[redacted]

727 P.2d 941

Golden DAVIS, Plaintiff-Appellee,

v.

HOMESTAKE MINING COMPANY, Employer, Self-Insured, Defendant-Appellant.

No. 8753.

Court of Appeals of New Mexico.

Aug. 19, 1986.

Certiorari Quashed Oct. 23, 1986.

Matthew P. Holt, Eric Scott Jeffries, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for plaintiff-appellee.

Gary Fernandez, Grants, for defendant-appellant.

OPINION

FRUMAN, Judge.

In this workmen's compensation case, defendant appeals from the judgment awarding benefits and attorney fees to plaintiff. The specific issues are: whether it was error to award total disability benefits during the time of plaintiff's return to his employment; and whether it was error to grant attorney fees based on the present value of the workmen's compensation benefits awarded, rather than on the value of the benefits actually received, since plaintiff died following the award but before the decision on attorney fees. This latter issue is one of first impression in our appellate courts. For the reasons stated in this opinion, we affirm the judgment entered.

POST-INJURY EMPLOYMENT

Plaintiff suffered a head injury in an accident which arose out of and in the course of his employment as an underground mechanic in defendant's mine. He

continued working for several weeks following the accident and then stopped working for several months while he received medical treatment and surgery for his injury. Plaintiff then returned to his employment for a period of approximately nine months. During this resumed employment, he experienced varying degrees of ill effects deriving from the injury. His health deteriorated to the point where he discontinued working.

Following trial on plaintiff's complaint for workmen's compensation, the court found that plaintiff had been totally and permanently disabled, beginning as of the date of the accident, and entered a judgment awarding him benefits for a period of 600 weeks as of that date. The court reserved jurisdiction on the issue of attorney fees.

Defendant contends that the trial court erred in awarding total disability benefits for the nine-month period of plaintiff's post-injury resumption of employment. In making this contention, defendant attacks several of the trial court's findings of fact which, essentially, are: that, during the period of plaintiff's return to work, he was totally disabled by brain damage; and, during that same period, he was not able to work or attempt to work at any job in view of his age, education, training, general physical and mental capacity, and prior work experience.

Our review is subject to the rule that the trial court's findings shall not be disturbed if supported by substantial evidence acceptable to a reasonable mind as relevant and adequate to support the conclusion. We then view that evidence in the light most favorable to support the findings, and disregard all evidence to the contrary. *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct.App.1985).

Defendant contends that the fact of plaintiff's post-injury resumption of employment constitutes proof of his employability. However, there is also evidence that, during plaintiff's return as an underground mechanic, he suffered pain; he could not tolerate noise; he had headaches, dizzy spells, and balance problems; and he was disoriented. There is also evidence that it was dangerous for plaintiff to work in the mine; that his co-workers covered for him; and that he was there only because of his stubborn pride.

There is ample authority for the proposition that an individual may work and also be totally disabled and entitled to workmen's compensation benefits. *Roybal v. County of Santa Fe*, 79 N.M. 99, 440 P.2d 291 (1968); *Lozano v. Archer*, 71 N.M. 175, 376 P.2d 963 (1962); *Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct. App.1974); *Adams v. Loffland Brothers Drilling Co.*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970). While the evidence could have supported a contrary result, our review discloses substantial evidence to support the trial court's finding. Therefore, its decision will be affirmed. *Id.*

ATTORNEY FEES

Upon entering its judgment for plaintiff on the question of workmen's compensation benefits, the trial court reserved jurisdiction to decide the issue of attorney fees at a later date. During that interim, plaintiff died of causes unrelated to his accidental injury. Later, in deciding the issue of attorney fees, the trial court found that the issue was not dependent upon the fact of plaintiff's death, and computed the present value of the benefits awarded, as of the date of that award, to be approximately $123,000. Unpaid medical bills and rehabilitative services increased the award to $128,000. The court then proceeded to make other findings with respect to the factors set forth in *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979), and in NMSA 1978, Section 52–1–54, and entered an award of $14,500 in attorney fees.

Defendant does not suggest that there is a lack of evidentiary support for the trial court's *Fryar* findings. Rather, defendant asserts that the term "present value of the award made in the workman's favor," a factor to be considered in determining a reasonable fee, (§ 52–1–54(D)(2)), means the value of the award as of the date when the decision on attorney fees is made, and

not its value as of the earlier date when the decision on compensation benefits was made. Under this theory, the "present value" of the award to plaintiff would be substantially reduced, and the question then would be whether the trial court contravened the general percentage guidelines set forth in *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985). The *Woodson* question arises because, by accepting defendant's interpretation of the present value of the benefits and computing that value to be approximately $34,000, the amount of attorney fees awarded would approach fifty percent of that value.

In *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct.App.1978), the meaning and intent of the term "present value of the award made" was analyzed in the context of the possibility of a reduction in compensation benefits based upon a reduced degree of disability after the original trial. We held that "the possibility of a future reduction in benefits cannot be a feasible consideration in the award of attorney fees since such a possibility cannot always be anticipated. In promulgating [§ 52-1-54(D)], the Legislature did not include such a possibility." *Id.* at 16, 595 P.2d at 1211.

Other jurisdictions have reviewed a situation similar to the one presented in this appeal. Where the employee died following an oral award of compensation benefits and attorney fees, but prior to the entry of a written judgment, the court in *Liberty Mutual Insurance Co. v. Woody*, 640 S.W.2d 718 (Tex.App.1982), upon denying a challenge to the award of attorney fees in these circumstances, found that the "present value" of the future compensation benefits became fixed and definite at the time they were calculated and the attorney's services were completed.

In *Elkhorn Stone Co. v. Webb*, 478 S.W.2d 720 (Ky.App.1972), the employee died and the unpaid balance of his award ceased. Because previously awarded attorney fees were payable out of that balance, the employer contended that payment of the fees also ceased. This contention was rejected, since the right to the fee vested when the award was made and was not affected by subsequent events which reduced the award. *Cf. Basford v. Florida Power & Light Co.*, 246 So.2d 1 (Fla.1971); *Dey v. David Kahn Inc.*, 92 N.J.Super. 250, 223 A.2d 33 (App.Div.1966). In these two cases, attorney fees were awarded prior to the employee's death. Both courts held that a vested interest accrued in the fee award, even though compensation payments to the employees ceased upon their deaths.

Several courts have reached contrary holdings, but they are either distinguishable or inconsistent with New Mexico law. In *S. & J. Mercury Cab v. Eibister*, 190 So.2d 754 (Fla.1966), the worker died before the award of attorney fees. During the award hearing, a physician testified as to the worker's probable life expectancy as of the date of the earlier compensation award. Since the fact of death was known at the time this testimony was given, it was held to be erroneous to base an award of attorney fees on the amount of benefits the claimant would have received had he survived. In contrast, our courts must give a balanced consideration to all *Fryar* factors. *Cf. Woodson.*

In *Oden Construction Co. v. Tyler*, 247 Miss. 21, 153 So.2d 294 (1963), the claimant died while his case was on appeal. Since attorney fees were allowed only upon the final award of compensation benefits, and since the finality of an award was suspended during the pendency of appellate proceedings, the fees awarded were based upon the amount actually received by the worker. In contrast, Section 52-1-54(D) permits fee awards when "the claimant shall thereafter collect compensation through court proceedings." *See Phelps Dodge Corp. v. Guerra*, 92 N.M. 47, 582 P.2d 819 (1978).

Following this analysis, it is appropriate that New Mexico adopt the following statement from 3 A. Larson, *The Law of Workmen's Compensation*, Section 83.13(i) (1983):

> As a general matter, the claimant's attorney's fee should be based on the facts as to his services in the compensation case as of the time the services were

rendered, and should not be at the mercy of subsequent or collateral events over which he has no control.

See also Corson v. Brown Products, Inc., 120 N.H. 665, 421 A.2d 1005 (1980).

The adoption of this statement will be consistent with our workmen's compensation policies. One such policy is to liberally construe the Workmen's Compensation Act in favor of the employee. *Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975). An equally important policy is to avoid a chilling effect on the worker's ability to obtain adequate representation. *Fryar.*

For these reasons, we hold that the "present value of the award made in the workman's favor" means the value computed as of the date of the award to the workman. Thus, we conclude that the trial court did not err in its evaluation and award of attorney fees in this case.

Plaintiff is additionally awarded $1,000 for the services of his attorney in defending this appeal.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

727 P.2d 944

STATE of New Mexico, Plaintiff-Appellee,

v.

Jacquelyn DEAN a/k/a Jackie Shells, Defendant-Appellant.

No. 9062.

Court of Appeals of New Mexico.

Sept. 9, 1986.

Certiorari Denied (Dean) Oct. 16, 1986.

Certiorari Denied (State) Oct. 21, 1986.

Jacquelyn Robins, Chief Public Defender, Deborah A. Moll, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Paul G. Bardacke, Atty. Gen., Patricia Freider, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

MINZNER, Judge.

Defendant appeals her conviction for trafficking in cocaine in violation of NMSA 1978, Section 30–31–20 (Repl.Pamp.1980). She raises four issues on appeal: (1) wheth-

er defendant knowingly, intelligently and voluntarily waived her right to a jury trial; (2) whether defendant was afforded effective assistance of counsel; (3) whether that part of the court's sentence requiring defendant to pay restitution to the New Mexico State Police Contingency Fund for the price of cocaine purchased from her is statutorily authorized; and (4) whether defendant's conviction is supported by substantial evidence. We affirm defendant's conviction but vacate that portion of the sentence requiring restitution and remand for entry of an amended judgment.

WAIVER OF RIGHT TO JURY TRIAL

A jury trial was scheduled in this case for November 6, 1985. Because defendant did not appear when the case was called, the jury panel was excused. The court then announced it was forfeiting defendant's bond, issuing a bench warrant for her arrest, and ordering defendant held on $20,000 bail in the event of her apprehension.

After the jury had been excused defendant arrived in court, explaining that she was late because of car trouble. The court informed defendant that there was no way of proceeding with a jury trial that day and that she was under arrest. The court then announced that the trial was rescheduled for December 16, the next available time. When defense counsel objected to the rescheduling because an out-of-state defense witness then present might not be able to return at a later date, the prosecutor agreed to preserve the witness' testimony by taking a deposition.

Following an apparent recess and consultation with her attorney, defendant filed a written waiver of trial by jury form. In response to the court's questions, she also acknowledged that she had "gone over" the matter with counsel, that she was not acting under coercion or solely because she was late for court, and expressed her desire to proceed to trial at that time without a jury. Defendant now argues that her waiver of a jury trial was not effective. We disagree.

The right to trial by jury may be waived. *State v. Shroyer,* 49 N.M. 196, 160 P.2d 444 (1945); *State v. Hernandez,* 46 N.M. 134, 123 P.2d 387 (1942). Before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. *Shroyer;* NMSA, Crim.P.R. 38(a) (Repl.1985). There is no dispute that defendant's waiver was concurred in by the state and approved by the court. The state concedes, and we agree, that defendant's consent must also be voluntary.

It is difficult to see how the court and the prosecutor could have been more accommodating to defendant. The only available choices when the issue arose were to reschedule a jury trial for the next available date and preserve the witness' testimony in case she was unable to return, or to proceed with a bench trial. It was defendant who suggested the latter alternative by filing the written waiver.

Defendant argues that she was under duress to waive a jury trial because the court had set bail she would not be able to meet and she would, therefore, be incarcerated prior to trial. This is not a unique situation. Many defendants who cannot post bond are faced with the choice of an early bench trial or later jury trial. Were we to accept defendant's argument, no waiver of a jury trial would ever be valid in this situation.

Neither the court nor the prosecutor promised, explicitly or implicitly, that defendant would be treated more leniently if she waived a jury. Viewing the totality of the circumstances, *see State v. Aguirre,* 91 N.M. 672, 579 P.2d 798 (Ct.App.1978), we hold that the record does not provide a factual predicate for defendant's argument.

Defendant has suggested that we should require a particular inquiry by the trial court before a waiver of jury trial is accepted. *See Commonwealth v. Williams,* 454 Pa. 368, 312 A.2d 597 (1973). Our criminal rules of procedure contain no

such requirement, *see* Crim.P.Rule 38(a), and we are persuaded that, in this case, the trial court's questions and the written waiver provide sufficient evidence of an effective waiver.

EFFECTIVE ASSISTANCE OF COUNSEL

An accused is entitled to effective representation of counsel. *State v. Robinson,* 99 N.M. 674, 662 P.2d 1341 (1983); U.S. Const. amend. VI; N.M. Const. art. II, § 14. The test for determining whether an accused has been afforded effective assistance of counsel is whether defense counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney. *State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982); *State v. McGuinty,* 97 N.M. 360, 639 P.2d 1214 (Ct.App.1982). Defendant bears the burden of showing both the incompetence of his attorney and proof of prejudice. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985); *McGuinty.* Further, absent a showing by defendant, counsel is presumed competent. *Talley.* In considering a claim of ineffective assistance, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court will not attempt to second-guess the tactics and strategy of trial counsel on appeal. *See State v. Helker,* 88 N.M. 650, 545 P.2d 1028 (Ct.App.1975).

The state's case was based on testimony by a Lovington police officer. Defense counsel's cross-examination centered on the officer's ability to identify defendant. On appeal, defendant complains that counsel's attempt to undermine the officer's identification allowed the state to offer rebuttal testimony which showed defendant was in Hobbs on the evening of the alleged crime, not out-of-state as she claimed. By claiming an alibi defense, defendant had put her identity in issue. Counsel's attempt to undermine the identification was the only reasonable tactic available. The evidence was properly introduced to show that the officer was not mistaken as to identity. NMSA 1978, Evid.R. 404(b) (Repl.Pamp.1983). Further, a trial court is presumed to disregard the introduction of inadmissible evidence. *See Matter of Doe,* 89 N.M. 700, 556 P.2d 1176 (Ct.App.1976).

