the victims. Plaintiffs do not claim that they themselves were otherwise harmed by the pipeline explosion. Liability for negligently inflicted emotional distress resulting from a plaintiff's perception of harm to another has been narrowly prescribed by our Supreme Court: "NIED is an extremely narrow tort that compensates a bystander who has suffered severe emotional shock as a result of witnessing a sudden, traumatic event that causes serious injury or death to a family member." *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, ¶ 6, 126 N.M. 263, 968 P.2d 774 (emphasis added). *305 **294 NIED is considered "a tort against the integrity of the family unit." *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983) *overruled on other grounds*, *Folz v. State*, 110 N.M. 457, 460, 797 P.2d 246, 249 (1990). Under controlling Supreme Court precedent, an actor is not liable for severe emotional harm to foreseeable witnesses of the effects of the actor's negligence on third persons, unless the witness-plaintiff has a close marital or family relationship with the third-person victim. *Id.* Any relaxation of the strict requirements imposed upon plaintiffs asserting NIED claims must be accomplished by our Supreme Court. Because Plaintiffs have not alleged that they had a marital or intimate

family relationship with the victims of the explosion, they fail to state a claim for NIED.

Intentional Infliction of Emotional Distress

{22} Plaintiffs argue that the district court erred in dismissing their IIED claim. The district court dismissed Plaintiffs' IIED claim on the grounds that Defendant's conduct as alleged by Plaintiffs "was not directed at Plaintiffs, and Plaintiffs were not present when the conduct which injured the [victims] occurred."

[8] {23} New Mexico has recognized a claim for IIED patterned on the Restatement (Second) of Torts § 46 (1965) (hereinafter Restatement or Section 46). *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333. The Restatement provides as follows:

§ 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

Our Supreme Court has identified the following elements of an IIED claim:

- (1) the conduct in question was extreme and outrageous;
- (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff;
- (3) the plaintiff's mental distress was extreme and severe; and
- (4) there is a causal connection between the defendant's conduct and the claimant's mental distress.

Trujillo, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333 (quoting *Hakkila v. Hakkila*, 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct.App.1991) (Donnelly, J., dissenting)) (internal quotation marks omitted).

{24} No reported New Mexico appellate decision has decided whether the tort of IIED requires the defendant's outrageous conduct to have been directed at the plaintiff. Based on an examination of cases from other jurisdictions, *see, e.g., Christensen v. Superior Court*, 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991), the district court predicted that New Mexico appellate courts would adopt a "directed at" requirement.

[9] {25} We are not persuaded that a valid IIED claim must include an allegation that the defendant's conduct was directed at the plaintiff. This requirement is not found in Subsection 46(1), nor is it included in the

Supreme Court's formulation of the tort of IIED. The words "directed at" do appear in Subsection 46(2). We believe that the introductory clause "[w]here such conduct is directed at a third person" was included merely to encapsulate the fact pattern addressed by Subsection (2)—A behaves outrageously toward B resulting in severe emotional distress to C—and not to state an additional element. Moreover, we share the concern articulated by the Tennessee Supreme Court that appellate courts incorporating a directed-at requirement "have often failed to distinguish adequately recklessness from intent, thereby rendering recklessness ineffective as an independent predicate for satisfying the *306 **295 state-of-mind element." *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 36 (Tenn.2005).⁵ Incorporating a directed-at requirement into the cause of action for IIED "reduces recklessness virtually to the same scope as intentional conduct." *Id.* We hold that the tort of IIED does not incorporate a separate requirement that the defendant's conduct be directed at the plaintiff.

⁵ The Tennessee Supreme Court's decision in *Doe*, with its detailed criticism of the "directed at requirement" was decided after the district court ruled in the present case. The district court therefor did not have the benefit of the Tennessee Supreme Court's highly persuasive analysis when it adopted a "directed at plaintiff" requirement. Instead, the district court relied on the decision of the Tennessee Court of Appeals, *Doe v. Roman Catholic Diocese of Nashville*, No. M2001-01780-COA-R3-CV, 2003 WL 22171558 (Tenn.Ct.App. Sept. 22, 2003), that the Tennessee Supreme Court reversed in *Doe*.

{26} As previously noted, the district court also based its dismissal on the alternate ground that Plaintiffs had failed to allege that they were present when the victims were injured by the explosion. The requirement of presence at

the time of the injury to a third person is not an element of the tort of IIED as defined by our Supreme Court in UJI 13-1628 NMRA; it does appear, however, in Subsection (2) of Section 46. As we understand the structure of Section 46, Subsection (1) states a general rule applicable to every IIED claim. Subsection (2) addresses a particular subset of IIED claims that involve a recurring fact pattern: the infliction of harm on a third-party which causes the plaintiff to experience severe emotional distress upon perceiving the harm to the third party. As the comments explain, the drafters of Section 46 were concerned that this fact pattern could generate large numbers of claims or claims lacking guarantees of genuineness. Section 46 cmt. 1. To address these concerns, the drafters of Section 46 proposed additional elements for this subset of IIED claims, which are set out in Subparagraphs 2(a) and (b).

{27} Section 46 was adopted four decades ago. It reflects a tentative, conservative formulation of the tort of IIED. Significantly, the drafters of Section 46 themselves expressed reservations about the limitations they were imposing on the tort of IIED. The drafters included a general caveat to Section 46 stating that the American Law Institute "expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." *Id.* The drafters addressed the relationship of this caveat to Subsection (2) in the following comment:

Where the extreme and outrageous conduct is directed at a third person,

as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the [wife].... The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the ... genuineness which her presence on the spot would afford. *The Caveat [to Section 46] is intended, however, to leave open the possibility of situations in which presence at the time may not be required.*

Section 46, cmt.1 (emphasis added).

[10] {28} We decline to adopt the categorical limitations imposed by Subsection (2) of

Section 46. As the comment quoted above demonstrates, the American Law Institute itself appears to have been lukewarm about the categorical limitations imposed by Subsection (2). To the extent that these categorical limitations are justified as gatekeeping criteria, they are unnecessary in view of the stringent elements already imposed by Subsection (1) on every IIED claim:

The elements of intentional and reckless infliction of emotional distress themselves perform an important gatekeeping function for the purposes of ensuring the reliability of claims and of preventing liability from *307 **296 extending unreasonably. The outrageous conduct requirement is a high standard which has consistently been regarded as a significant limitation on recovery.... [T]he outrageousness requirement is an exacting standard which provides the primary safeguard against fraudulent and trivial claims. The mental harm which the plaintiff suffered also must be demonstrated to have been particularly serious.

