

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 1, 2019

Elisabeth A. Shumaker
Clerk of Court

FRANKLIN J. MORRIS, as personal
representative of the wrongful death estate
of Marcellino Morris, Jr. (deceased),

Plaintiff - Appellant,

v.

GIANT FOUR CORNERS, INC.,
d/b/a Giant #7251,

Defendant - Appellee.

No. 19-2071
(D.C. No. 1:15-CV-00055-JCH-LF)
(D.N.M.)

ORDER CERTIFYING QUESTION OF STATE LAW*

Before **PHILLIPS, BALDOCK, and MORITZ**, Circuit Judges.

Following a tragic automobile accident, Plaintiff-Appellant Franklin J. Morris sued Defendant-Appellee Giant Four Corners, Inc. In his complaint, Plaintiff alleges Defendant is vicariously liable for the death of Marcellino Morris, Jr. because its employee negligently entrusted gasoline to the intoxicated driver who caused the car crash. Neither party in this case has asked us to certify any question of law to the New Mexico Supreme Court. Nevertheless, because the disposition of Plaintiff's appeal turns on an important and unsettled issue of New Mexico law, we exercise our

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

discretion under Tenth Circuit Rule 27.4(A) and Rule 27.4(B) to certify the question presented below to the New Mexico Supreme Court *sua sponte*:

Under New Mexico law, which recognizes negligent entrustment of chattel as a viable cause of action, does a commercial gasoline vendor owe a duty of care to a third party using the roadway to refrain from selling gasoline to a driver it knows or should know to be intoxicated?

I.

In the early morning hours of December 30, 2011, Marcellino Morris, Jr. was tragically killed in an automobile collision with Andy Denny, who was intoxicated at the time of the accident.¹ Before the accident occurred, Denny's automobile ran out of gasoline. Denny and his friend who was with him at the time walked approximately one mile to the nearest gas station, which was the Tohatchi Giant gas station owned by Defendant. While the Tohatchi Giant did not have any gasoline cans available for purchase, the clerk working at the time sold Denny a gallon of gasoline and a gallon of water. Denny dumped the gallon of water out of the jug, filled the jug with gasoline, and walked back to fill up his vehicle. Denny returned to the Tohatchi Giant and purchased, *inter alia*, an additional nine gallons of gasoline. The Tohatchi Giant did not sell alcohol to Denny on either occasion. Shortly thereafter, Denny dropped off his friend at her house and was driving alone when his car crossed the center line of the highway and collided with the vehicle of Marcellino Morris, Jr., who died as a result of the crash.

¹ Plaintiff asserted a negligence claim against Denny but later dismissed him as a party in the district court proceedings. Denny is not a party on appeal.

Plaintiff-Appellant Franklin J. Morris, personal representative of the decedent's estate, brought a wrongful death action in New Mexico state court, claiming Defendant is liable for the decedent's death under two theories of negligence. As is relevant here, Plaintiff asserted a claim for negligent entrustment based upon Defendant's sale of gasoline to Mr. Denny, who was allegedly visibly intoxicated when he purchased a gallon of gasoline from Defendant's employee. Defendant removed the case to the United States District Court for the District of New Mexico based upon the parties' diversity of citizenship under 28 U.S.C. § 1332.

In the district court, Defendant moved for judgment on the pleadings on Plaintiff's negligent entrustment claim, arguing New Mexico law imposes no duty of care on a commercial gasoline vendor to refrain from selling gasoline to an intoxicated driver. The district court determined Plaintiff failed to identify any persuasive legal precedent, statutes, or other principles of law demonstrating such a duty exists under New Mexico law. Accordingly, the district court granted judgment in Defendant's favor on Plaintiff's negligent entrustment claim. Plaintiff's timely appeal followed.²

² In its motion for judgment on the pleadings, Defendant did not seek dismissal of Plaintiff's claim for negligent training, hiring, and supervision. Nonetheless, the district court indicated it was skeptical about the viability of Plaintiff's remaining claim "because presumably the two causes of action are predicated upon the same legal duty that the [c]ourt found lacking as a matter of law on Plaintiff's negligent entrustment claim." The district court afforded Plaintiff 14 days to submit a written response to the court's contemplated dismissal of the remaining claim against Defendant for negligent training, hiring and supervision. After Plaintiff did not file any form of response, the district court entered a final judgment dismissing Plaintiff's claims in their entirety. Plaintiff appeals only the dismissal of his negligent entrustment claim and makes no argument regarding the dismissal of his claim for

II.

“When state law permits, this court may: (1) certify a question arising under state law to that state’s highest court according to that court’s rules; and (2) abate the case in this court to await the state court’s decision of the certified question.” 10th Cir. R. 27.4(A); *see also* 10th Cir. R. 27.4(B) (explaining this “court may certify on its own or on a party’s motion”). As is relevant here, New Mexico’s highest court may “answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of [New Mexico].” N.M. Stat. Ann. § 39–7–4; *accord* N.M. R. App. P. 12–607(A)(1). The contents of a certification order to the New Mexico Supreme Court must include: “(1) the names and addresses of counsel of record . . . ; (2) the question of law to be answered; (3) the facts relevant to the question, showing fully the nature of the controversy . . . ; and (4) a statement acknowledging that the Supreme Court may reformulate the question.” N.M. R. App. P. 12-607(C).