Defendant also argues that trial counsel should have advocated her motion for a new trial and challenged her waiver of a jury trial on constitutional grounds. Defendant knowingly, intelligently and voluntarily waived her right to a trial by jury. No matter how vigorously counsel might have argued, she was not entitled to a new trial. Consequently, defendant failed to prove prejudice. In the absence of prejudice, defendant's argument has no merit. *Strickland v. Washington.*

RESTITUTION

The court sentenced defendant to nine years imprisonment, suspended all except three years, followed by two years parole. The court also ordered that as a term of her parole, defendant make restitution to the New Mexico State Police Contingency Fund in the amount of $130.00 (the amount an undercover police officer spent to purchase cocaine from defendant). No period of probation was imposed.

The district court was required to include parole of two years in defendant's sentence. NMSA 1978, § 31–18–15(C) (Repl.Pamp.1981); NMSA 1978, § 31–21–10(C) (Cum.Supp.1986); *State v. Acuna,* 103 N.M. 279, 705 P.2d 685 (Ct.App.1985). Since part of defendant's sentence was suspended, the court had the option of also imposing a period of probation. NMSA 1978, §§ 31–20–5(A) and –6(D) (Cum.Supp. 1986). Probation is not automatic; upon suspending a sentence, the sentencing judge has authority to withhold imposition of probation. *See State v. Soria,* 82 N.M. 509, 484 P.2d 351 (Ct.App.1971). That is what the court chose to do in this case.

Where parole and probation are both included in a sentence, conditions of probation imposed by the court are deemed

as additional conditions of parole. NMSA 1978, § 31–20–5(B)(1) (Cum.Supp.1986). Otherwise, terms of parole are set by the parole board. NMSA 1978, § 31–21–10(D) (Cum.Supp.1986); *see* NMSA 1978, § 31–21–5(B) (Repl.Pamp.1981); *State v. Hovey,* 87 N.M. 398, 534 P.2d 777 (Ct.App.1975). Nevertheless, if the court has ordered a defendant to make restitution to a victim under NMSA 1978, Section 31–17–1 (Repl. Pamp.1981), the parole board must include restitution as a condition of parole. § 31–21–10(D).

This court has held that ordering payment to the New Mexico State Police Contingency Fund is a valid condition of probation under NMSA 1978, Section 31–20–6(F) (Cum.Supp.1986). *State v. Taylor,* 104 N.M. 88, 717 P.2d 64 (Ct.App.1986). In this case, however, no probation was imposed. Thus, the court's only authority to order a condition of parole was its power to order restitution to a victim under Section 31–17–1. § 31–21–10(D).

The purpose of Section 31–17–1 is to make whole the victims of crime to the extent possible. *State v. Lack,* 98 N.M. 500, 650 P.2d 22 (Ct.App.1982). The statute defines a victim as "any person who has suffered actual damages as a result of the defendant's criminal activities[.]" § 31–17–1(A)(1). Actual damages are defined as "damages which a victim could recover against the defendant in a civil action arising out of the same facts or event...." § 31–17–1(A)(2). Under the statute, the state is not a victim, and compensating the state does not further the purpose of victim restitution. *See State v. Hernandez,* 104 N.M. 97, 101, 717 P.2d 73, 77 (Ct.App.1986) (Bivins, J., dissenting). We conclude that the payment ordered by the court is not authorized by Section 31–17–1.

Since the court did not order the payment as a condition of probation pursuant to *Taylor,* and since it is not authorized by Section 31–17–1, the order that defendant reimburse the New Mexico State Police Contingency Fund is void. *See Sneed v. Cox,* 74 N.M. 659, 397 P.2d 308 (1964). The unauthorized portion is separable, however, and the judgment may be amended on remand. *Id.*

SUFFICIENCY OF THE EVIDENCE

In determining whether the state has met its burden of proving guilt beyond a reasonable doubt, *see State v. Davis,* 97 N.M. 130, 637 P.2d 561 (1981), this court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). This court does not weigh the evidence and may not substitute its judgment for that of the fact finder, *id.,* so long as there is sufficient evidence to support the verdict. *State v. Robinson,* 94 N.M. 693, 616 P.2d 406 (1980); *State v. Carter,* 93 N.M. 500, 601 P.2d 733 (Ct.App. 1979). It is for the fact finder to determine the credibility of the witnesses and the weight to be given to their testimony. *See State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975). The fact finder may reject defendant's version of the incident. *Id.*

Viewing the evidence as mandated by *Lankford,* it is clear that there is sufficient evidence to support the court's guilty verdict. The trial court rejected defendant's version of the facts. It was within its province in so doing. *Vigil.* Defendant's conviction is supported by substantial evidence, and must be affirmed by this court. *Robinson; Lankford; Carter.*

CONCLUSION

The case is remanded with instructions to vacate that portion of the sentence ordering payment of $130.00 to the New Mexico State Police Contingency Fund as a condition of parole and to enter an amended judgment. In all other respects the trial court is affirmed.

IT IS SO ORDERED.

ALARID, J., concurs.

BIVINS, J., specially concurs.

BIVINS, Judge (specially concurring).

I concur in the discussion of the issues dealing with waiver of the right to a jury trial, effective assistance of counsel and sufficiency of the evidence. I also concur with that portion of the discussion on restitution which concludes that NMSA 1978, Section 31–17–1 (Repl.Pamp.1981), being the victim restitution statute, does not authorize restitution to the state for the amount paid to defendant in the drug transaction. See my dissenting opinion in *State v. Hernandez,* 104 N.M. 97, 101, 717 P.2d 73, 77 (Ct.App.1986).

The majority goes one step further and distinguishes *State v. Taylor,* 104 N.M. 88, 717 P.2d 64 (Ct.App.1986), on the basis that since the present case does not involve payment of restitution as a condition of probation, *Taylor* is not controlling. Since I do not agree with *Taylor,* see my dissenting opinion in *Hernandez,* I see no need to make such a distinction. I, of course, agree with the result reached and file this separate opinion only to preserve my continuing objection to the rationale of *Taylor.*

727 P.2d 949

STATE of New Mexico, Plaintiff-Appellee,

v.

Ricky CLARK, Defendant-Appellant.

No. 9096.

Court of Appeals of New Mexico.

Sept. 11, 1986.

Certiorari Denied Oct. 21, 1986.

Paul G. Bardacke, Atty. Gen., Alicia Mason, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Lynne Fagan, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

GARCIA, Judge.

Prior to trial on charges of receipt of stolen property in violation of NMSA 1978,

Section 30–16–11 (Repl.Pamp.1984), defendant sought to suppress evidence which was seized from his rented mobile home after his landlady had consented to a warrantless search. The trial court denied the motion and defendant was ultimately convicted of the crime. He takes a timely appeal. In addition to his unlawful search contention, defendant asserts a violation of NMSA 1978, Crim.P. Rule 27 (Repl.1985), as well as instances of prosecutorial misconduct and cumulative error. We affirm defendant's conviction.

ISSUES

(1) Whether the court erred in refusing to suppress evidence obtained during the search of a mobile home after defendant's landlady consented to the search;

(2) Whether the court erred in refusing to declare a mistrial after the state cross-examined defendant about an uncharged crime, and did not disclose to defense counsel either the documentary information the state possessed about the uncharged crime or its intent to cross-examine defendant about it;

(3) Whether the prosecutor engaged in misconduct during closing argument; and

(4) Whether cumulative error was present.

Another issue in defendant's docketing statement, which was not briefed, is abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985).

BACKGROUND

Police officers received information that stolen goods could be located inside defendant's mobile home. Without first securing a search warrant, an officer went to the trailer and found defendant's landlady already there. Rent was unpaid, an eviction notice had been posted, and the landlady was on the premises to post a second eviction notice. She had heard defendant was incarcerated in another town, and had been told by defendant's sister to remove defendant's possessions. The landlady testified that she intended to move defendant's things that day. She gave the officer permission to enter and search. Incriminating evidence was seized and subsequently admitted at defendant's trial.

CONSENT OF OWNER

Defendant argues that the landlady's consent was invalid because a landlord cannot consent to a warrantless search of a tenant's possessions. Under the facts of this case, we disagree.

Any discussion of the validity of the landlady's consent to search defendant's possessions must first consider whether defendant had any legitimate expectation of privacy in the premises or possessions searched. *See* Justice Harlan's concurrence in *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967); *State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983).

The fourth amendment's requirement of a legitimate expectation of privacy on the part of one who seeks to suppress evidence involves two questions: (1) has the individual by his conduct exhibited an actual (subjective) expectation of privacy; and (2) is this individual's subjective expectation one that society is prepared to recognize as reasonable. *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *State v. Donaldson.*

In answer to the second question, an individual's expectation of privacy in his dwelling place is ordinarily afforded the most stringent fourth amendment protection. *See United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *see also State v. Fisher,* 141 Ariz. 227, 686 P.2d 750 (1984) (En Banc). The fact that an individual leases or rents his dwelling place does not affect the fourth amendment's protection of a tenant's legitimate expectation of privacy; nor can the vagaries of state property law determine the parameters of that expectation. *See United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Chapman v. United States,* 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961).

However, when an individual's actions indicate an intent to abandon his

dwelling or possessions, his conduct no longer evinces a privacy expectation and the fourth amendment will not protect him against a warrantless search. *See United States v. Robinson,* 430 F.2d 1141 (6th Cir.1970). Abandonment is an ultimate fact or conclusion based upon a combination of acts and intent. *See People v. Morrison,* 196 Colo. 319, 583 P.2d 924 (1978) (En Banc) (when defendant had left state and all clothes, bedding and personal effects were removed from apartment and all that remained was trash and defendant never claimed any items left in apartment, his actions unequivocably indicated abandonment). The intent to abandon will not be presumed and must be affirmatively shown by the party relying on abandonment. The showing must be by clear, unequivocal and decisive evidence. *United States v. Robinson; Peyton v. United States,* 275 A.2d 229 (D.C.App.1971).

In this case the state relies on a theory of abandonment to validate the officer's warrantless search, asserting that because defendant's interest in his property was terminated by his abandonment, the landlady, as owner of the mobile home, could give permission for a warrantless search. *See Commonwealth v. Jackson,* 384 Mass. 572, 428 N.E.2d 289 (1981).

We agree with the state that an individual's abandonment of his leased premises will give rise to an owner's ability to consent to a search of those premises. Upon a review of the whole record, we find support for a finding of intentional abandonment in this case. *Id.*

The evidence offered in support of abandonment includes: the fact that the landlady had heard that defendant was in jail; that defendant was behind in his rent; that the landlady had previously placed an eviction notice on defendant's trailer which was "missing" on the day of the search; that the landlady, because of nonpayment, intended to enter the trailer and move defendant's things out that day; and that the landlady had made arrangements with defendant's sister to remove defendant's possessions.

The state admits that mere nonpayment of rent is not, in itself, evidence of abandonment. *State v. Hodges,* 287 N.W.2d 413 (Minn.1979). In addition, the landlady's actions in posting eviction notices is not dispositive. The actual rights and liabilities of defendant under New Mexico property law do not control his ability to assert his fourth amendment right to privacy. *See State v. Johnson,* 108 Idaho 619, 701 P.2d 239 (Ct.App.1985).

The fact of defendant's incarceration is, similarly, not a factor indicating an intent to abandon. To the contrary, defendant's incarceration is the type of involuntary absence which triggers the imposition of "an especially heavy burden" on the government to show abandonment. *United States v. Robinson.* In *Robinson,* a case quite factually similar to this one, defendant was incarcerated at the time of the search. He had been absent from his apartment for over a month without paying any rent. A friend of defendant's wife (defendant was not living with his wife) had accompanied the wife to defendant's apartment and removed some of defendant's belongings sometime before the search. In overruling the trial court's finding of abandonment, the Sixth Circuit Court noted that the act of removing defendant's belongings and the building manager's belief that defendant had abandoned the apartment could not be considered as evidence of defendant's intent to abandon the apartment. *Cf. Baggett v. State,* 254 Ark. 553, 494 S.W.2d 717 (1973) (abandonment found where although the rent had been paid on the day the search was conducted, accused had quit his job, told several people he was going to another city, turned his key over to owner and taken all his personal belongings with him).

There was, however, testimony from which the court could determine that defendant intended to abandon the trailer. The landlady testified regarding her contacts with defendant's sister, and about a conversation concerning the removal and storage of defendant's belongings. The landlady told the sister she could not store

defendant's possessions, but would move them "outside."

In viewing the landlady's testimony in a light most favorable to the court's findings, there is a fair inference that defendant communicated to his sister his desire that she arrange for the removal of his possessions. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983). This evidence, when coupled with the nonpayment of rent and the landlady's previous postings of an eviction notice, is substantial evidence which supports the court's finding of abandonment. *Cf. People v. Brewer,* 690 P.2d 860 (Colo.1984).

From the facts before us, we conclude that the state met its heavy burden of showing abandonment by substantial evidence. Our inquiry need not, however, end here. While we believe that the validity of the landlady's consent to enter the premises can be predicated upon defendant's abandonment of the trailer, we can also affirm the trial court's admission of the evidence seized therein on another ground.

Warrantless searches are valid if performed after valid consent is given by someone who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected. *See State v. Larson,* 94 N.M. 795, 617 P.2d 1310 (1980); *Ex parte Hilley,* 484 So.2d 485 (Ala.1985) (one who subjects his property to the exclusive or joint control of another assumes risk that consent will be granted by other to search of property); *State v. Carter,* 485 So.2d 260 (La.App. 3 Cir.1986).