Further, the state-of-mind element of intent or recklessness places significant limitation on recovery. Being required to prove the tortfeasor's intent or recklessness imposes a significantly higher burden than is required for mere negligence actions.

Doe, 154 S.W.3d at 39 (internal quotation marks and citations omitted). We hold that the contemporaneousness of a plaintiff's perception of the injury to a third party and the nature of a plaintiff's relationship to that third party are not separate elements of the tort of IIED; rather, they are factors that may be

considered in determining whether a plaintiff otherwise has satisfied the stringent elements of the tort as set out in *Trujillo*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333.

{29} For the reasons set out above, we reject both of the rationales on which the district court relied in dismissing Plaintiffs' IIED claim.

[11] {30} As a fallback position, Defendant urges us to affirm the district court's dismissal on a ground that the district court did not reach, but which Defendant argued in the district court. According to Defendant, Plaintiffs have not met, and cannot meet, the burden of pleading that Defendant's conduct was outrageous.

{31} As we understand Plaintiffs' theory of their case, Plaintiffs claim that:

[Defendant] undertook a cost-benefit analysis (a “Pinto” analysis)⁶ that studied the costs to make the pipelines safe as compared to the costs that would be incurred for personal injury and wrongful death claims—and thereafter curtailed its pipeline “renovation” program. At the time of the August [2000] explosion, [Defendant] had renovated less than 5% of its pipeline system despite its knowledge that the system

was corroding and that its pipelines were exploding.

⁶ This is apparently a reference to the cost-benefit analysis that led a jury to award \$125 million in punitive damages against the manufacturer of the Pinto subcompact automobile. *Grimshaw v. Ford Motor. Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, 358, 384 (1981).

Further, according to Plaintiffs, Defendant knew—because its operating manuals so specified—that local emergency personnel inevitably would be called to the site of a pipeline rupture and explosion. In their complaint, Plaintiffs alleged numerous, system-wide departures from applicable state, federal, and industry standards of care with respect to the design, construction, maintenance, inspection, and operation of Defendant's pipeline. In evaluating the sufficiency of the allegations of the complaint, we must take care not to improperly compartmentalize the various acts or omissions that Plaintiffs have alleged in their complaint. *Cf. Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994) (holding that a court must view the actions of the corporate defendant's employees “in the aggregate” in determining whether the defendant's conduct justified an award of punitive damages).

{32} *Clay* is particularly instructive because, like the present case, it dealt with the failure of a defendant corporation to properly control a dangerously explosive gas. *Clay* recognized that:

as the risk of danger increases, conduct that

amounts to a breach of duty is more likely to demonstrate a culpable mental state. The circumstances define the conduct; a cavalier attitude toward the lawful management of a dangerous product may raise the wrongdoer's level of conduct to recklessness, whereas a cavalier attitude toward the lawful management of a nondangerous product may be mere negligence.

Id. at 269, 881 P.2d at 14.

{33} According to the allegations of the complaint, Defendant's pipeline was capable of transporting enormous amounts of pressurized natural gas: up to *one billion* cubic *308 **297 feet per day. As this case demonstrates, the failure of a thirty-inch-diameter, high-pressure natural gas pipeline can result in a devastating explosion akin to that of a fuel-air bomb. We think it is open to proof under the allegations of the complaint that Defendant was guilty of prolonged, systemic indifference to the potential failure of its aging pipeline system, and that it was not a question of *if* Defendant's pipeline would fail, but rather *when and where*. Considering the magnitude of the harm that can result from the failure of a natural gas pipeline, we cannot say that as a matter of law Plaintiffs' complaint fails to allege outrageous disregard for the safety of the public.

{34} Plaintiffs face stringent substantive requirements in establishing their IIED claim. At this stage, we cannot say that there is no conceivable set of facts provable under the allegations of Plaintiffs' complaint that would satisfy the elements of the tort of IIED. Accordingly, we reverse the district court's dismissal of Plaintiffs' IIED claim.

CONCLUSION

{35} We affirm the district court's dismissal of Plaintiffs' NIED claim. We reverse the dismissal of Plaintiffs' IIED claim and remand for further proceedings consistent with this opinion.

{36} **IT IS SO ORDERED.**

SUTIN, Judge (specially concurring).

{37} Plaintiffs are municipal fire department firefighters and emergency medics summoned to the scene of an explosion and fire. They were obligated pursuant to their employment to respond to such an emergency circumstance. I join in affirming the dismissal of Plaintiffs' claim of negligent infliction of emotional distress. No claim for negligent infliction of emotional distress is stated because the fireman's rule precludes the claim and because, as recognized by Judge Alarid, New Mexico has not extended the cause of action to include the circumstances in this case. With that issue out of the way, the only issue left in this case, other than that of attorney fees, is whether Plaintiffs state a cause of action for intentional infliction of emotional distress. I agree with reversing the dismissal of Plaintiffs' claim of intentional infliction of emotional distress. I do not, however, agree that the fireman's rule

should be addressed or that, if it is addressed, it should be abandoned.

{38} The fireman's rule does not cover intentional acts. It does not limit liability for intentional acts. As Judge Castillo states in her concurring opinion, we do not, therefore, have to address the fireman's rule to reach that issue. However, because Judge Alarid generally disavows the fireman's rule, I address the rule.

{39} As Judge Alarid points out, the fireman's rule in New Mexico began with *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322 (Ct.App.1984). *Moreno's* analyses are confusing and difficult to follow and understand in several respects, making it difficult to know for what it ultimately stands. Nevertheless, the following statements in *Moreno* are clear and should stick as precedent: “[N]egligence in causing a fire is not a basis for liability to firemen injured in fighting the fire. In fact, the view that there is no liability to a fireman for negligence in causing a fire is a statement of the fireman's rule as it originally existed.” *Id.* at 377, 695 P.2d at 1326.

{40} Whatever may be an underlying rationale for the rule, simply and properly stated the fireman's rule is that a firefighter cannot recover under general negligence principles for negligence in causing the fire. *See Moody v. Delta Western, Inc.*, 38 P.3d 1139, 1141 (Alaska 2002). As part of the concept, recovery is permitted under a claim relating to negligent conduct independent of negligence causing the fire, such as, for example, under owner's and occupier's liability principles. *See Moreno*, 102 N.M. at 376, 695 P.2d at 1325. I respectfully

do not agree with the various rationales used by Judge Alarid to disavow the fireman's rule.