The decision to certify a question of law lies within the sound discretion of this court. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). But because we have no desire to “trouble our sister state courts every time an arguably unsettled question of state law comes across our desks,” we exercise careful “judgment and restraint before certifying.” *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir.

negligent training, hiring, and supervision. Thus, only the dismissal of Plaintiff’s negligent entrustment claim is at issue on appeal.

2007). In determining whether to certify a question, we consider “the importance of allowing the [New Mexico] Supreme Court to decide questions of state law and policy, and thus define state law.” *State Farm Mut. Auto. Ins. Co. v. Fisher*, 609 F.3d 1051, 1058–59 (10th Cir. 2010). When we certify a sufficiently novel and outcome-determinative question of state law, we “give meaning and respect to the federal character of our judicial system” and recognize “the judicial policy of a state should be decided when possible by state, not federal, courts.” *Pino*, 507 F.3d at 1236.

III.

Bearing in mind New Mexico’s standards for certification and our own federal jurisprudence, we believe the question presented is a prime candidate for certification to the New Mexico Supreme Court. First, the question is undoubtedly determinative of the case at hand because it is the ground on which the district court granted Defendant’s motion for judgment on the pleadings and the sole substantive question on appeal. Answering the question of whether a commercial gasoline vendor owes a duty of care to a third party not to sell gasoline to a visibly intoxicated driver will determine the outcome of this appeal. Should no duty exist, Plaintiff cannot prevail on his negligent entrustment claim. If such a duty exists, on the other hand, the district court erroneously granted judgment on the pleadings in Defendant’s favor.

The novelty of the question and the unsettled nature of the applicable state law is likewise apparent. No controlling New Mexico statute or constitutional provision exists. Similarly, no authoritative decision of a New Mexico appellate court addresses whether a gasoline vendor owes a duty to a third party not to sell gasoline to a visibly

intoxicated driver. Neither party in this case cites a New Mexico state court decision directly on point, and we are not aware of one. While New Mexico appellate courts have addressed several permutations involving the negligent entrustment of chattel in the context of automobiles and intoxicated drivers, they have not yet considered whether the specific duty Plaintiff is seeking to impose on Defendant exists. Even looking outside New Mexico decisions for guidance, the authority on this issue is scant at best. The governing New Mexico statute contemplates certification in exactly these circumstances. *See* N.M. Stat. Ann. § 39–7–4 (“The supreme court of this state may answer a question of law certified to it . . . if the answer may be determinative of an issue . . . and there is no controlling appellate decision, constitutional provision or statute of this state.”).

Nor do the general legal principles set forth by the parties definitively answer whether a gasoline vendor owes a duty of care to an injured third party to refrain from selling gasoline to a visibly intoxicated driver. New Mexico’s doctrine of negligent entrustment of chattel is far from settled, and what legal authority does exist underscores the question is an open one. *See, e.g.,* N.M.R.A., Civ. UJI 13-1646 (explaining the “extent to which the theory of negligent entrustment may apply to other chattels carrying a potential for risk, such as a firearm or other dangerous instrumentality, is unresolved in New Mexico”). Additionally, the important state policy concerns surrounding drunk driving and the significant practical consequences of imposing a duty on gasoline vendors under these circumstances also counsel in favor of certification. *See Fisher*, 609 F.3d at 1058–59. In sum, this case presents a

dispositive and novel question of New Mexico law that will impact, *inter alia*, a significant matter of state legal policy in terms of application of the negligent entrustment doctrine.

IV.

For the foregoing reasons, this appeal presents an outcome-determinative question of first impression in New Mexico that is sufficiently novel to warrant certification. “In furtherance of the interests of comity and federalism that certification protects,” we respectfully request the New Mexico Supreme Court exercise its discretion to provide authoritative guidance on this issue. *See Howard v. Zimmer, Inc.*, 711 F.3d 1148, 1152–53 (10th Cir. 2012) (citation omitted). Therefore, pursuant to Tenth Circuit Rule 27.4(A) and New Mexico Rule of Appellate Procedure 12-607(A)(1), the United States Court of Appeals for the Tenth Circuit hereby certifies the following question of state law to the New Mexico Supreme Court:

Under New Mexico law, which recognizes negligent entrustment of chattel as a viable cause of action, does a commercial gasoline vendor owe a duty of care to a third party using the roadway to refrain from selling gasoline to a driver it knows or should know to be intoxicated?

The New Mexico Supreme Court may, of course, reformulate this certified question of law as it deems appropriate. N.M. Stat. Ann. § 39–7–5.

As required under New Mexico Rule of Appellate Procedure 12-607(C)(1), we include the following information regarding the names and addresses of counsel of record:

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And, on behalf of Defendant:

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The Clerk of the Tenth Circuit Court of Appeals shall transmit a copy of this certification order to counsel for all parties and forward a copy of this order, together with a copy of the parties' briefs filed in this court, to the Clerk of the New Mexico Supreme Court. This appeal is therefore ordered ABATED pending the New Mexico Supreme Court's consideration of this request and resolution of the certified question of state law.

Entered for the Court



Bobby R. Baldock
Circuit Judge