There is a fair inference from the evidence before the court that defendant had arranged, through his sister, for the landlady to store his belongings. Once defendant allowed the landlady this "common authority" over his possessions he took the chance that she might consent to a search. *See State v. Barry,* 94 N.M. 788, 617 P.2d 873 (Ct.App.1980). In *Barry,* we said:

> [W]hen one chooses to dilute his exclusive possession of any part of the premises by granting access to another, he loses the expectation of privacy he would otherwise enjoy, because he then subjects his privacy to the comings and goings of another, and to anyone else who might accompany his co-possessor or pass within viewing range of the exposed area.

Id. at 791, 617 P.2d at 876.

Defendant, by virtue of the arrangements made with his landlady, empowered the landlady to consent to a search of his trailer. *See State v. Larson; DeRochemont v. Commissioner-Internal Revenue Service,* 628 F.Supp. 957 (N.D. Ind.1986). We affirm the trial court's denial of defendant's motion to suppress.

CROSS–EXAMINATION

Prior to trial on the stolen property charge, defendant had been arrested and charged with forgery. After a hearing on defendant's motion in limine, in part directed to the prior forgery conviction, the trial court determined that the state could cross-examine defendant regarding the fact of conviction, pursuant to NMSA 1978, Evid. Rule 609 (Repl.Pamp.1983), should defendant testify.

During defendant's direct examination, defense counsel elicited the fact of the forgery conviction. The court gave a limiting instruction to the jury directing it to consider the conviction for credibility purposes only.

On cross-examination, the prosecutor questioned defendant about defendant's use of a driver's license he had altered to carry out the forgeries. After establishing that defendant had possession of Kurt Pfeiffer's license, the following exchange took place:

Q: What else did you do to Mr. Pfeiffer's driver's license, Mr. Clark?

A: Uh, that's it.

Q: No, you put somebody else's picture on it, didn't you?

A: Yes.

Q: Whose picture did you put on it?

A: I put my picture on it.

Q: And why did you do that, Mr. Clark?

At that point defense counsel interposed an immediate request to approach the bench. Counsel made several objections, one of which, that the prosecutor was improperly trying to elicit a claim of privilege in front of the jury, the trial judge sustained.

At the close of the evidence, defense counsel moved for a mistrial because of the asserted improper cross-examination and because of the prosecutor's failure to disclose the information about the altered license to defendant. The court denied the mistrial motion.

On appeal, defendant contends that the cross-examination was improper without reference to any discovery violations and that his motion for mistrial should have been granted because of the prosecutor's intentional failure to disclose the investigatory report.

The cross-examination was proper. While it is true that the underlying circumstances of a prior conviction should not ordinarily be inquired into, *see State v. Ocanas,* 61 N.M. 484, 303 P.2d 390 (1956), our cases recognize that evidence may be inadmissible for some purposes, yet admissible for others. *State v. Wyman,* 96 N.M. 558, 632 P.2d 1196 (Ct.App.1981). Notwithstanding that the facts surrounding the altered license would be inadmissible as an underlying circumstance of a prior conviction, those same facts are admissible under NMSA 1978, Evid.Rule 608(b) (Repl.Pamp. 1983), as a specific instance of conduct which is probative of truthfulness. Defendant admits this.

Defendant contends that the prosecutor's manner of cross-examining defendant was error because it did not allow the trial court a prior opportunity to determine the self-incrimination issue. Nothing in Evid.Rule 608 requires the prosecutor to announce to the court its intention to use evidence so that the trial court may make a prior determination of whether the use of the evidence would violate any self-incrimination rights. In this case, the prosecutor asked several questions concerning the altered license before defendant objected. Once defendant objected, the trial court sustained the objection on self-incrimination grounds and no further questions were asked on this topic. The trial court acted properly in sustaining the objection when it was made. Defendant has a duty to object at the earliest possible time. *State v. Fish.* We will not entertain the issue of the prosecutor's questions which were asked before the objection. *Id.*

RULE 27 VIOLATION

The prosecutor's information about the license alteration was obtained from an investigatory report of defendant's prior forgery arrest. This investigatory report, prepared by the Clovis Police Department, had been attached to the judgment and sentence of the prior conviction. The judgment and sentence were disclosed to defense counsel without the investigatory report.

Defendant maintains that his statements about the altered license should have been disclosed under both Sections (a)(1) and (a)(3) of Crim.P.Rule 27.

Criminal P. Rule 27(a)(1) provides for the disclosure of:

> (1) * * * Any statement made by the defendant, or co-defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney[.]

Criminal P. Rule 27(a)(3) provides for the disclosure of:

> (3) * * * Any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant[.]

The state maintains that because the prosecutor intended to use the information to impeach defendant's credibility, the re-

port is somehow not a statement or document required to be disclosed by the rule.

Evidence which the state intends to use at trial must be disclosed. *State v. Perrin,* 93 N.M. 73, 596 P.2d 516 (1979). The state must also disclose items which are material to the preparation of the defense. *Chacon v. State,* 88 N.M. 198, 539 P.2d 218 (Ct.App.1975).

The state fastens on the requirement of Crim.P. Rule 27(a)(3) that documents "material to the preparation of the defense" be disclosed, and chooses not to discuss the section's further requirement of disclosure of "evidence" intended for use by the state at trial. As to the assertion that the report was not material to the defense, the state offers no authority for the proposition that information that would certainly impact a defense counsel's tactical trial decisions is not material to the defense. Receipt of the report would clearly affect counsel's decisions on further suppression motions; on whether defendant should testify; on the preparation of defendant for cross-examination; and on the extent of information elicited by defense counsel on direct.

Our cases have held that the duty of a prosecutor is to see that defendant has a fair trial. *State v. Manus,* 93 N.M. 95, 597 P.2d 280 (1979). In *State v. Manus,* defendant claimed error as a result of the surprise testimony of a rebuttal witness who had not been on the state's disclosed witness list. After objecting, the trial court postponed testimony until the next day to allow defendant time to depose the witness but denied defendant's request for a continuance to further investigate. On appeal, the New Mexico Supreme Court concluded that defendant was not prejudiced by the failure to disclose because of the opportunity to depose. Thus, the court did not specifically decide whether rebuttal witnesses were subject to disclosure. The court criticized, however, as we do today, the "gamesmanship" inherent in this type of litigation tactic. "A criminal trial, like its civil counterpart, is a quest for truth." *Gregory v. United States,* 125 U.S.App. D.C. 140, 143, 369 F.2d 185, 187 (1966), *cert. denied,* 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969). The process is far too important and the goal too dear to allow this kind of trial maneuvering.

We do not, however, find that defendant has shown prejudice under the standard enunciated in *State v. Sandoval,* 99 N.M. 173, 655 P.2d 1017 (1982): "The prejudice part of the test [to obtain reversal for a Rule 27 violation] requires the court to assess whether the omitted evidence created a reasonable doubt which did not otherwise exist." *Id.* at 175, 655 P.2d at 1019. In this case, the omitted evidence creates no doubt.

Thus, we do not specifically decide whether the investigating report was the type of document or statement of defendant which should properly have been admitted under Crim.P. Rule 27. The trial court's denial of the mistrial is affirmed.

CLOSING ARGUMENT AND CUMULATIVE ERROR

We address these issues together because, having found no reversible error in the first two issues, the only alleged errors to which the doctrine of cumulative error would be applicable are those found in closing argument. Moreover, contentions relating to prosecutorial misconduct during closing argument are frequently reviewed for the cumulative impact of the prosecutor's remarks. *See State v. Diaz,* 100 N.M. 210, 668 P.2d 326 (Ct.App.1983).

Defendant complains of three comments. First, the prosecutor told the jury that defense counsel did not like his own witnesses and the prosecutor did not like them either. Next, the prosecutor suggested that defense counsel's dissatisfaction with the investigation of this case was without basis because the police had more experience in investigation than defense counsel. Finally, the prosecutor told the jury that they would have every right to kick him out of the courtroom if he gave them a case like the defense did. Objection was made to each of these comments; the objections were sustained and the court ad-

monished the jury as to the last two comments.

We do not believe that the comments rise to the level of depriving defendant of a fair trial. *See State v. White,* 101 N.M. 310, 681 P.2d 736 (Ct.App.1984). This is not a case like *State v. Henderson,* 100 N.M. 519, 673 P.2d 144 (Ct.App.1983), in which the prosecutor told a highly prejudicial and supposedly true story that had no basis whatsoever in the evidence, or *State v. Diaz,* in which the prosecutor repeatedly cast aspersions on defendant, the defense case, and defense counsel, none of which had any basis in the evidence. In this case, if there was error, it was cured by the sustaining of objections and the admonitions. *See State v. Pace,* 80 N.M. 364, 456 P.2d 197 (1969); *Henderson.*

The conviction and sentence are affirmed.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

727 P.2d 956

Geraldine CARTER, Plaintiff-Appellant,

v.

MOUNTAIN BELL, Employer and Insurer, Defendant-Appellee.

No. 8738.

Court of Appeals of New Mexico.

Oct. 7, 1986.

Randi McGinn, Albuquerque, for plaintiff-appellant.

H. Perry Ryon, Mountain States Tel. & Tel. Co., Albuquerque, for defendant-appellee.

OPINION

ALARID, Judge.

Plaintiff Geraldine Carter appeals from a judgment awarding her compensation for a scheduled injury, and crediting defendant Mountain Bell with payments previously made to plaintiff under defendant's benefits plans. On appeal, plaintiff raises two issues. She first challenges the trial court's decision to give defendant credit. She next alleges that she should have been found to be totally disabled or, at least, to have suffered a separate and distinct impairment to the body as a whole, thereby allowing her to recover benefits for partial disability. The facts necessary for our discussion will be discussed as we analyze the legal issues raised by plaintiff in her appeal. We affirm the trial court on the credit issue and remand on the issue of scheduled versus non-scheduled injury.

DISCUSSION

I. Whether the trial court erred in granting defendant credit against worker's compensation benefits for monies paid under its accident and disability plans.

Defendant is self-insured. Since 1913, all Bell System companies have had benefit plans similar to the ones at issue in this case. *See Southwestern Bell Telephone Co. v. Siegler,* 240 Ark. 132, 398 S.W.2d 531 (1966).

Defendant has had a "Sickness and Accident Disability Benefit Plan." For sickness, defined as illness or off-the-job injury, the plan pays the employee full salary for a certain time, depending on the employee's longevity with the company, and then half-salary for the remainder of the time up to fifty-two weeks. Then, for sickness, the employee is eligible for benefits of half-salary for as long as the employee is disabled under another plan, the "Company's Long Term Disability Plan," administered by Mutual of Omaha. For accident defined as on-the-job accident, the "Sickness and Accident Disability Benefit Plan" pays the employee full salary for a certain time, again depending on the employee's longevity with the company, and then half-salary for as long as the employee remains disabled. Thus, the benefits are the same for sickness as for accident. The only difference is that for sickness, the long-term disability plan picks up the payments after one year, whereas, for accident, the "Sickness and Accident Disability Benefit Plan" pays all the benefits.

The sickness and accident plan provides that employees cannot get benefits for both sickness and accident at the same time. In addition:

> In case any benefit, which the Committee shall determine to be of the same general character as a payment provided by the Plan, shall be payable under any law now in force or hereafter enacted to any employee of the Company, the excess only, if any, of the amount prescribed in the Plan above the amount of such payment prescribed by law shall be payable under the Plan; provided, however, that no benefit payable under this Plan shall be reduced by reason of any governmental benefit payable on account of military service or by reason of any benefit which the recipient would be entitled to receive under the Social Security Act.

The following testimony was given relating to this paragraph:

> Q. Under paragraph 25, there was a committee referred to. What committee is this?

A. This is in our Corporate Benefit Office and the committee consists of managers of all departments.

Q. Do you know whether the committee has determined that the New Mexico worker's compensation payments are of the same general character as those paid under the Accident and Sickness Plan?

A. Yes.

Q. Ok. And this has been the position of the committee at all times from 1973 to the present time?

A. Yes.

The long-term disability plan specifically includes worker's compensation in the list of benefits which shall be deducted from the benefit paid by this plan.

The following facts are undisputed in this case: (1) plaintiff was injured in an on-the-job accident on January 10, 1983; (2) her salary at that time was $527.50 per week; (3) the compensation rate applicable to plaintiff was $271.76 per week; (4) plaintiff received $527.50 per week when she was unable to work due to the accident; (5) plaintiff went back to work and was downgraded in salary because of a change in position; when she went off work again because of disability related to the January 1983 accident, she was earning $382.50 per week; and (6) plaintiff received $382.50 during the time she was unable to work until her right to full salary under the plans was used up, then she began receiving $191.25 per week as half-salary under the plans. Defendant did neither ask for nor receive a dollar-for-dollar credit. It sought and received a week-for-week credit.

Thus, there are three time periods involved: (a) the time immediately after January 10, 1983, when plaintiff was receiving $527.50 from the plans; (b) the time immediately after she stopped working for the second time, when she was receiving $382.50 from the plans; and (c) the time when the plans only paid half-salary, during which plaintiff was receiving $191.25 from the plans. The way the court worked the credit was so that defendant did not have to pay compensation for the weeks in which plaintiff received either $527.50 or $382.50. Defendant received a credit of $170.62 per week against the $271.76 it owed plaintiff for the weeks it paid plaintiff half-salary pursuant to the plans. (The discrepancy between the credit given of $170.62 and defendant's allegation that half plaintiff's salary would have been $191.25 may be explained by the fact that defendant made a mistake in paying plaintiff benefits.)