{41} I am unpersuaded that comparison with other occupations, such as construction workers, is useful or applicable. Those in the private sector are compensated primarily to produce goods and provide services. The risks that may be inherent in those occupations are secondary to accomplishing the primary *309 **298 goal. Firefighters are paid for the primary purpose of facing risks of fire and other emergency circumstances to protect life and property. Even if some occupations might be somewhat comparable in terms of exposure to risk, the fireman's rule is based on policy that sets it apart and calls for departure from the general common law principle that one is responsible for an injury caused by a tortfeasor's want of ordinary care.

{42} As Judge Alarid acknowledges in his opinion at paragraph 17, most jurisdictions in this country, either through court decision or legislation, have a fireman's rule. *See Moody*, 38 P.3d at 1140–41. The policy reasons given in court cases vary. The policy reason that makes the most sense is simply that firefighters are paid to put themselves in harm's way, having the duty to respond to negligently caused fires and other emergency circumstances potentially very harmful to life and property. *See id.* at 1141–42 (discussing the manner in which “[t]he Firefighter's Rule reflects sound public policy”). A commensurate policy is that citizens, regardless of their negligence, should be encouraged to summon the aid of firefighters. *See Carson v. Headrick*, 900 S.W.2d 685, 690 (Tenn.1995) (stating this

policy in applying a policeman's and fireman's rule to granting immunity to police officers).

{43} The broad language from *Yount v. Johnson*, 1996–NMCA–046, ¶ 4, 121 N.M. 585, 915 P.2d 341, quoted by Judge Alarid in his opinion at paragraph 14, cannot be ignored; however, *Yount* does not discuss *Moreno* or the fireman's rule. Moreover, *Yount's* facts, involving whether to make a special exception for a child's horseplay, were too dissimilar to those in the present case to apply its broad language to disavowing the fireman's rule.

{44} Nor am I persuaded that it is useful to draw comparisons between voluntary rescuers and public employees, who are paid and are obligated and expected to face and encounter risk of fire and other emergency circumstances. I think it significant that *Govich v. North American Systems, Inc.*, 112 N.M. 226, 814 P.2d 94 (1991), which was decided after *Moreno*, discussed the rescuer doctrine without mention of *Moreno*. I see no basis on which to think that the rescuer doctrine was meant to include the fireman's rule or that the fireman's rule is an exception to the rescuer doctrine. The fireman's rule, if an exception to anything, is an exception to the general rules governing liability for negligence.

{45} Legislation in this arena of law would be appropriate. The place to start is not for this Court to disavow the fireman's rule and await legislative action. The fireman's rule has been unaffected by legislative action for more than twenty years. The place to start is with the fireman's rule in place, and for the Legislature to address whether to change the fireman's rule in any respect or to override the rule. If

the fireman's rule is to continue to provide immunity for liability for negligent acts, then, hopefully, the Legislature will provide for adequate compensation benefits for injured firefighters commensurate with their risk.

{46} The sole intentional tort liability issue that is before us should be whether a person who intentionally causes a fire should be subject to liability under the recognized cause of action for intentional infliction of emotional distress. I think so. Because of the very limited and strict circumstances under which a person is entitled to recover for intentional infliction of emotional distress, I see no reason to grant immunity to one who intentionally causes a fire to which a firefighter responds.

CASTILLO, Judge (specially concurring).

{47} I concur in the affirmance of the dismissal of Plaintiffs' claim for NIED, and I concur in the reversal of the dismissal of Plaintiffs' claim for IIED. However, I cannot concur in the portion of Judge Alarid's opinion that disavows *Moreno*. The resolution of this case does not turn on the applicability of the fireman's rule as enunciated in *Moreno*; therefore, there is no reason to reach this issue because it has no effect on the outcome of the case. See *Priesskorn v. Maloof*, 1999–NMCA–132, ¶¶ 17–18, 128 N.M. 226, 991 P.2d 511 (stating that the court need not reach additional issues that would not have an impact *310 **299 on the outcome of the case, even if decided in favor of the appellant).

{48} *Moreno* created an exception regarding the element of duty of care. See 102 N.M. at 377–78, 695 P.2d at 1326–27. Duty is one of the elements to be proved in a negligence action.

See UJI 13–1601 NMRA. Here, Plaintiffs limit their appeal to the dismissal of two claims: NIED and IIED. J. Alarid's Op. ¶ 19. As explained by Judge Alarid in paragraph 21, NIED is an extremely narrow tort, and there is no recovery, unless the witness-plaintiff has a close marital or family relationship with the third-person victim. *Fernandez*, 1998–NMSC–039, ¶ 6, 126 N.M. 263, 968 P.2d 774. Plaintiffs' complaint was deficient because it failed to include allegations regarding the necessary relationship and therefore failed to state a claim for NIED. See J. Alarid's Op. ¶ 21. Once this Court affirmed the trial court on this ground, there was no need to continue the analysis to determine whether *Moreno* would have the same effect.

{49} Nor is the *Moreno* analysis necessary for resolution of the IIED claim. *Moreno* is premised on the creation of an exception regarding the element of duty of care. See 102 N.M. at 377–78, 695 P.2d at 1326–27. IIED is an intentional tort, and proof of a duty is not an element. See UJI 13–1628. Accordingly, a claim for IIED will lie, regardless of the duty element; thus, *Moreno* is not applicable. See *Moreno*, 102 N.M. at 377–78, 695 P.2d at 1326–27 (holding that conduct inflicted “willfully or wantonly” is not protected by the fireman's rule).

All Citations

143 N.M. 297, 176 P.3d 286, 2008 -NMCA-010

KeyCite Yellow Flag - Negative Treatment
Distinguished by Castillo v. City of Las Vegas, N.M.App., August 27, 2008

143 N.M. 288

Supreme Court of New Mexico.

Christopher Lee BALDONADO,
et al., Plaintiffs–Respondents,

v.

EL PASO NATURAL GAS
COMPANY, a foreign corporation,
Defendant–Petitioner.

No. 29,941.

|
Dec. 10, 2007.

|
Rehearing Denied, No. 29,941,
Jan. 10, 2008.

Synopsis

Background: Firefighters sued gas company for negligent and intentional infliction of emotional distress sustained in course of response to pipeline explosion during which family of campers were either killed outright or who later died from severe burns. The District Court, Chavez County, William P. Lynch, D.J., granted gas company's motion to dismiss for failure to state claim, and firefighters appealed. The Court of Appeals affirmed with respect to claim for negligent infliction of emotional distress but reversed with respect to claim for intentional infliction of emotional distress.