Defendant does not believe that plaintiff should be able to get a double recovery of both worker's compensation plus benefits under the plans. Defendant contends that a ruling in plaintiff's favor would encourage it not to pay any benefits under the plans until plaintiff's right to worker's compensation is established. This would result in a period of hardship for plaintiffs, but would insure that defendant would not have to pay both company benefits and worker's compensation contrary to the language in the plans. Plaintiff contends that the Workmen's Compensation Act does not preclude such double recovery and that she should be entitled to get all benefits that both the plans and the law allow. Plaintiff also asserts that the language in the sickness and accident plan is not clear enough to warrant a conclusion that worker's compensation is to be deducted from the benefits under the plans.

Although both parties cited sections in Larson's and cases which support their respective positions, these authorities cannot be categorized into the majority and minority rules, thereby allowing this court to pick which rule it wants to follow. The reason the authorities cannot be categorized is that they rely on statutes peculiar to their jurisdictions or language in benefit plans peculiar to those plans or they decide the case on grounds not related to either statutory or benefit plan language.

4 A. Larson, *The Law of Workmen's Compensation,* Sections 97.51(a) and (c) (1986), states the rules as follows:

> As to private pensions or health and accident insurance, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits. * * *
>
> * * * * * *
>
> Although avoidance of duplication cannot ordinarily be achieved under American statutes in these cases by, so to speak, trimming at the compensation end, it is frequently achieved by express language trimming at the private-plan end, that is, by reducing the private benefits by the amount of any compensation payments. Even when the language of the plan is not specific, a court may give the benefit of the doubt to a construction that will avoid overlapping payments. [Footnotes omitted.]

Plaintiff relies on the first paragraph of this quote and the cases cited in it. Defendant relies on the second paragraph and the cases cited in it. The problem with both parties' reliance is that the cases they cite are based, for the most part, on specific statutes. Defendant also relies on cases which concentrate on the language of the particular plan being considered. *See Jones & Laughlin Steel Corp. v. Kilburne,* 477 N.E.2d 345 (Ind.App.1985); *Cole v. Armour & Co.,* 257 N.W.2d 381 (Minn.1977).

Yet, just as these cases concentrate so heavily on the plan language without regard to statutory considerations, there exists a case which concentrated on statutory language without regard to contractual considerations outlined in the plan language. In *In re Gould's Case,* 355 Mass. 66, 242 N.E.2d 748 (1968), the court was faced with a statute that prohibited the worker's compensation board from considering benefits derived from other sources. The court said that the board's simple function was to determine what benefits under the worker's compensation law the employee was to get, implying that it would be too hard, and contrary to the statutory language, to spend time interpreting the language in all the plans that could come before the board. Thus, in the absence of express statutory language allowing a set-off for private plans, the board could not consider them.

We should note that plaintiff does not rely on the *Gould* case and appears to concede that if the plan language precludes double recovery, then the trial court's judgment could be affirmed, subject to one other argument. Plaintiff argues that the testimony does not establish that the committee determined that New Mexico worker's compensation benefits are of the same general character as the plan benefits. She asserts that the testimony only shows that the witness knew whether the committee made the determination. Plaintiff is reading the testimony too technically. The clear import of the testimony, even though the question was not directly asked, was that the committee affirmatively made the determination that worker's compensation benefits were of the same general character. Moreover, even if there was no such direct testimony, a number of courts have held, apparently as a matter of law in construing the plan, that these plan benefits are of the same general character as worker's compensation benefits. *See, e.g., Western Electric, Inc. v. Ferguson,* 371 So.2d 864 (Miss.1979); *Strohmeyer v. Southwestern Bell Telephone Co.,* 396 S.W.2d 1 (Mo.App.1965).

Plaintiff's other argument is that, because her benefits were paid under the "sickness" and "long term disability" portions of the plans rather than the "accident" portion, and because the plans pay different amounts over different times than worker's compensation benefits are paid, the plan is not of the same character as worker's compensation, regardless of the testimony. These contentions are without merit. Because of the cases cited immediately above, the plans are of the same general character as worker's compensation; both are intended to compensate the employee when he is unable to work. *Cf. also Mirabal v. International Minerals & Chemical Corp.,* 77 N.M. 576, 425 P.2d 740 (1967). The fact that the plans pay more,

for a longer time, and for more reasons does not establish that they are not of the same general character. Because it is undisputed that plaintiff received benefits under the plans for the same injury as she was suing for worker's compensation, plaintiff cannot seriously contend that the plan benefits were for a sickness other than her accidental injury. There was simply no evidence to support this contention. Because the payments made by defendant to plaintiff under the plan were characterized as payments for "sickness" does not mean that defendant is not entitled to a credit against the installment payments of worker's compensation determined to be payable.

In resolving the questions raised by plaintiff concerning the propriety of the trial court's allowance of credits, two subissues are presented. First, in the absence of any statutory language whatsoever, and solely in reliance on the language of the plans, may this court say that plaintiff should not get overlapping benefits for this injury? Second, even if this court says that, should the credit be determined in a worker's compensation action or should defendant have to sue plaintiff separately for the difference? The first issue is substantive; the second issue is procedural.

We treat the substantive issue first. The New Mexico Workmen's Compensation Act, NMSA 1978, Sections 52–1–1 through –69 (Orig.Pamp. & Cum.Supp.1985), says nothing about overlapping benefits or credits for defendant in this situation. Section 52–1–56(C) allows defendant to be reimbursed out of recoveries from third-party tort claims. Section 52–1–65 allows credit for worker's compensation benefits furnished under the laws of other jurisdictions. Beyond that, the statute is silent.

Paternoster v. La Cuesta Cabinets, Inc., 101 N.M. 773, 689 P.2d 289 (Ct.App.1984), involved the issue of credit for past overpayments of compensation. This court allowed such credit as a matter of "fundamental fairness." However, *Paternoster* is different than this case in that *Paternoster* did not decide the substantive issue of whether there were, in fact, overpayments as a matter of fundamental fairness. In *Paternoster*, all agreed that there were overpayments. In this case, the substantive issue is whether plaintiff received too much. *Paternoster's* discussion of fundamental fairness was in the context of procedure: would defendants be allowed to claim the credit in the worker's compensation action? Thus, while *Paternoster* may be of some assistance in the procedural aspects of this case, it is of little help in deciding the substantive aspects.

New Mexico does have a few cases involving recovery of benefits other than worker's compensation. In *Clemmer v. Carpenter*, 98 N.M. 302, 648 P.2d 341 (Ct. App.1982), the worker's family was allowed to recover both worker's compensation and federal reserve benefits for the worker's death while the worker was engaged in the dual purpose of driving to both a Coast Guard Reserve meeting and to his office to pick up papers. In *Roybal v. County of Santa Fe*, 79 N.M. 99, 440 P.2d 291 (1968), the worker was allowed to collect both his salary and worker's compensation benefits. The court found that the salary was not intended to be a gratuity. *See also Walters v. General Accident & Fire Assurance Corp.*, 119 So.2d 550 (La.App.1960), another case cited by plaintiff dealing with the concept of gratuities. In *Snead v. Adams Construction Co.*, 72 N.M. 94, 380 P.2d 836 (1963), the worker was allowed to collect both veterans' disability and worker's compensation benefits. *See also Winter v. Roberson Construction Co.*, 70 N.M. 187, 372 P.2d 381 (1962) (unemployment compensation).

Because of the importance of the statutory scheme to rights under the worker's compensation law, it can easily be said in this case that, because there is no statute expressly allowing credit, credit should not be allowed. We reject this analysis. Our reason for the rejection is that plaintiff's rights do not only flow from the statute. The benefit plan is in the nature of a contract and plaintiff's rights should be equally governed by it. Our reading of

the benefit plans, which is supported by both the testimony and the cases cited, is that plaintiff cannot get both worker's compensation and the benefits under the plans. Thus, as a matter of substantive right under the plans, plaintiff does not receive both, and defendant should not have to pay both.

The next question, then, is whether our courts can trim at the compensation end to effectuate the trim that should have been made at the private plan end. On this question, *Paternoster* provides substantial guidance. *Paternoster* adopts the following rationale:

> "In our view, the voluntary payment of compensation benefits during the pendency of [compensation] proceedings ... is a matter of great importance to an injured worker and should not be discouraged. Any statutory interpretation which would penalize an employer who voluntarily makes weekly payments to an injured employee in excess of his ultimate liability would certainly discourage voluntary payment by his employers and would therefore constitute a disservice to injured workers generally."
>
> * * * We agree with the policy of encouraging voluntary, prejudgment payments. The employer, in so making these payments, furthers the prime goal of the Act, which is to protect an employee against want, and to prevent an employee from becoming a public charge. ... Using "fundamental fairness" as our guideline, therefore, we believe it equitable to acknowledge, in some fashion, the employer's prejudgment payment contribution.

101 N.M. at 777, 689 P.2d at 293 (citation omitted) (*quoting in part Casualty & Surety Co. v. Adkins,* 619 S.W.2d 502, 503–04 (Ky.App.1981)). Cases allowing credit based on private plans contain the same rationale. *See, e.g., Cowan v. Southwestern Bell Telephone Co.,* 529 S.W.2d 485 (Mo.App.1975). Plaintiff contends that this rationale should not be used because defendant is obligated to pay. Whether or not defendant is so obligated, the fact remains that people sometimes do not live up to their obligations and, therefore, the law does what it can to encourage them. In addition, adoption of the rationale of *Paternoster* and *Cowan* would be consistent with the general distaste courts have for allowing double recovery. *See* Larson, *supra,* at 18–92.

Finally, plaintiff contends that if this court rules that, as a matter of substantive right under the plans, plaintiff does not have a right to both plan benefits and worker's compensation, then the procedural remedy defendant has is not an off-set in the worker's compensation case. Rather, defendant's remedy is to file an independent suit. Under the fundamental fairness doctrine of *Paternoster,* plaintiff's interpretation would lead to an unnecessary multiplicity of suits. If defendant is entitled under the plans to recover excess payments it made, then such recovery is easily accomplished as part of the worker's compensation judgment.

Thus, summarizing on this issue: Most of the authorities relied upon by both plaintiff and defendant are inapposite because plaintiff's authorities rely on statutes precluding set-offs for other categories of benefits while defendant's authorities rely on statutes permitting such set-offs. Plaintiff's position is best supported by those cases which consider worker's compensation remedies to be strictly statutory. Therefore, what is not provided for in the statutes is not possible. Defendant's position is best supported by those cases which consider language in a plan to be controlling and which consider the policy effects of a decision not allowing a set-off—that defendants will then be reluctant to voluntarily pay benefits. Moreover, defendant's position is supported by a general distaste for double recovery and the abhorrence of the notion that a worker should get more money for being disabled than for working.

We reach a decision in defendant's favor primarily based on the language of the plan itself. This is the document that controls the rights as between the parties. It does not allow duplication of benefits as a matter of substance. As a matter of procedure, once the substantive issue is decided, then fairness requires that defendant be allowed the credit in this proceeding.

Where the Workmen's Compensation Act is silent, fundamental fairness must be our guideline. *Transport Indemnity Co. v. Garcia,* 89 N.M. 342, 552 P.2d 473 (Ct.App. 1976).

II. Scheduled injury.

The trial court found that plaintiff suffered injuries to her right wrist and right shoulder as a direct and proximate result of her accident. Plaintiff argues that the trial court erred in limiting her recovery under the Scheduled Injury Section, Section 52-1-43, instead of awarding partial disability or total disability.

The problem with this issue is that, although there was substantial evidence to support the trial court's determination that this is a scheduled injury, the trial court found that plaintiff suffered a "shoulder injury." There is a preliminary question: is a "shoulder injury" a scheduled injury? We rule that it is not. However, because New Mexico courts have not clearly decided this question of law, we do not believe that the trial court's findings are clear and unambiguous enough to apply the rule that findings prevail over conclusions. *See Roybal v. Chavez Concrete & Excavation Contractors, Inc.,* 102 N.M. 428, 696 P.2d 1021 (Ct.App.1985). Accordingly, we remand on this issue.

We relate the facts of this issue first. Plaintiff fell onto her right wrist. This injured the right wrist and caused carpal tunnel syndrome. An operation for the syndrome was somewhat unsuccessful. Plaintiff continued to have pain. There was a second operation which revealed a neuroma. An operation to treat the neuroma would be dangerous. Plaintiff refused to have it and defendant does not contend that such refusal was unreasonable.

Because of the wrist injury, plaintiff developed a condition called reflex sympathetic dystrophy in her shoulder. This condition causes pain between the shoulder and the neck, and it limits the range of motion in plaintiff's arm.

According to plaintiff's evidence, she was totally disabled. She could not do anything. She suffered terrible pain, and the pain medication she took made her drowsy so that she could not work.

According to defendant's evidence, plaintiff's doctors released her to go back to work with restrictions on the use of her right arm. There were jobs available that plaintiff could perform even with her restrictions. Plaintiff owned a boutique. Defendant's private investigators observed plaintiff working at the boutique. Plaintiff used her right arm to remove jewelry from a case, move a bar stool, write, use a calculator, take dresses from a rack, pick up things, support her chin, and pull back a chair.

Pertinent findings include: that plaintiff suffered injuries to her right wrist and shoulder (# 1); that as a direct result of the wrist problem, plaintiff developed a reflex sympathetic dystrophy in her shoulder and that this condition causes pain from the top of the shoulder to the bottom of the neck and limits the range of motion in plaintiff's arm (# 6); and as a result of the accident plaintiff is temporarily "disabled in her dextrous member (shoulder injury)" (# 7). The court concluded that plaintiff is disabled in her dextrous member. Judgment was for two hundred weeks of compensation payments. The court orally commented that the injury was limited to the hand and shoulder and there was not involvement to the body; there was no total and permanent injury to the body as a whole; there was only a scheduled injury.

To the extent that plaintiff claims that she is totally disabled, *see Hise Construction v. Candelaria,* 98 N.M. 759, 652 P.2d 1210 (1982), the evidence on the question was conflicting. When the evidence is conflicting, the trial court's decision, not finding a total disability, will be affirmed. *Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985).

It is to the extent that plaintiff claims that she suffered a separate and distinct impairment to a non-scheduled body part, *see American Tank & Steel Corp. v. Thompson,* 90 N.M. 513, 565 P.2d 1030 (1977), that this issue becomes problematic. The problem is that the trial court's

findings are inconsistent. On the one hand, the court found a scheduled injury—that the injury is to the dextrous member. On the other hand, it found a shoulder injury. Is a shoulder injury a non-scheduled injury?

We think so. Section 52-1-43(A) lists specific body members, injury to which is compensable by a certain number of weeks of compensation. The one issue here is "(1) one arm at or near the shoulder." Because worker's compensation statutes should be liberally construed in the worker's favor to insure the full measure of his exclusive statutory remedy, *Evans v. Stearns-Roger Manufacturing Co.,* 253 F.2d 383 (10th Cir.1958), and because any reasonable doubts should be resolved in favor of the workman, *Shillinglaw v. Owen Shillinglaw Fuel Co.,* 70 N.M. 65, 370 P.2d 502 (1962), we believe that the statutory language should be construed to include only injuries to the arm itself and not injuries to the shoulder.

Other jurisdictions have ruled similarly. *M.R. Thomason & Associates v. Jones,* 48 Ala.App. 67, 261 So.2d 899 (1972); *Safeway Stores, Inc. v. Industrial Commission,* 27 Ariz.App. 776, 558 P.2d 971 (1976); *Hernandez v. De Carlo,* 116 So.2d 429 (Fla. 1959). Moreover, we do not read *Maschio v. Kaiser Steel Corp.,* 100 N.M. 455, 672 P.2d 284 (Ct.App.1983), to require a different result. In that case, the trial court found an injury to the leg at the knee level and the statutory language was "one leg at or above the knee, where stump remains sufficient to permit the use of an artificial limb." Here, one part of the trial court's inconsistent findings find a shoulder injury and not an arm injury at the shoulder.

Finally, *Hamilton v. Doty,* 71 N.M. 422, 379 P.2d 69 (1962), supports the proposition that injuries to the shoulder such as are present here may not be scheduled. *Hamilton* decided that a shoulder dislocation, which caused a secondary injury to the trapezius (back) muscle, pain spreading around the neck and to the spine, and loss of sleep, did not limit compensation to the schedule. There are similar findings of fact in this case, particularly finding No. 6, noted above.

Accordingly, we believe that based on the evidence in this case, the trial court could have found a shoulder (non-scheduled) injury or could have found an injury only to the dextrous arm at or near the shoulder (scheduled). Either finding would have been supported by substantial evidence.

If findings are inconsistent and cannot be reconciled, an appellate court may remand for additional findings. NMSA 1978, Civ.P.R. 52(B)(1)(g) (Repl. Pamp.1980). *See also Hillelson v. Republic Insurance Co.,* 96 N.M. 36, 627 P.2d 878 (1981); *Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976). Where there is doubt as to the findings adopted by the trial court, the cause will be remanded for additional findings and conclusions. *Martinez v. Martinez,* 101 N.M. 493, 684 P.2d 1158 (Ct.App.1984). Because of the doubt as to what the trial court intended to do, as evidenced by the inconsistency in its findings, we remand this case.

III. Attorney fees.

Plaintiff requests attorney fees. Whether she is awarded fees or not depends on the resolution of the case by the trial court. Until the trial court decides, any award of fees is premature. *Ortiz v. Ortiz & Torres Dri-Wall Co.,* 83 N.M. 452, 493 P.2d 418 (Ct.App.1972).

CONCLUSION

The trial court is affirmed on the first issue and the case remanded on the second issue for new findings and conclusions, and a new judgment, if necessary. Any award of attorney fees on appeal must await the determination of the trial court on the second issue and are thus premature at this time. Affirmed in part and reversed in part.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

[redacted]

727 P.2d 1342

STATE of New Mexico,
Plaintiff-Appellee,

v.

Mickey Dean COPELAND,
Defendant-Appellant.

No. 8998.

Court of Appeals of New Mexico.

Aug. 19, 1986.

Certiorari Denied Oct. 16, 1986.

Paul G. Bardacke, Atty. Gen., Alicia Mason, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Paul D. Campos, Archuleta, Sanchez & Co., P.A., Santa Fe, Martin A. Lopez, Albuquerque, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from his convictions for homicide by vehicle and driving while intoxicated. NMSA 1978, §§ 66–8–101 and –102 (Cum.Supp.1986). We affirm. We address each of defendant's appellate issues below.

FACTS

Defendant's truck struck and killed State Police Officer Manuel Olivas on the night of February 1, 1985, at the Pecos River bridge between Santa Fe and Las Vegas. The incident occurred at about 8:30 p.m. while Olivas was walking along I–25 with a measuring wheel, investigating a traffic accident near the bridge. Olivas was hit about twenty feet from the Las Vegas end of the bridge. There were no eyewitnesses to the accident.

Officers Perkins and Martinez investigated the accident. They found vehicle body

parts on the road and scuff marks in the snow. Based on the evidence, Martinez concluded that the suspect vehicle would be damaged on the right front; the headlight would be round and broken, the grill would be damaged, the portion around the headlight would be square, and the vehicle would be a truck. This information was broadcast and received by Officer Meserve in Las Vegas. Martinez told Meserve to search local motel parking lots for vehicles with similar damage.

At the third motel, Meserve located such a truck at about 11:15 p.m. The motel manager told Meserve that the driver of the truck checked into the motel at around 9:00 that evening, or perhaps between nine and ten. Meserve, knowing that an officer had been killed, called for back-up.

When the back-up arrived, all the officers examined the truck. They noticed a piece of cloth on the bottom of it, which indicated that the vehicle could have struck a person. There was also a slight indentation across the hood. The officers banged on the door of the room into which the driver of the truck had checked in. There was no answer. The manager opened the door with a pass key. However, the door would not open because the chain was up. Through a crack in the door, the officers could see someone lying on the bed with his glasses on.

The officers were nervous. They knew an officer had been killed. They did not know whether the man in the room was injured or whether he was lying in wait. They suspected that the man in the room had hit Olivas and was drunk. According to Meserve, hit-and-runs are usually associated with driving while intoxicated. The officers did not want the evidence to dissipate. A search warrant would have taken two-and-one-half to three hours to procure. They decided to break the chain lock. They did not ask the motel manager questions which might have helped to confirm or deny their beliefs about the man in the room.

Once in the room, the officers questioned defendant. Defendant stated that he owned the pickup and had come from Albuquerque. Defendant was arrested, read his rights, and told to get dressed. Defendant had trouble getting dressed. Meserve said that defendant smelled of alcohol. There were two beer cans in the room. One was unopened and the other was half full.

Defendant was taken to the police station, where he was given breath alcohol tests. These were given at 11:45 p.m. They registered .19, .21, and .21. Defendant made a number of statements at the police station. He told officers that, after a quarrel with his wife, he had driven from Albuquerque to Las Vegas; that he thought he struck something on the road but did not know what it was; and that he had drunk some beer while driving. All defendant's statements, except the one about striking something, were suppressed.

Officer Meserve next swore out a search warrant to get a blood alcohol test and to search the car. In the affidavit, he related that Olivas had been killed, that the damage on the truck matched the damage the officer was looking for, that the times coincided, that defendant had two beer cans by the bed, and that defendant made the statements. The search warrant issued and the blood alcohol test, performed three hours after the breath tests, showed a content of .18.

Defendant first argues that the police did not have probable cause to break into his room; that all the police had were suspicions which could have been dispelled had the officers questioned the manager of the motel. Defendant asserts that the motel manager would have told the police that defendant acted normally when he checked in. Defendant's second issue is based on the fact that Meserve, at one point, stated that he thought defendant could have operated a vehicle safely. Thus, defendant contends that there was no probable cause to arrest defendant because there was no probable cause that he drove in such a way as to cause an accident. Defendant's third issue appears to raise three sub-issues: (1) because there was no probable cause, the

officers could not invoke the Implied Consent Act (Act), NMSA 1978, Sections 66–8–105 to –112 (Orig.Pamp. and Cum.Supp. 1986), at all; (2) the officers could not seek a blood alcohol test once defendant consented to a breath test; and (3) defendant's consent to take the breath test was involuntary. Similarly, there are three sub-issues in defendant's fourth issue: (4)(a) there was no probable cause; (b) because statements subsequently suppressed from evidence appeared in the affidavit for the search warrant, and the evidence discovered pursuant to it were fruits of the poisonous tree; and (c) there were misrepresentations in the affidavit, specifically the affirmation that there were two beer cans in the room when the facts were that one was unopened and one was only half consumed. We now turn to these contentions.

I. PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES FOR THE ARREST

Defendant's motel room is treated as his dwelling for fourth amendment purposes. *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). *See State v. Madrid,* 91 N.M. 375, 574 P.2d 594 (Ct.App.1978). In order to make a warrantless, nonconsensual entry into a person's home to make an arrest, the police must have probable cause to arrest and there must be exigent circumstances necessitating the immediate entry. *State v. Chavez,* 98 N.M. 61, 644 P.2d 1050 (Ct.App.1982).

Probable cause exists when the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being, committed. *State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983). Probable cause means more than a suspicion but less than a certainty; only a probability of criminal conduct need be shown. *Id.* The officers do not need to positively know that a crime was committed; nor do they need to specify the exact crime as long as it is a serious crime. *United States ex rel. Frasier v. Henderson,* 464 F.2d 260 (2d Cir.1972).

In this case, the officers knew that a fellow officer had been killed by a hit-and-run driver in a truck with a certain type of headlight and that the headlight would be damaged. The officer was killed by someone driving toward Las Vegas at a time when the person may have been expected to stop at Las Vegas. The officers knew that hit-and-runs frequently involve alcohol. Thus, when the officers located defendant's truck and saw the recent damage to it, which was consistent with the damage they believed would be caused by the impact, and when they learned that defendant checked into the motel at a time consistent with the time at which the person who hit Olivas would have arrived in Las Vegas, there was probable cause to believe that defendant was the person who struck Olivas in the unlawful operation of a motor vehicle.

Questions of the exigency of the circumstances are fact questions for the trial court, whose decision will be upheld if supported by substantial evidence. *Chavez.* Exigent circumstances means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. *Id.* The issue is not what the circumstances eventually show; it is whether, on the basis of the facts known to a prudent, cautious, trained officer, the officer could reasonably conclude that swift action was necessary. *Id.*

In this case, the officers knew that the accident happened about two-and-one-half hours prior to their entry into the room and that it would take another two-and-one-half to three hours to get a warrant. In the meantime, the alcohol thought to be in defendant's system would be metabolizing. This is a means of destruction of evidence, no less than flushing drugs down the toilet. Under *Chavez,* based on the destruction of evidence rationale alone, the trial court was warranted in finding

exigent circumstances. *See also State v. Komoto,* 40 Wash.App. 200, 697 P.2d 1025 (1985).

When, to this rationale, the other facts of this case are added, the exigency becomes even more compelling. The other facts include the following. The officers were aware that an officer had been killed. This made them nervous. They did not know what type of person they were dealing with. When defendant did not answer the door, the officers thought that defendant was either too drunk to do so, that he was injured, or that he was lying in wait for them. This belief became even stronger when they saw, through the crack in the door, that defendant was lying on the bed with his glasses on. Although none of these possibilities was, in fact, the case, the officers' beliefs in them were reasonable and they were justified in acting on those beliefs. *Chavez. See United States v. Mireles,* 583 F.2d 1115 (10th Cir.1978).

With regard to defendant's second issue concerning some conflicting evidence of probable cause, we note that substantial evidence will support the trial court's determination. *State v. Boeglin,* 100 N.M. 127, 666 P.2d 1274 (Ct.App.1983). The evidence recited constitutes substantial evidence of both probable cause and exigent circumstances. Therefore, the arrest of defendant was legal.

II. IMPLIED CONSENT ACT

Defendant's third argument involves application of the Act. The Act provides that any person who operates a motor vehicle within New Mexico shall be deemed to have given consent, subject to the provisions of the Act, to chemical tests of his breath or blood, if arrested for any offense arising out of acts alleged to have been committed while the person was driving a vehicle under the influence of an intoxicating liquor or any drug. § 66–8–107(A). The Act takes effect upon arrest. *Id.* Defendant first maintains that because the arrest was illegal, the officers could not invoke the Act. Because the arrest was legal, this issue is without merit. Given the foregoing, the police officers did have reasonable grounds to believe that defendant had been driving while under the influence of intoxicating liquor; and, therefore, they could administer a chemical test after defendant's arrest for vehicular homicide. § 66–8–107(B).

Defendant further contends that the police were without authority to seek a search warrant for a further blood test. Apparently, defendant refused a blood test after his breath tests. Section 66–8–111(A) provides for chemical tests upon a search warrant issued by a magistrate when an individual refuses to submit to a chemical test. Nowhere in the Act is there a provision which limits the number of permissible tests to one, or any other number. The purpose of the Act is to deter driving while intoxicated, and to aid in discovering and removing the intoxicated driver from the highway. *McKay v. Davis,* 99 N.M. 29, 653 P.2d 860 (1982). Because multiple testing is consistent with this purpose, and because the Act does not limit the number of tests, the extra blood test was not per se unauthorized. We have considered defendant's involuntary argument based on coercion and find it to be without merit. The record does not support defendant's claim of coercion.