Holdings: On gas company's petition for certiorari review, the Supreme Court, Chavez, C.J., held that:

[1] firefighters' stated sufficient claim under firefighter's rule that injuries sustained exceeded normal scope of distress inherent in their profession;

[2] under firefighter's rule, person creating peril owes rescuer no duty if the rescuer's injury was derived from negligence that occasioned rescuer's response, or was derived from reckless conduct that occasioned rescuer's response and was within the scope of risks inherent in rescuer's professional duties;

[3] firefighters stated sufficient claim for intentional infliction of emotional distress.

Affirmed; remanded to District Court.

West Headnotes (13)

[1] Pretrial Procedure

↔ Construction of pleadings

Pretrial Procedure

↔ Fact questions

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true. NMRA, Rule 1–012(B)(6).

[2] Pretrial Procedure

↔ Availability of relief under any state of facts provable

A motion to dismiss for the failure to state a claim may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. NMRA, Rule 1-012(B)(6).

Special relationships, such as the doctor-patient or employer-employee relationship, can create a duty to rescue. Restatement (Second) of Torts § 314A.

3 Cases that cite this headnote

[3] Damages

↔ Privilege or immunity; exercise of legal rights

Firefighters' allegations that they suffered from continuing, severe emotional distress manifested by physical symptomology which has impacted their personal lives, has resulted in recurrent nightmares and flashbacks, has been debilitating, and has been traumatizing, supported claim against gas company under firefighter's rule that injuries exceeded normal scope of distress inherent in their profession, for purposes of claim of intentional infliction of emotional distress arising from trauma in responding to explosion that killed several campers either outright or who later died from severe burns.

6 Cases that cite this headnote

[4] Health

↔ Necessity and existence of duty

Labor and Employment

↔ Existence of Duty on Part of Employer

Negligence

↔ Duty in general

[5] Negligence

↔ Professional rescuers; "firefighter's rule"

Under the firefighter's rule, the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; or (2) was derived from the reckless conduct that occasioned the rescuer's response and was within the scope of risks inherent in the rescuer's professional duties.

2 Cases that cite this headnote

[6] Negligence

↔ Professional rescuers; "firefighter's rule"

Whether a firefighter can recover for injuries under the firefighter's test does not depend on the firefighter's categorization as an entrant to land, on which the injury occurred, or on whether the firefighter is a paid professional or a volunteer.

1 Cases that cite this headnote

[7] Negligence

↔ Professional rescuers;
“firefighter's rule”

A landowner's duty to warn of hidden hazards and to accurately represent the nature of a hazard are distinct from the conduct that brings firefighters to the scene, and thus fall outside the scope of the firefighter's rule.

2 Cases that cite this headnote

[8] Negligence

↔ Professional rescuers;
“firefighter's rule”

Negligence

↔ Professional rescuers;
“firefighter's rule”

The duty to firefighters should be evaluated for intentional conduct or recklessness rather than strict liability when firefighters respond to an emergency arising out of an inherently dangerous or ultrahazardous activity.

[9] Damages

↔ Nature of conduct

Intentional infliction of emotional distress requires a showing of reckless or intentional conduct on defendant's part.

25 Cases that cite this headnote

[10] Damages

↔ Privilege or immunity; exercise of legal rights

A claim of intentional infliction of emotional distress is legally sufficient under the firefighter's rule, so long as defendant's actions were intentional or, if reckless, plaintiffs' injuries exceeded the normal scope of injuries inherent to their profession.

15 Cases that cite this headnote

[11] Damages

↔ Nature of conduct

The tort of intentional infliction of emotional distress provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized.

11 Cases that cite this headnote

[12] Damages

↔ Particular Cases

Firefighters' allegations that gas company failed to maintain pipelines, that gas company had previously been cited for safety violations, that gas company knew that area around pipeline that exploded was used for camping, and that, despite knowledge and its statutory obligation to establish procedures for working with fire officials to minimize hazards to life or property, gas company failed to

communicate any such information to firefighters, stated claim for intentional infliction of emotional distress based on trauma suffered by firefighters in responding to explosion that killed several campers and severely burned others. 49 C.F.R. § 192.615(a)(8), (c)(4).

7 Cases that cite this headnote

[13] Negligence

↔ Reckless conduct

“Recklessness” is the intentional doing of an act with utter indifference to the consequences.

1 Cases that cite this headnote

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OPINION

CHÁVEZ, Chief Justice.

***289** {1} On motion for rehearing, the opinion filed December 4, 2007, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} The issue in this case is whether firefighters may recover damages for intentional infliction of emotional distress sustained in the course of responding to a fire. The answer to this question initially turns on whether the firefighter's rule, as adopted in *Moreno v. Marrs*, 102 N.M. 373, 695 P.2d 1322 (Ct.App.1984), should continue as a part of New Mexico jurisprudence. The rule, which prohibits firefighters from suing for damages sustained while responding to a fire ***290** ****279** except where the owner or occupier of the land fails to warn of a known danger or misrepresents the nature of the hazards being confronted, was overruled by the Court of Appeals. In that opinion, one judge would abolish the rule entirely and two judges would prohibit firefighter litigation involving negligence claims. *See Baldonado v. El Paso Natural Gas Co.*, No. 24,821, 143 N.M. 297, 176 P.3d 286 (N.M.Ct.App. June 29, 2006). We adopt a policy-based approach to the firefighter's rule and hold that a firefighter may recover damages if such damages were proximately caused by (1) intentional conduct; or (2) reckless conduct, provided the harm to the firefighters exceeded the scope of risks inherent in the firefighters' professional duties. Applying this rule to the case before us, we conclude that the firefighters have properly pled a claim for intentional infliction of emotional distress.

I. BACKGROUND

{3} On August 19, 2000, in the early morning hours, a high-pressure natural gas pipeline¹ operated by El Paso Natural Gas Company ruptured near the Pecos River south of Carlsbad, New Mexico. *Baldonado*, No. 24,821, 143 N.M. 297, 300, 176 P.3d 286, 289, 2006 WL 5358966, ¶ 2. At that time, twelve members of an extended family were camped in the area of the pipeline. The escaping gas ignited, creating a fireball that engulfed the campsite. All twelve family members, including young children, either were killed during the fire or died later from severe burns. The survivors were conscious but in obvious physical pain and mental anguish. The record and the Court of Appeals opinion depict the horror of the scene, which we do not duplicate here. *See id.*

¹ The pipeline measured thirty inches in diameter and was approximately fifty years old.

{4} Plaintiffs are paid or volunteer members of the local fire departments who responded to the explosion. Plaintiffs did not assist in putting out the fire, nor do they claim to have suffered any physical injuries from the fire or explosion. Rather, Plaintiffs assert that they suffered extreme emotional distress in witnessing the severe injuries suffered by the victims when Plaintiffs assisted them after the explosion.