III. SEARCH WARRANT AFFIDAVIT

Defendant contends that evidence obtained in the execution of the warrant should have been suppressed because the affidavit contained statements that were suppressed from evidence as having been taken in violation of defendant's rights and because it contained material misrepresentations.

When a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, evidence seized pursuant to the warrant is admissible if the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information. *United States v. Smith,* 730 F.2d

1052 (6th Cir.1984); *see Segura v. United States,* 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); *State v. Barry,* 94 N.M. 788, 617 P.2d 873 (Ct.App.1980). Our inquiry, therefore, is whether the affidavit established probable cause without the tainted statements. Because we hold that it does, we need not determine whether we could use defendant's statements notwithstanding the fifth amendment violation. *See United States v. Morales,* 788 F.2d 883 (2nd Cir.1986).

Defendant also contends that the affidavit contained misrepresentations. Because the rule also requires this court to ignore the misrepresentations and to substitute in its stead the true facts, *State v. Donaldson,* the affidavit will be reviewed both without the tainted statements and with the true facts concerning the cans of beer in the motel room set forth.

So reviewed, the affidavit contains the following information. Olivas was killed by a hit-and-run driver while investigating an accident on I–25. The affiant had seen Olivas alive at 8:00 p.m. The sheriff had investigated the accident and learned that Olivas was killed by a driver who left the scene. The affiant went to motels to look for vehicles with damage consistent with that which would be sustained by hitting a person on the road. A truck with a broken headlight and grill was found at a motel. The person driving the truck had checked into the motel at a time consistent with having struck Olivas after 8:00 p.m. The person driving the truck was in the motel room, lying in the bed with his glasses on. There was a half-consumed can of beer by the bed and another unopened can of beer there also. Defendant said he thought he had hit something but he did not know what it was.

This information was sufficient to establish probable cause to search the truck for traces of evidence indicating a more direct match to Olivas' body, for evidence of drinking, and to test defendant's blood for evidence of drinking.

IV. ADMISSION OF TESTIMONY OF BACA

The trial court admitted evidence that two women, Baca and Clark, who were driving from Santa Fe to Las Vegas, saw a truck that looked like defendant's weaving on the road. Defendant contends that there was insufficient evidence that the truck belonged to him and that the trial court, therefore, abused its discretion in admitting the evidence.

Baca testified that she and Clark passed a weaving truck at Glorieta on their way to the bridge. While there are numerous problems with their subsequent testimony and the coordination of the time of death with the location of the weaving truck, Baca positively identified the picture of defendant's camper attachment as the camper she saw on the road. The evidence was relevant, *see State v. Young,* 103 N.M. 313, 706 P.2d 855 (Ct.App.1985), and any doubts concerning the connection of the evidence to issues in the case would go to weight of the evidence, and not to its admissibility. *State v. Belcher,* 83 N.M. 130, 489 P.2d 410 (Ct.App.1971). No abuse of discretion was displayed by the trial court in admitting the evidence. *State v. Simonson,* 100 N.M. 297, 669 P.2d 1092 (1983).

V. SUFFICIENCY OF THE EVIDENCE AS TO INTOXICATION AND CAUSATION

Defendant contends there was no direct evidence that he was under the influence of intoxicating liquor at the time of the accident. On appeal, the issue is whether substantial evidence of either a direct or circumstantial nature exists to support the verdict. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). All evidence must be viewed in a light most favorable to the verdict, and all inferences from the evidence that can be reasonably drawn will not be overturned on appeal. *Id.*

Defendant's blood alcohol content at 11:45 p.m. exceeded .22, according to the testimony of a toxicologist. Although the toxicologist could not say what the alcohol content was at the time of the accident,

other evidence could have reasonably led the jury to infer that defendant was under the influence at the time of the accident.

If, by virtue of having consumed intoxicating liquor, defendant's ability to handle his vehicle with safety to himself and the public was lessened to the slightest degree, then he drove while under the influence. *State v. Dutchover,* 85 N.M. 72, 509 P.2d 264 (Ct.App.1973). There was evidence that the truck was swerving, as testified to by Baca and Clark. Second, the motel manager testified that he saw defendant bring a cooler from his truck to the motel room. When the police entered the room, there were two beers in the room, one still in the cooler and one on the nightstand. The officers found defendant lying on the bed with his glasses on. It was reasonable to infer that defendant did not go out drinking after he checked into the motel room, and that all he drank at the motel room was the part of the beer that was on the nightstand before he got into bed and fell asleep with his glasses on. Third, there was evidence that defendant said he hit something, maybe a big bird or a deer. Defendant was not aware that he had struck a person even though the evidence indicates that the person bounced up onto the hood and remained there for about sixty-five or seventy-five feet. Defendant was traveling at between thirty and forty-five miles per hour. The vehicle swerved to the left as the person fell off the hood. This evidence supports the finding that defendant was under the influence at the time of the accident. *See Dutchover.*

Defendant further contends that there was no substantial evidence that his acts caused Olivas' death. Other witnesses testified that the officer could be seen walking along the road, and that his car could be seen with its lights. With the evidence of intoxication recited above, the jury could reasonably have inferred that defendant's intoxication was at least one cause of the officer's death. *State v. Maddox,* 99 N.M. 490, 660 P.2d 132 (Ct.App. 1983). The evidence was sufficient to support the conviction for homicide by vehicle.

VI. PROSECUTOR MISCONDUCT AND CUMULATIVE ERROR

Defendant complains of six instances of alleged prosecutor misconduct: (A) the prosecutor mentioned, and then argued, the presumption of impairment when blood alcohol content is over .1, when the presumption did not apply to this case; (B) the prosecutor asked hypothetical questions of the toxicologist and the hypotheticals had no basis in fact in the evidence; (C) the prosecutor violated ethical rules by informing the press of defendant's suppressed statements; (D) the prosecutor argued that the crime was one of strict liability; (E) the prosecutor asked questions concerning *Miranda* rights (*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), and then argued the subject of *Miranda* to the jury in closing; and (F) the prosecutor commented on defendant's failure to testify at trial by referring to the silence of the dead victim and these comments also served to inflame the passions of the jury. We address each of these claimed points of misconduct.

A. THE PRESUMPTION

When the prosecutor first mentioned the presumption in opening statement, the court instructed the jury that there was no such presumption and that the jury would be instructed on the law at the end of the case. The jury was properly instructed that they could consider the test results together with the other evidence in the case in determining whether defendant was under the influence. *Compare* § 66–8–110(B)(3), *with* NMSA 1978, § 66–3–110 (Cum.Supp.1985). During closing argument, the prosecutor argued to the jury that a doctor had testified that a person with a blood alcohol content of .1 would be affected and that defendant was driving with a level of twice that amount. There was then no mention of any presumption.

The prosecutor's comment during opening statement was cured by instruction. *See State v. Vialpando,* 93

N.M. 289, 599 P.2d 1086 (Ct.App.1979). The prosecutor's comment during closing argument was properly based on the evidence in the case. *See State v. Henderson,* 100 N.M. 519, 673 P.2d 144 (Ct.App.1983).

B. HYPOTHETICAL QUESTIONS

There was evidence to support the hypothetical questions asked of the toxicologist relating to the blood alcohol content at the time of the accident. There was circumstantial evidence to support the fact that defendant did most of his drinking before the time of the accident. There was an absence of evidence concerning whether defendant had eaten. The hypothetical questions asked of the toxicologist were to explain to the jury the distinction between the effect of alcohol on someone who had eaten as opposed to someone who had not eaten. The toxicologist explained that food in the stomach would interfere with the rate of alcohol absorption into the blood. This was opinion testimony based on specialized knowledge that could assist the jury in understanding the evidence of blood alcohol content. NMSA 1978, Evid.R. 702 (Repl.Pamp.1983). No misconduct occurred in asking the questions.

C. PUBLICITY

Defendant complains that the prosecutor committed an ethical violation by talking to the media about defendant's suppressed statements. The only factual basis for this issue is counsel's representations at the motion for new trial hearing. Counsel's representations are not evidence such as would afford defendant a factual basis for the relief requested. *State v. Jacobs,* 102 N.M. 801, 701 P.2d 400 (Ct.App.1985).

D. STRICT LIABILITY

Defendant contends that the prosecutor misstated the law in regard to causation, suggesting that vehicular homicide is a strict liability crime. Defendant does not explain his contention, and no mention was made in closing about any strict liability concepts. A defendant has to adequately explain his argument. *State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982). This point will not be considered.

E. & F. *MIRANDA* AND COMMENT ON SILENCE

Defendant's most serious allegations of error concern the prosecutor's references to *Miranda* rights and his extended commentary on the silence of the deceased. Defendant's arguments on this issue point in two directions. First, he contends that the commentary, taken together, was a comment on defendant's failure to testify. Second, he contends that the commentary on the silence of the victim was simply an appeal to the passions of the jury.

1. Comment On Silence

Defendant's first instance of comment on *Miranda* rights occurred at a pretrial hearing. Because that could not have prejudiced the jury, it is not reviewed. There was testimony at trial, however, concerning defendant being given his rights. It does not appear that defendant objected at this point. This testimony is important because it provides the factual basis for the prosecutor's argument to the jury.

The second instance of comment on *Miranda* rights was during closing argument. At this time, the prosecutor commented that defendant was given his *Miranda* rights and then made the voluntary, extemporaneous statement about how he hit something, maybe a big bird or a deer. Because the jury was instructed to determine if defendant's statement was voluntary before they considered the statement for any purpose, the argument was within the evidence and issues in the case. *See State v. Henderson.*

The prosecutor's rebuttal closing argument began and ended with an argument concerning the silence of Officer Olivas. The prosecutor stated that although Olivas was silenced in death and could not testify, the evidence produced at trial was, in effect, Olivas' way of speaking out to the jury to convict defendant. Defendant contends that the effect of this, in combination with the *Miranda*-related comments,

amounted to a comment on defendant's failure to testify. Defendant did not object to this argument until the end of the closing argument.

Because the silence of Olivas was, at best, an indirect comment on defendant's failure to testify, a timely objection was required to preserve any error. *State v. Dominguez,* 91 N.M. 296, 573 P.2d 230 (Ct.App.1977). Objection at the end of the prosecutor's closing was not timely. *State v. Carmona,* 84 N.M. 119, 500 P.2d 204 (Ct.App.1972). Moreover, the jury was instructed not to draw any inference from defendant's failure to testify. Additionally, because the *Miranda*-related comments were made on a legitimate issue in the case, i.e., the voluntariness of one of defendant's statements, no error occurred.

2. Appealing To Passions

Defendant also contends that the rebuttal closing argument was not based on the evidence because there was no evidence of Olivas' intent and that the argument was solely for the purpose of prejudicing the jury by arousing their passions in stating that Olivas' soul would not be at peace until defendant was convicted.

Again, however, defendant did not object at the time of this argument. Indeed, defendant did not even state these grounds (that the argument appealed to the jury's passions) when he made his motion for mistrial after the argument. Under *Carmona* and NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App. Rule 308 (Repl. Pamp.1983), raising the matter for the first time on appeal is too late. We do not review this claim.

With regard to the claim of cumulative error, there was no cumulative prosecutorial misconduct in closing argument. Unlike the situation in *State v. Diaz,* 100 N.M. 210, 668 P.2d 326 (Ct.App.1983), legitimate reasons can be found for the prosecutor's comments in this closing argument. Moreover, as the opinion has recited, defendant was not deprived of a fair trial because of alleged cumulative error in the other portions of the trial. *See State v. Shafer,* 102 N.M. 629, 698 P.2d 902 (Ct.App.1985).

Defendant's convictions, judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and GARCIA, JJ., concur.

728 P.2d 447

NICHOLS CORPORATION, a New Mexico corporation, and the State of New Mexico, for the Use of Nichols Corporation, Plaintiffs-Appellees,

v.

BILL STUCKMAN CONSTRUCTION, INC., and American Insurance Company, Defendants-Appellants.

No. 15656.

Supreme Court of New Mexico.

Oct. 29, 1986.

Rehearing Denied Dec. 2, 1986.

Sutin, Thayer & Browne, Jay D. Hertz, Philip R. Schichtel, Alburquerque, for plaintiffs-appellees.

Poole, Tinnin & Martin, Douglas Seegmiller, Judy K. Kelley, Robert C. Poole, James R. Scarantino, Albuquerque, for defendants-appellants.

OPINION

FEDERICI, Justice.

Nichols Corporation (appellee) filed suit in the District Court of Valencia County naming as defendants A.J. Mills (Mills), d/b/a A.J. Mills Construction Co. (Mills Construction), d/b/a Molino and Company (Molino), Bill Stuckman Construction Company, Inc. (Stuckman) and American Insurance Company (American) (appellants). The jury found in favor of Nichols Corporation and judgment was entered accordingly. Stuckman and American appeal. We affirm.

Stuckman was the general contractor for the Wastewater Treatment Plant Improvement Project in Lovington, New Mexico (Project). Appellee alleged in its complaint that prior to April 10, 1981, Mills Construction assumed a subcontract held by Chava & Company calling for earth moving and excavation on the Project. On April 10, 1981, Mills Construction and appellee signed a written agreement whereby appellee agreed to furnish financial assistance to Mills Construction for expenses to be incurred in performing the subcontract work. In return Mills agreed to reimburse appellee each month upon receipt of monthly estimate payments from Stuckman. Appellee was to receive "thirty percent of any and all profits, determined after deducting operating expenses * * *. Upon the completion of said Project, Nichols Corporation will receive 30% of any profits from sums held in retainage." The record on appeal indicates the "[p]rofits were to include proceeds from the sale of crushed material and fill dirt removed from the [project] site." Appellee and Mills had set up an independent operation on land adjacent to the Project. It involved producing crushed material and fill dirt from waste excavated from the Project to be sold to other construction projects. It was not part of the Project.

Appellee further alleged in its complaint that for a time Mills reimbursed appellee in accordance with their April 1981 contract. The payments were made by checks drawn on the Molino bank account. The Molino account was a joint account of Mills and appellee and either Mills or Nichols could draw against the full balance. Nichols testified the account was opened with his money as a form of escrow to ensure control over the Project's proceeds. The complaint alleged that Mills ceased payments to appellee in June 1981 and failed to account for profits. In August 1981 appellee terminated the April agreement and brought this action.

Appellee sued Stuckman and American under two theories. First, appellee claimed to be a third party beneficiary of the Stuckman-Mills subcontract. Second, pursuant to NMSA 1978, Sections 13-4-18 and -19 (Repl.Pamp.1985) (Little Miller Act), appellee sought relief against the performance and payment bond executed by American seeking payment for equipment, materials, and financial services allegedly used on the project.

Default judgment for nonappearance was entered on April 11, 1983 against Mills in favor of appellee. At the outset of the Nichols-Stuckman trial in May 1984 it was brought to the court's attention that a default judgment as to Stuckman's crossclaim against Mills had never been entered. The trial judge, pursuant to motion, again granted default judgment against Mills for nonappearance.

Stuckman counterclaimed against appellee alleging that Mills and appellee were partners or joint venturers for performing

the subcontract work on the Project and for the crushing operation. Further that Mills defaulted on the subcontract because appellee had stopped providing money to Mills. As a result and to complete the Project, Mills and Stuckman agreed in writing that Stuckman would pay Mills' expenses and charge the payments against the remaining subcontract proceeds and retainage as default damages. Stuckman sought to hold appellee, as a partner or joint venturer of Mills, jointly and severally liable for the expenses Stuckman incurred on the Project as a result of Mills' default.

The jury found by special interrogatory that appellee was a subcontractor of Mills and thus a sub-subcontractor of Stuckman and awarded appellee $125,073.04 against Stuckman and American. Stuckman was awarded nothing on its counterclaim against appellee. This appeal followed.

Appellants contend on appeal that the following are prejudicial and reversible errors committed by the trial court:

1. The exclusion of the deposition testimony of Mills;

2. Refusing to instruct and in improperly instructing the jury in the law of partnership and joint ventures;

3. Permitting parol evidence to contradict the terms of a written agreement in violation of the parol evidence rule;

4. Failure to instruct the jury on Stuckman's and American's defense that the alleged Mills-Nichols sub-subcontract was unenforceable because it had not been approved as required by the Stuckman-Mills subcontract;

5. The determination that Nichols' testimony was competent evidence as to the reasonable value of labor and materials actually used on the Project;

6. Incorrectly instructing the jury on damages under the Little Miller Act.

Issue 1.

Appellants argue the exclusion of Mills' deposition was prejudicial and reversible error.

We find appellants have failed to preserve the issue for appeal. An offer of proof is essential to preserve error where evidence has been excluded. *Williams v. Yellow Checker Cab Co.*, 77 N.M. 747, 427 P.2d 261 (1967). For the exclusion of the evidence to be error, the substance of the evidence must be made known to the trial court by offer or must be apparent from the context in which questions were asked. NMSA 1978, Evid.R. 103(a)(2) (Repl.Pamp. 1983).

The record discloses that appellants offered only excerpts of Mill's deposition which were pertinent to his residence as part of their effort to demonstrate Mills' unavailability. The record does not show that appellants otherwise attempted to make the substance of the deposition known to the trial judge. Thus, appellants have not met their burden in order to preserve the issue for appellate review.

Issue 2.

Appellants argue the trial court's refusal to instruct and its improper instruction to the jury on the law of partnership and joint venture was prejudicial and reversible error. Appellants also objected to Special Interrogatory 1 as prejudicial in that it "effectively instructed the jury to disregard [appellants'] principal defense that Nichols and Mills were partners."

As to appellants' challenge to the special interrogatory, this Court notes that Jury Instruction 4 stated, in pertinent part, "if Nichols Corporation was a partner or joint venturer of A.J. Mills, then any payment made by Bill Stuckman Construction, Inc. to A.J. Mills was a payment to the partnership or joint venture." As appellants acknowledge in their reply brief, all instructions must be read and considered together and when so considered they must fairly present the issues and the law applicable thereto. *Williams v. Vandenhoven,* 82 N.M. 352, 482 P.2d 55 (1971). We conclude that any error which may have existed in the special interrogatory was corrected when the court gave Jury Instruction 4.

As to the tendered instructions refused and those instructions given on the law of

partnership and joint venture, NMSA 1978, Civ.P.Rule 51(I) (Repl.Pamp.1980) provides:

> For the preservation of any error in the charge, objection must be made to any instruction given, whether UJI or not; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

Appellee argues that pursuant to Rule 51(I), no appellate issue exists concerning the instructions given on partnerships because appellants' objections were not on the record until six weeks after the verdict was returned and therefore the issue was not preserved. Further that Rule 51(I) requires that error in jury instructions be made known to the trial court and placed in the record before the jury retires in order to preserve error. *City of Albuquerque v. Ackerman,* 82 N.M. 360, 482 P.2d 63 (1971); *Baros v. Kazmierczwk,* 68 N.M. 421, 362 P.2d 798 (1961). The purpose of the rule is to give the trial court an opportunity to correct any error before the jury retires to deliberate. *Ackerman; Hamel v. Winkworth,* 102 N.M. 133, 692 P.2d 58 (Ct.App.1984).

Appellants acknowledge the above principles but submit that due to "exceptional circumstances" in the present case they should not be held to have waived their objections. In the present case, there was "extensive argument" on tendered jury instructions in the presence of the trial judge. However, the proceeding was not recorded. Appellants argue that they assumed it was being recorded because the court reporter entered periodically and appeared to be adjusting the recorder and they first learned it was not being recorded after the instructions were settled. The record verifies appellants' statement that, when the verdict was returned, the trial judge told counsel they could return later to place objections to the instructions in the record. Counsel for appellee did not then object to the proposed subsequent proceeding on the grounds of Rule 51(I) and the record indicates counsel for appellee expressed his intention to participate in the later proceeding. Counsel for appellee first objected to the subsequent recording of objections at that later proceeding. Appellee now relies on Rule 51(I) to argue that the issue was not properly preserved. As to appellee's Rule 51(I) argument, it is well established that a "litigant may not invite error and then take advantage of it." *McCauley v. Ray,* 80 N.M. 171, 176, 453 P.2d 192, 197 (1968) (quoting *Hodgkins v. Christopher,* 58 N.M. 637, 274 P.2d 153 (1954)).

We find that the intended purpose of Rule 51(I) was satisfied in this case. The trial judge was alerted to any error in the instructions and had the opportunity to correct any error prior to retirement of the jury by virtue of his participation in the "extensive argument" both parties agree occurred in settling the jury instructions. This is true notwithstanding the failure to record the discussion. The issue of erroneous instructions was preserved. Nonetheless, we find that the instructions given on partnership, when taken as a whole, properly submitted the issues to the jury. The trial court adequately instructed the jury on the issue and law of partnership and joint ventures.

As to appellants' allegation of error in the trial court's refusal to give certain other requested instructions, this Court has previously held that it is not error to deny requested instructions when the instructions given adequately cover the applicable law. *Kirk Co. v. Ashcraft,* 101 N.M. 462, 684 P.2d 1127 (1984); *Hudson v. Otero,* 80 N.M. 668, 459 P.2d 830 (1969). In the present case the trial court did not commit error in refusing appellants' requested instructions.

Issue 3.

Appellants also argue that the admission of Nichols' testimony violated the parol evidence rule because that rule bars evidence which varies or contradicts a written agreement even where one party to the lawsuit is a "stranger" to the agreement, at least where the obligations and relation-

ships of the parties under the agreement are at issue.

We need not decide whether the parol evidence rule was violated in this case by the admission of Nichols' testimony of an antecedent oral agreement with reference to his contractual relationship with Mills. Sufficient evidence existed, other than Nichols' testimony, to support the jury finding that Nichols was a subcontractor of Mills and thus a sub-subcontractor of Stuckman. *Clovis National Bank v. Harmon,* 102 N.M. 166, 692 P.2d 1315 (1984).

Issue 4.

Appellants allege the trial court erred in failing to instruct the jury on their defense that the alleged sub-subcontract of Mills-Nichols was unenforceable because it had not been approved by Stuckman in accordance with the earlier Stuckman-Mills subcontract.

We hold that the trial court did not err in failing to give appellants' requested instructions that the Mills-Nichols agreement was unenforceable. Such instruction would have deprived appellee of its statutory protection under the Little Miller Act, Sections 13–4–18 and –19.

This Court has previously determined that the legislative intent in enacting Sections 13–4–18 and –19 was to provide a remedy equivalent to that of a materialmen's lien under NMSA 1978, Section 48–2–2 where, as here, no such lien would attach because the project is a government project. Thus, the Legislature has recognized the need to protect all those who have input into a government construction project. *State ex rel. W.M. Carroll & Co. v. K.L. House Construction Co.,* 99 N.M. 186, 656 P.2d 236 (1982). Third tier suppliers of materials to government construction projects are entitled to protection under New Mexico's Little Miller Act. *Id.*

Issue 5.

Appellants allege that the trial court erred in determining that Nichols' testimony as to damages was competent evidence of the reasonable value of labor and materials actually used on the Project. They submit that Nichols' testimony was nothing more than conjecture and guesswork because of the undisputed fact that he was only at the Project site one time. Further, that his testimony based on long distance telephone conversations with the Project foreman and his testimony based on business records did not constitute competent evidence to enable the jury to determine damages with reasonable certainty and accuracy.

The record shows that Nichols was an officer of Nichols Corporation, signed equipment rental agreements and checks, reviewed logs and records, and had daily telephone contact with personnel on the Project site. The admission of evidence is largely within the discretion of the trial court. There is substantial evidence in the record to support the findings and conclusions of the trial judge. *Kirk Co. v. Ashcraft; Matter of Ferrill,* 97 N.M. 383, 640 P.2d 489 (Ct.App.1981).

Issue 6.

Appellants argue that the trial court incorrectly and prejudicially instructed the jury on damages recoverable under the Little Miller Act because "the jury should have been instructed that repairs in the nature of replacement for capital could not be recovered." In point of fact, Jury Instruction 29 on the measure of damages stated, in pertinent part, "[t]his does not include labor or materials consumed or used on other projects, or the cost of major repairs to equipment which will benefit the owner of the equipment on other projects." We find appellants' contention to be without merit.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

RIORDAN, C.J., and STOWERS, J., concur.

SOSA, Senior J., and WALTERS, J., dissent.

WALTERS, Justice (dissenting); SOSA, Senior Justice (concurring in dissent).

I dissent from the majority's opinion because the record does not support the trial court's submission of the partnership issue to the jury. *See,* NMSA 1978, Civ.P.R. 50 (Repl.Pamp.1980); *Owen v. Burn Construction Co.,* 90 N.M. 297, 563 P.2d 91 (1977); *State Farm Fire and Casualty Co. v. Price,* 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied,* 101 N.M. 362, 683 P.2d 44 (1984). I am persuaded by Stuckman's basic contention that had proper instructions been given, no reasonable jury could have concluded under the evidence presented in this case that Nichols was Mills's subcontractor. The trial court erred in twice refusing Stuckman's request for a ruling that Mills and Nichols were partners or joint venturers as a matter of law. This, in conjunction with the incomplete and erroneous jury instructions, require that this case be reversed and remanded for trial on Stuckman's counterclaim. *Cf. Kinney v. Luther,* 97 N.M. 475, 641 P.2d 506 (1982).

I.

NMSA 1978, § 54–1–6, defines a partnership as, "an association of two or more persons to carry on as co-owners a business for profit." In the absence of an express agreement, a pattern of conduct, including sharing of profits and expenses of the business, execution of contracts on behalf of the business, and control of the partnership bank account, will suffice to show creation of a partnership relationship. *Dotson v. Grice,* 98 N.M. 207, 647 P.2d 409 (1982).

A joint venture has been held to include the following elements: (1) a community of interest to perform a common purpose; (2) a joint proprietary interest in the subject matter; (3) a mutual right to control; (4) a right to share in the profits; and (5) a duty to share in the losses. *Cooper v. Curry,* 92 N.M. 417, 421, 589 P.2d 201, 205 (Ct. App.), *cert. quashed,* 92 N.M. 353, 588 P.2d 554 (1978).

Intent to create a partnership or joint venture may be implied from the parties' conduct; therefore, it is immaterial that the parties do not designate their relationship as a partnership or joint venture, or even realize that they are partners or joint venturers. *Anderson Hay and Grain Co. v. Dunn,* 81 N.M. 339, 467 P.2d 5 (1970).

The facts in this case demonstrate that the Mills-Nichols business arrangement satisfied the legal definition of both a partnership and a joint venture.

Early in 1981, Mills was an employee and consultant of Chava & Co. Nichols, dealing through Mills, had supplied financial assistance to Chava & Co. on other projects. As shown by Nichols's annual audit exhibits, these contracts with Chava were treated by Nichols's accountant as "joint ventures, with Nichols as the financing arm." In the spring of 1981, Mills sought to acquire Chava's subcontract with Stuckman on the Lovington project. At that time, Mills requested that Nichols provide to Mills the same type of financial assistance which he had supplied to Chava in the past, and Nichols agreed to do so.