{5} Plaintiffs brought suit against Defendant for negligent infliction of emotional distress, intentional infliction of emotional distress, and other counts. Defendant filed a motion to dismiss pursuant to Rule 1-012(B)(6) NMRA, claiming that Plaintiffs' claims were barred by

the firefighter's rule. The district court granted Defendant's motion and dismissed Plaintiffs' complaint. Plaintiffs appealed to the Court of Appeals, which affirmed the district court with respect to the negligent infliction of emotional distress claim, but reversed with respect to the intentional infliction of emotional distress claim. *Baldonado*, No. 24,821, 143 N.M. 297, 308, 176 P.3d 286, 297, 2006 WL 5358966, ¶ 35. Defendant filed a petition for writ of certiorari with this Court, contending that the firefighter's rule bars a claim in this case, and that Plaintiffs failed to properly plead a claim for reckless or intentional infliction of emotional distress. *Baldonado v. El Paso Natural Gas Co.*, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102. We granted certiorari on the question of intentional infliction of emotional distress.²

² Initially we also granted certiorari on the question of negligent infliction of emotional distress, but later quashed certiorari on that issue.

II. DISCUSSION

[1] [2] {6} “A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true.” *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 650, 905 P.2d 185, 190 (1995), *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. “[T]he motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim.” *Runyan v. Jaramillo*, 90 N.M. 629, 632, 567 P.2d 478, 481 (1977).

{7} Defendant asserts two reasons why the Court of Appeals erred in holding that *291 **280 Plaintiffs' complaint for intentional infliction of emotional distress is legally sufficient. First, Defendant argues that the firefighter's rule in New Mexico has no exception for reckless or intentional conduct, thereby barring Plaintiffs' lawsuit. Second, Defendant argues that New Mexico has adopted the definition of intentional infliction of emotional distress from *Restatement (Second) of Torts* § 46 (1965), and Plaintiffs cannot prove that Defendant's conduct was "directed at" Plaintiffs as required by the *Restatement*. *Id.* § 46(2).

{8} Plaintiffs urge this Court to abolish the firefighter's rule, contending that the rule is outdated, as evidenced by the several jurisdictions that have abolished the rule or created exceptions for intentional torts that would otherwise be excluded by the rule. Plaintiffs also argue that they have stated a cause of action for intentional infliction of emotional distress as defined in *Trujillo v. Northern Rio Arriba Electric Cooperative, Inc.*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333.

A. The Firefighter's Rule

{3} {9} A firefighter's rule bars a firefighter, and possibly other professional rescuers, from suing the party whose actions caused the event to which the firefighter responded. Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 Ind. L.J. 745, 745 (Summer 2007). Although most states have adopted a firefighter's rule, they "disagree considerably about the exceptions to and the scope of"

the rule, and in many states the exceptions threaten to swallow the rule. *Id.* at 753. Thus, when deciding to adopt a firefighter's rule, it is necessary to choose among formulations. *Moreno*, 102 N.M. at 377, 695 P.2d at 1326.

{10} States that have adopted a firefighter's rule generally base it on one of three legal theories: (1) duties of landowner to invitees; (2) assumption of risk; or (3) public policy. The original firefighter's rule was based on the duties of a landowner or occupier of the land to invitees or licensees. *Gibson v. Leonard*, 143 Ill. 182, 32 N.E. 182, 183 (1892), *overruled in part by Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881, 886 (1960). Some courts have since rejected this theory of the firefighter's rule. *See, e.g., Hass v. Chicago & Nw. Ry. Co.*, 48 Wis.2d 321, 179 N.W.2d 885, 887 (1970). The rule can also be based on assumption of risk, although this theory is also falling out of favor. *See, e.g., Fordham v. Oldroyd*, 171 P.3d 411, 414 (Utah 2007).

{11} Most modern decisions base the firefighter's rule on a public policy rationale. *Id.* at 417 (Wilkins, Assoc. C.J., concurring and dissenting). Utah, the most recent state to adopt the firefighter's rule, chose this approach. *Id.* at 415. Public policy provides a number of rationales for the firefighter's rule. The rule encourages the public to summon assistance when they need help and recognizes that firefighters "have a relationship with the public that calls on them to confront certain hazards as part of their professional responsibilities." *Id.* at 413. The rule also spreads the costs of injury among taxpayers and avoids charging taxpayers twice—once when they pay their taxes for public services, and again when they

are sued by those same service providers. Heidt, *supra*, at 760–61. Some courts, however, reject the public policy rationale, arguing that the sounder policy is to allow firefighters to sue for injuries the same as any other injured party. *Fordham*, 171 P.3d at 417 (Wilkins, Assoc. C.J., concurring and dissenting).

{12} In *Moreno*, the Court of Appeals adopted a firefighter's rule for New Mexico based on the California case of *Walters v. Sloan*, 20 Cal.3d 199, 142 Cal.Rptr. 152, 571 P.2d 609 (1977), *superseded by statute* Cal. Civ. § 1714.9 (West 2001) (codifying California's firefighter's rule). *Moreno*, 102 N.M. at 376, 695 P.2d at 1325. The California Supreme Court based its rule on both assumption of risk theories and public policy rationales. *Walters*, 142 Cal.Rptr. 152, 571 P.2d at 612–13.

{13} We agree with the Court of Appeals in *Moreno* that “there should be a fireman's rule.” 102 N.M. at 376, 695 P.2d at 1325. We take this opportunity, however, to clarify the rule's definition and scope. In doing so, *292 **281 we hope to avoid the necessity for myriad exceptions that other states have faced.

{14} We begin by recognizing that a policy-based firefighter's rule follows naturally from our version of the rescue doctrine. Traditionally, the rescue doctrine “prevent[ed] a rescuer from being barred from recovery because of a finding that the rescuer was contributorily negligent” for the injuries he or she received in rescuing a victim. *Restatement (Third) of Torts* § 32 cmt. d (Proposed Final Draft No. 1, 2005). In *Govich v. North American Systems, Inc.*, 112 N.M. 226, 231, 814 P.2d 94, 99 (1991), we examined the impact

of our system of comparative negligence on the rescue doctrine. We concluded that the rescue doctrine is “shorthand for a public policy” that imposes a duty of care owed to rescuers. *Id.* at 232, 814 P.2d at 100.

[4] {15} The rescue doctrine creates the need for a firefighter's rule. Because there is no general duty to rescue, the rescue doctrine imposes a duty of care owed to rescuers. However, when the rescuer has a duty to rescue—as is the case with firefighters—the underlying rationale for imposing a duty on the public changes, and the doctrine must change along with the policy.³ The firefighter's rule accomplishes that change by limiting the scope of the rescue doctrine. In other words, the rescue doctrine creates an exception to traditional tort duties, and the firefighter's rule limits that exception.

3 We recognize that special relationships, such as the doctor-patient or employer-employee relationship, can create a duty to rescue. See *Johnstone v. City of Albuquerque*, 2006–NMCA–119, ¶ 14, 140 N.M. 596, 145 P.3d 76; *Restatement (Second) of Torts* § 314A (1965). The rescuers in these situations are not professional rescuers, so our ruling today does not affect this category of duties.

{16} We seek a formulation of the firefighter's rule that will avoid piling exception upon exception. Utah, for example, recently adopted a simple firefighter's rule based on culpability: the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; and (2) was within the scope of risks inherent in the rescuer's professional duties. *Fordham*, 171 P.3d 411, 413.

{17} The Utah test provides a good starting point, but we believe it is too broad because it allows recovery for injuries arising from negligent actions, so long as those injuries are outside the normal scope of a firefighter's duties. Joining the two prongs in the disjunctive would narrow the test, excluding all injuries arising out of negligent actions. It would, however, also exclude injuries arising out of intentional actions—such as arson—if the injuries are within the normal scope of a firefighter's duties.

[5] [6] [7] {18} We choose to adopt a two-prong test based on culpability that holds the public liable for intentional acts and some reckless acts. Under our test, the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; or (2) was derived from the reckless conduct that occasioned the rescuer's response and was within the scope of risks inherent in the rescuer's professional duties. This test ignores different “degrees” of negligence, a distinction we rejected in *Govich*, 112 N.M. at 233, 814 P.2d at 101. As in *Moreno*, the test does not depend on the firefighter's categorization as an entrant to land, on which the injury occurred, or on whether the firefighter is a paid professional or a volunteer. *See Moreno*, 102 N.M. at 376–77, 695 P.2d at 1325–26. Furthermore, the specific duties noted in *Moreno*—to warn of hidden hazards and to accurately represent the nature of a hazard—are distinct from the conduct that brings firefighters to the scene, and thus fall outside the scope of today's rule. *See id.* at 378, 695 P.2d at 1327.

{19} In contrast to *Moreno*, this rule does allow recovery for actions that derive from reckless or intentional behavior. *See id.* at 377, 695 P.2d at 1326. The potential injuries to the firefighter are the same, whether they arise from negligence, recklessness, or intentional conduct. From a public policy viewpoint, we do not want to reward reckless or intentional acts by insulating defendants from liability.

****282 *293 [8]** {20} Plaintiffs base their second claim for relief on the theory that gas transport is an inherently dangerous activity. *Moreno* applied the firefighter's rule to ultrahazardous activities, declining to impose strict liability for injuries to firefighters resulting from such activities. *Id.* We note that the underlying public policy rationales for imposing a duty are the same, whether the fire resulted from an ordinary, an inherently dangerous, or an ultrahazardous activity. Therefore, we hold that the duty to firefighters should be evaluated under the culpability test announced today, rather than strict liability, when firefighters respond to an emergency arising out of an inherently dangerous or ultrahazardous activity.

{21} This is the first opportunity we have had to address the firefighter's rule since *Moreno* was decided over twenty years ago. Tort law, especially with respect to the duties owed to rescuers, has changed significantly during that time. A policy-based approach to the firefighter's rule will encourage the public to ask for rescue while allowing professional rescuers to seek redress in limited but appropriate circumstances.

[9] [10] {22} Because Plaintiffs are firefighters, a legally sufficient complaint must allege that Defendant acted recklessly or intentionally. Plaintiffs have claimed damages based on intentional infliction of emotional distress, which requires a showing of reckless or intentional conduct on Defendant's part. *Trujillo*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333; *see also* UJI 13–1628 NMRA. A claim of intentional infliction of emotional distress is therefore legally sufficient under the firefighter's rule, so long as Defendant's actions were intentional or, if reckless, Plaintiffs' injuries exceeded the normal scope of injuries inherent to their profession.

{23} Firefighters will always be subject to some emotional distress when responding to an emergency call. We must determine whether Plaintiffs have alleged facts sufficient to show that their distress could have exceeded the normal scope of distress inherent to their profession; ultimately, however, it will be up to the jury to determine whether Plaintiffs' stress did in fact exceed that scope. *See Dominguez v. Stone*, 97 N.M. 211, 215, 638 P.2d 423, 427 (Ct.App.1981). Plaintiffs allege that they suffer from continuing, severe emotional distress that “has been manifested by physical symptomatology [sic], has impacted their personal lives, has resulted in recurrent nightmares and flashbacks, has been debilitating, and has been traumatizing.” We find that the particular injuries described by Plaintiffs in their complaint could be found to exceed the normal scope of injuries inherent to the profession. Therefore, even if Defendant's actions were reckless, Plaintiffs have alleged sufficient facts to state a claim under the firefighter's rule. We must now determine

whether Plaintiffs have alleged sufficient facts to support a cause of action for intentional infliction of emotional distress.

B. Intentional Infliction of Emotional Distress

[11] {24} The tort of intentional infliction of emotional distress was developed primarily by legal scholars rather than the courts. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L.Rev. 42, 42 (1982). It “provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized.” *Id.* Perhaps because of its indeterminacy, its main purpose seems to be to “provide the basis for achieving situational justice.” *Id.* at 74–75, 638 P.2d 423.

{25} New Mexico first confronted intentional infliction of emotional distress in *Mantz v. Follingstad*, 84 N.M. 473, 479–80, 505 P.2d 68, 74–75 (Ct.App.1972), but the plaintiffs failed to present sufficient facts to submit the claim to the jury. In the next case to address the tort, the Court of Appeals followed the elements as defined in the *Restatement (Second) of Torts* § 46, when it found that the plaintiffs had established sufficient facts to survive summary judgment on the cause of action. *Dominguez*, 97 N.M. at 214–15, 638 P.2d at 426–27.

**283 *294 {26} This Court has “adopted the approach used in the *Restatement (Second) of Torts* § 46.” *Trujillo*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333. The *Restatement*

sets out a two-prong approach, providing for both first-party and third-party claims:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

Restatement (Second) of Torts § 46.

{27} In *Trujillo*, we also stated that the following elements must be proven: “(1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff's mental distress was extreme and severe; and (4) there is a causal connection between the defendant's conduct and the claimant's mental distress.” *Trujillo*, 2002–NMSC–004, ¶ 25, 131 N.M. 607, 41 P.3d 333 (quoting *Hakkila v. Hakkila*, 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct.App.1991)) (Donnelly, J., specially concurring) (internal quotation marks omitted). We note that these elements merely restate the first prong of the

Restatement test. The second prong of the *Restatement* test was not at issue in *Trujillo*, so we had no reason to address it.⁴ Because of the special relationship between Plaintiffs and Defendant, as detailed below, we do not address Plaintiffs' third-party claim under the second prong in this case.

4 Although the Court of Appeals quoted the *Restatement* test in its entirety in *Dominguez*, our research has turned up no New Mexico cases that have based a claim on the second prong of the test. See *Dominguez*, 97 N.M. at 214, 638 P.2d at 426.

1. First-Party Claim

[12] {28} Intentional infliction of emotional distress claims most frequently arise from a preexisting relationship between the plaintiff and the defendant. Givelber, *supra*, at 63. The relationship may have a formal legal basis, such as employer-employee, *id.* at 63–64, or it may be more informal, such as a situation where one party has an obligation to the other that is regulated by the State. *Id.* at 70. One of the first academic articles on intentional infliction of emotional distress noted that the early version of the tort had most frequently been applied to innkeepers and common carriers, and raised the question of “how far this liability for insulting conduct will be extended to other relationships.” Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L.Rev. 1033, 1051–53 (1936). The *Restatement* also recognizes the importance of relationships: “The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.” *Restatement (Second) of Torts* § 46 cmt. e; see also *Restatement (Third)*

of *Torts* § 45 cmt. c (“[W]hether an actor's conduct is extreme and outrageous” depends on the facts of each case, including the relationship of the parties).

{29} Most of the intentional infliction of emotional distress cases in New Mexico have involved such relationships. *See, e.g., Trujillo*, 2002–NMSC–004, ¶¶ 1–2, 131 N.M. 607, 41 P.3d 333 (employer-employee and Human Rights Act); *Coates v. Wal-Mart Stores, Inc.*, 1999–NMSC–013, ¶ 1, 127 N.M. 47, 976 P.2d 999 (employer-employee and Workers' Compensation Act); *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998–NMSC–004, ¶ 13, 124 N.M. 613, 954 P.2d 45 (contract for burial); *Sanders v. Lutz*, 109 N.M. 193, 194, 784 P.2d 12, 13 (1989) (agreement granting easement); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 425, 773 P.2d 1231, 1232 (1989) (employer-employee); *Silverman v. Progressive* *295 **284 *Broad., Inc.*, 1998–NMCA–107, ¶ 1, 125 N.M. 500, 964 P.2d 61 (employer-employee and federal Civil Rights Act); *Stock v. Grantham*, 1998–NMCA–081, ¶¶ 1, 22, 125 N.M. 564, 964 P.2d 125 (employer-employee and Human Rights Act); *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 271, 901 P.2d 201, 202 (Ct.App.1995) (employer-employee); *Hakkila*, 112 N.M. at 173, 812 P.2d at 1321 (husband-wife); *Dominguez*, 97 N.M. at 212, 638 P.2d at 424 (employer-employee and Human Rights Act).

{30} Oregon has formally recognized the significance of the relationship between the parties in cases alleging intentional infliction of emotional distress. For example, *Rockhill v. Pollard*, 259 Or. 54, 485 P.2d 28 (1971) (en banc), involved a claim of intentional

infliction of emotional distress that arose when a physician turned away accident victims who sought his help. The Oregon Supreme Court noted that “the particular relationship between the parties” was an “important factor” in the case. *Id.* at 31. The Oregon court later clarified this statement, noting that the special relationship between the parties is a factor in determining whether the defendant's conduct is outrageous. *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 850 (1995) (en banc) (analyzing claim of intentional infliction of emotional distress in the context of an employer-employee relationship). In fact, almost all successfully pleaded claims in Oregon involved a special relationship. *Delaney v. Clifton*, 180 Or.App. 119, 41 P.3d 1099, 1107 n. 7 (2002).

{31} Other courts have followed Oregon's lead. The Arizona Court of Appeals concluded that *Rockhill* and similar cases from other jurisdictions “emphasize the relationship between the parties as being a factor to consider” in determining whether conduct is outrageous. *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 85, 716 P.2d 1022, 1027 (Ct.App.1985). A federal court, applying Washington state law, noted that the extreme and outrageous nature of a defendant's conduct must be determined on a case-by-case basis, and that “whether a special relationship exists between the parties” is a factor in that determination. *Masood v. Saleemi*, 2007 WL 2069853, at *6 (W.D.Wash. July 13, 2007); *see also Garretson v. City of Madison Heights*, 407 F.3d 789, 799 (6th Cir.2005) (“[I]n Michigan, a special relationship between the parties may lower the level of conduct needed to be actionable.”); *Robinson v. Intercorp*, 512

F.Supp.2d 1307, 1315 (N.D.Ga.2007) (“[T]he existence of a special relationship between the actor and victim, such as that of employer to employee, may make otherwise non-egregious conduct outrageous.”) (citing *Trimble v. Circuit City Stores, Inc.*, 220 Ga.App. 498, 469 S.E.2d 776 (1996)); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681, 688 (1980) (“[T]here are cases in which the extreme and outrageous nature of the conduct arises not so much from what is done as from the abuse by the defendant of a relationship with the plaintiff which gives him power to damage the plaintiff’s interests.”) (citing William L. Prosser, *Insult and Outrage*, 44 Cal. L.Rev. 40, 47 (1956)); *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685, 695 (1998) (surveying cases in several states that found “[T]he employer-employee relationship has been regarded as a special relationship which is a factor to be considered in determining whether liability should be imposed.”) (quoting J.D. Lee & Barry A. Lindahl, 3 *Modern Tort Law: Liability and Litigation* § 32.03, at 133–34 (rev. ed.1990)) (internal quotation marks omitted).

{32} In this case Plaintiff’s allegations that Defendant is subject to various statutes and regulations could support a finding that Defendant has a special relationship with Plaintiffs. As Defendant points out, federal law seemingly requires Defendant to establish procedures for “[n]otifying appropriate fire ... officials of gas pipeline emergencies and coordinating with them both planned responses and actual responses during an emergency.” 49 C.F.R. § 192.615(a)(8) (2006). This regulation requires more than just establishing procedures: Defendant is also required to “establish and maintain liaison with

appropriate fire ... officials.” *Id.* § 192.615(c). The purpose of this liaison is for Defendant to

(1) Learn the responsibility and resources of each government organization that may respond to a gas pipeline emergency;

****285 *296** (2) Acquaint the officials with the operator’s ability in responding to a gas pipeline emergency;

(3) Identify the types of gas pipeline emergencies of which the operator notifies the officials; and

(4) *Plan how the operator and officials can engage in mutual assistance to minimize hazards to life or property.*

Id. (emphasis added).

{33} This regulation requires more of both parties than the typical relationship of a member of the general public with the local fire department. It requires more than even a business owner or landlord who must abide by a fire code and pass inspections. This regulation requires active cooperation between Defendant and Plaintiffs. In particular, Section 192.615(c)(4) requires Defendant and Plaintiffs to work together to minimize the exact risk that Plaintiffs allege led to their injuries in this case.

{34} We now must evaluate Defendant’s conduct in the context of this potential relationship. We first note that it is highly unlikely that calling firefighters in response to an emergency will ever be considered extreme and outrageous conduct. *See Restatement (Second) of Torts* § 46 cmt. g (“[C]onduct, although it would otherwise be extreme and

outrageous, may be privileged under the circumstances.”). It is always appropriate for firefighters to respond to an emergency, even one caused by an intentional act such as arson, and we do not want to discourage any member of the public from calling for assistance. Thus, we look not to Defendant's response to the emergency, but to Defendant's alleged acts leading up to the emergency.

{35} According to Plaintiffs' complaint, Defendant is required to properly design and maintain its pipelines, and Defendant failed to take the steps necessary to insure the safety of the pipeline at issue. Defendant knew the consequences of such failure: Defendant had been cited for past safety violations, and had experienced at least two previous pipeline explosions, one of which involved severe burns. With respect to the pipeline at issue in this case, Defendant knew that the area around it was used for camping. Defendant also knew, or should have known, that this area of pipeline suffered from the same problems that resulted in the explosions in other pipelines nearby. Despite this knowledge, and its obligation to coordinate with firefighters, Defendant did not share any of this information with Plaintiffs.

{36} Given the nature of Defendant's relationship to Plaintiffs, we find that these facts show Defendant's conduct could be considered extreme and outrageous. We are aware of no cases where a firefighter's claim for intentional infliction of emotional distress has been decided on the merits, and thus find little guidance in the precedent of either New Mexico or other jurisdictions. Instead, we look for circumstances that indicate an “abuse by the defendant of a relationship with the plaintiff,”

M.B.M. Co., 596 S.W.2d at 688, or a “disregard for the plaintiff[] ... under particularly trying circumstances.” *Rockhill*, 485 P.2d at 32. The allegations that Defendant knew about the specific risks inherent in failing to maintain its pipelines, and that Plaintiffs would be exposed to those risks, if proven could support a finding of such abuse or disregard.

[13] {37} Plaintiffs must also show that Defendant's conduct was intentional or in reckless disregard of Plaintiffs.⁵ Recklessness is “ ‘the intentional doing of an act with utter indifference to the consequences.’ ” *Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001–NMCA–082, ¶ 59, 131 N.M. 100, 33 P.3d 651 (quoting UJI 13–1827 NMRA); *see also Restatement (Second) of Torts* § 46 cmt. *297 **286 i (defining recklessness as “deliberate disregard of a high degree of probability that the emotional distress will follow”). The prior explosions with injuries, and Defendant's failure to remedy the problems with its pipelines, could show recklessness. *See Gonzales v. Surgidev Corp.*, 120 N.M. 133, 147, 899 P.2d 576, 590 (1995) (finding that prior acts are relevant to recklessness, and failure to remove defective products from the market “demonstrate[s] a reckless disregard for the safety” of others).

5 We are aware that firefighters are necessarily subjected to emotional distress every time they respond to an emergency. Supervisors therefore necessarily and knowingly send firefighters into a situation where they will suffer injuries. These actions, however, do not expose supervisors to liability for intentional infliction of emotional distress. In *Delgado v. Phelps Dodge Chino, Inc.*, 2001–NMSC–034, ¶ 26, 131 N.M. 272, 34 P.3d 1148, we noted that when an “employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker[.]” then the employer could be liable for

the worker's injury. We specifically recognized, however, that firefighters and police fall under the "just cause or excuse" exception. *Id.* ¶ 27.

{38} Finally, Plaintiffs must show that their mental distress is extreme and severe, and that there is a causal connection between Defendant's conduct and Plaintiffs' mental distress. As we discussed under our analysis of the firefighter's rule, *supra*, Plaintiffs have alleged sufficient facts to show that their distress is severe. That stress arose from witnessing the physical injuries to the victims, injuries caused by Defendant's failure to maintain the pipeline at issue.

{39} Plaintiffs have thus alleged sufficient facts to support each element of a claim of intentional infliction of emotional distress. These facts allow Plaintiffs' claim to survive Defendant's Rule 1-012(B)(6) motion, but Plaintiffs must still prove their case. In evaluating the outrageousness of Defendant's conduct and the severity of Plaintiffs' distress, we must remember that emotional distress is part of a firefighter's job; what might be outrageous conduct or severe distress to a typical member of the public may just be part of an ordinary day to a firefighter.

2. Third-Party Claim

{40} It is tempting to analyze this case under the second prong of the *Restatement* test, as Defendant would have us do. The second prong covers situations where the defendant's conduct is directed at a third person, and observation of the third person's injuries causes the plaintiff's emotional distress. *Restatement (Second) of Torts* § 46, cmt. 1. In this case, Plaintiffs

allege that their mental distress arose from observing the injuries to the victims caused by Defendant's failure to properly maintain the pipeline at issue. However, as we discussed in our analysis of Plaintiffs' first-party claim, the extreme and outrageous nature of Defendant's conduct arises if there is a special relationship between Defendant and Plaintiffs. It is the possibility of a special relationship that permits Plaintiffs' claim under the elements defined in *Trujillo*. Therefore, we do not need to reach Defendant's argument that Plaintiffs' claim is legally insufficient as a third-party claim.

III. CONCLUSION

{41} The firefighter's rule has a place in New Mexico law, but as a matter of public policy it does not cover injuries arising out of intentional acts and certain reckless acts. Under our reformulation of the firefighter's rule, Plaintiffs' complaint alleges legally sufficient facts to support a first-party claim of intentional infliction of emotional distress. We remand this case to the district court for further proceedings consistent with this opinion.

{42} **IT IS SO ORDERED.**

WE CONCUR: PATRICIO M. SERNA, PETRA JIMENEZ MAES, RICHARD C. BOSSON, and PAUL J. KENNEDY (Pro Tem), Justices.

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