Nichols and Mills established a bank account in the name of "Molino & Co." Nichols testified that the account was to serve as a depository for Stuckman's monthly estimate payments to Mills, and to give Nichols sufficient control to assure Nichols that he would be reimbursed for his expenses on the Lovington project. The evidence disclosed that Nichols endorsed checks for Mills, and signed most of the checks that were drawn on the Molino account.

At trial, Nichols testified that he and Mills expected only a 1–to–2 percent profit on the subcontract, but that they were planning to make their profit by crushing and selling the excavated material. The record reflects that funds from the Molino account were used to pay expenses for both the Chava subcontract and the crushing operation, and that both the crushing expenses and subcontract expenses were charged to a single account on Nichols Corporation's books.

There was other reinforcing evidence of partnership or joint venture in that Nichols gave Mills a Nichols Corporation credit card to use for travel, food, lodging and other business-related expenses. Nichols authorized Mills to incur debts in the name of the Nichols Corporation for equipment repairs. At Mills's request, Nichols executed an equipment lease in the name of "Molino & Co.," and paid freight charges for transporting equipment to the job site. Mills, on the other hand, supplied fuel for both the excavation and crushing operation, supplied equipment for excavation, and paid the rent on the crusher and other excavating machines. While Mills never billed Nichols for any of those items, most of those expenses were paid with checks signed by Nichols and drawn on the Molino account.

Nichols testified that he retained exclusive control of excavation, while Mills retained exclusive control of sludge pumping, demolition and the crushing operation. Delegation of control is permissible between joint venturers. *Fullerton v. Kaune,* 72 N.M. 201, 382 P.2d 529 (1963). Nichols admitted that in many instances, he and Mills jointly decided how and what expenses were to be incurred on both the subcontract and the crushing operation projects. They continuously made a joint decision whether to use Molino funds to pay operational expenses.

The evidence indisputably establishes that as far as Mills and Nichols were concerned, the Chava subcontract, the crushing operation, and the Molino account were inseparable components of a single venture or enterprise. Just as clearly, the elements of a joint venture, as articulated in *Cooper,* were fully shown. Accordingly, the trial court erred in submitting the partnership issue to the jury. *Owen v. Burn Construction Co.*

II.

Even if evidence of partnership or joint venture were not patently clear, we should remand on the basis of error in the jury instructions and the special interrogatory relating to a partnership or joint venture. *Kinney v. Luther.*

Instruction 12 told the jury, in essence, that an essential element in the creation of a partnership is the specific intent to create the partnership. That statement is contrary to *Anderson Hay and Grain Co.,* which unequivocally decided that "intent may be implied from ... acts." *Id.* 81 N.M. at 341, 467 P.2d at 7.

The trial court also erred in refusing defendant's requested instruction that a partnership or joint venture may be created or implied by the conduct of the parties. That requested instruction is supported by *Dotson v. Grice* and *Anderson Hay and Grain Co.* Refusal to give the instruction was particularly prejudicial to the defendant in light of the language in instruction 12.

Additionally, because Instruction 12 advised that partners have a joint right of management and control, it was error to refuse another of defendant's requested instructions that the jury be told that joint venturers may delegate responsibility and control between themselves. *See Fullerton v. Kaune.*

The most glaring error is found in special interrogatory No. 1. There the jury was instructed that if Nichols's relationship to Mills was anything other than that of a lender, and Nichols had not been paid in full, Nichols could recover on the bond. Neither this interrogatory nor the instructions which preceded it told the jury that if Mills and Nichols were partners or joint venturers, then payment to Mills was payment to Nichols. *See* NMSA 1978, § 54-1-8(A). The record contains overwhelming evidence that Mills and Nichols were partners or joint venturers on the Lovington project.

Stuckman's estimate payments to Mills (*i.e.,* payments to the partnership or joint venture and deposited in the Molino account), exceeded Nichols's expenses; consequently, Nichols had no cause of action under Little Miller Act. *See* NMSA 1978, §§ 13-4-18 to -19 (Repl.Pamp.1985).

For the above stated reasons, this case should be reversed and remanded for a trial on Stuckman's counterclaim. The majority concluding otherwise, I respectfully dissent.

SOSA, Senior J., concurs.

728 P.2d 454

BOARD OF COUNTY COMMISSIONERS OF CIBOLA COUNTY, New Mexico, Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF VALENCIA COUNTY, New Mexico, Defendants-Appellees.

No. 16215.

Supreme Court of New Mexico.

Nov. 4, 1986.

Rehearing Denied Nov. 19, 1986.

Saul Cohen, Sutin, Thayer & Browne, P.C., Santa Fe, for plaintiff-appellant.

John J. Romero, Jr., Esquibel, Valencia, Sanchez & Griego, Los Lunas, for defendants-appellees.

OPINION

WALTERS, Justice.

This appeal concerns a disagreement between two counties regarding entitlement to federal funds. Although the appellate briefs contain a paucity of cited authority, the issues in this case are important to the public and may recur at some future time. We have, therefore, undertaken our own research to address the question presented.

Pursuant to the "Payments in Lieu of Taxes Act" (PILT), 31 U.S.C. Sections 6901–6907 (1982 and Supp. II 1984), the federal government compensates local governmental units for loss of tax revenues from certain tax-exempt federal lands ("entitlement lands") located within local governmental boundaries.

The Bureau of Land Management (BLM) is delegated the authority to administer the PILT program for the Secretary of the Interior. 43 C.F.R. § 1881.0–5(e) (1985). Computation of the amount of a payment under PILT is based upon the acreage of entitlement lands located within the local government boundaries at the end of the federal fiscal year (September 30) preceding the fiscal year for which the PILT payment is to be made. 43 C.F.R. § 1881.-

1–2(b)(1) (1985). The amount is further limited by a formula related to the local government population. 31 U.S.C. § 6903(c)(1–2) (1982).

On June 19, 1981, Cibola County was created from the western portion of Valencia County. NMSA 1978, § 4–3A–1 (Supp. 1981). Prior to the formation of Cibola County, Valencia County had within its borders 710,967 acres of federal entitlement lands. Upon its creation, Cibola acquired 671,046 acres, or 94.38% of the federal entitlement lands previously located in Valencia County.

On September 21, 1981, BLM made its 1981 PILT payment in the amount of $500,761 to Valencia County, paying none of it to Cibola County. Valencia County refused to transfer any portion of the 1981 PILT payment to Cibola County, and plaintiff Board of County Commissioners of Cibola County, New Mexico (Cibola), filed an action seeking declaratory judgment to compel defendant Board of County Commissioners of Valencia County, New Mexico (Valencia), to remit a portion of that payment to Cibola. Both Cibola and Valencia filed motions for summary judgment. The trial court granted summary judgment in favor of Valencia; from this decision Cibola appeals. Both parties assert there is no genuine issue of material fact.

Valencia contends that an order requiring Valencia County to transfer a portion of the contested PILT funds to Cibola County would be tantamount to overturning the decision of the federal agency charged with administering a legislatively-created program. *Cf. Lawrence County v. Lead-Deadwood School District,* 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985); *Health & Social Services Department v. Garcia,* 88 N.M. 640, 545 P.2d 1018 (1976).

Valencia's assertion is without merit. Any federal interest in PILT funds is concluded once the initial payee and amount of payment are determined. *See Lawrence County v. Lead-Deadwood School District.* Cibola does not challenge BLM's payment of PILT funds to Valencia; instead, it asserts that at the time Cibola County came into being, neither 31 U.S.C. Sections 6901–6907 nor 43 C.F.R. Section 1881 addressed how PILT payments should be distributed to newly-created counties, and that reference to applicable New Mexico law is thus required. Cibola relies on NMSA 1978, Section 4–3A–6 (Supp.1981), and NMSA 1978, Section 6–6–18 (Repl. Pamp.1983), to urge that it should receive 94.4% of the contested PILT payment.

Valencia answers that Section 4–3A–6 is purely a tax statute; that PILT payments are not taxes and, therefore, that Section 4–3A–6 does not apply to the present case.

It is true that PILT funds are not taxes. But that alone does not make Section 4–3A–6 inapplicable to the present case. That section, entitled "Unpaid Taxes," states:

> The county of Cibola is entitled to all unpaid taxes, which remain unpaid at the effective date of this act upon property within the area embraced by the county of Cibola *and any funds in the hands of the treasurer of Valencia county at the time this act becomes effective, or which thereafter come into the treasurer's hands which are properly transferable by the treasurer of Valencia county to the treasurer of Cibola county, shall be transferred* in the regular course in the administration of the office *upon the demand from such authority to receive same.* (Citations omitted; emphasis supplied.)

In construing a statute, we must give effect to the intent of the legislature. *E.g., Board of Education v. Jennings,* 102 N.M. 762, 701 P.2d 361 (1985). It is presumed that at the time Section 4–3A–6 was enacted, the legislature knew that PILT payments were forthcoming. *E.g., State ex rel. Bird v. Apodaca,* 91 N.M. 279, 573 P.2d 213 (1977). "[I]t is not the business of the courts to look beyond the plain meaning of the words of a clearly drafted statute in an attempt to divine" the legislative intent. *State v. Ellenberger,* 96 N.M. 287, 288, 629 P.2d 1216, 1217 (1981).

Section 4–3A–6 clearly provides that "Cibola is entitled to all unpaid taxes * * * *and any funds* in the hands of the treasurer of Valencia County * * * or [any funds] which thereafter come into the treasurer's hands which are properly transferable. * * *" This statute must be construed so that, if possible, no part of it is rendered surplus or superfluous. *Western Investors Life Insurance Co. v. New Mexico Life Insurance Guaranty Association,* 100 N.M. 370, 671 P.2d 31 (1983). If this statute is interpreted as only providing for unpaid taxes, that portion of the statute which refers to "any funds" becomes superfluous.

The statutory title, "Unpaid Taxes," while shedding light on the legislative intent, does not limit the scope of this statute to merely unpaid taxes. *See State v. Ellenberger.* Notwithstanding the title, the content of the statute embraces taxes unpaid at the time of the creation of Cibola County, as well as all other funds thereafter coming into the hands of the Valencia County Treasurer which are "properly transferable" to the Cibola County Treasurer. Unpaid payments "in lieu of taxes" are sufficiently germane to the subject matter of "unpaid taxes" to permit our conclusion that the legislature intended that PILT funds were included within the meaning of "any funds" in Section 4–3A–6.

The next question is: Are PILT funds "properly transferable" funds within the meaning of Section 4–3A–6?

In *Lawrence County v. Lead-Deadwood School,* the Supreme Court held invalid a South Dakota statute which attempted to mandate that PILT funds be distributed in the same manner as were general taxes. The issue in *Lawrence* differs from the question here and the case is not helpful. Unlike South Dakota, the New Mexico legislature did not undertake to force Valencia County to spend the PILT payment in any particular fashion; nor did *Lawrence* address the transferability of a portion of the PILT funds from one governmental entity to another.

It does not require a strained reading to hold that a portion of the 1981 PILT funds are "properly transferable" from Valencia to Cibola pursuant to NMSA 1978, Section 4–3A–6 (Supp.1981). They were funds coming into the hands of the Valencia County Treasurer *after* the effective date of the Act, and are directly related to in-lieu-of taxes on lands of which the major portion lay in Cibola County.

Our holding is buttressed by the fact that 43 C.F.R. Section 1881.1–2 was amended on January 10, 1985 to clearly express the intent of Congress. At that time, subsection (f) was added and it precisely covers the question of Cibola's entitlement to a portion of the 1981 PILT payment. Although the amendment was not cited by counsel for either party, 43 C.F.R. Section 1881.1–2(f) (1985) provides:

> If a unit of general local government eligible for payments under this part reorganizes, the authorized officer shall, for the fiscal year in which the reorganization occurred, calculate payments as if the reorganization had not occurred and issue any payments due under this part *jointly to all of the newly formed units of general government.* (Emphasis added.)

Our interpretation of NMSA 1978, Section 4–3A–6 (Supp.1981), provides for this "joint" entitlement now mandated by regulation.

We therefore must determine what portion of the contested 1981 PILT payment is "properly transferable" from Valencia to Cibola. Cibola prefers that the county fiscal year, July 1, 1981, through June 30, 1982, be selected to compute the portion of the 1981 PILT payment it should receive. *See* NMSA 1978, § 6–6–17 (Repl.Pamp. 1983). It contends that under NMSA 1978, Section 6–6–18 (Repl.Pamp.1983), the 1981 PILT funds, not belonging to a "particular general county fund," became part of the county funds for the 1981–82 county fiscal year. Cibola County, having been created on June 19, 1981, was in existence for that entire county fiscal year. Thus, applying

Section 6–6–18, Cibola claims that it is entitled to 94.4% of the 1981 PILT payment.

Section 6–6–18, in pertinent part, reads:

> [A]ll monies other than those collected from the tax rolls, or that should have been on the tax rolls, that are collected during any current year and have not by law been placed as belonging to some particular general county fund shall go to and be a part of the fund for the current year in which the same are collected.

Cibola's position regarding the amount of PILT funds to which it is entitled conflicts with 31 U.S.C. Section 6902(a) which provides that "[t]he Secretary of the Interior shall make a payment for each [federal] fiscal year to each unit of general local government in which entitlement land is located." PILT payments are based on "[t]he amount of entitlement lands within the boundaries of each unit of local government as of the last day of the [federal] fiscal year preceding the [federal] fiscal year for which the payment is to be made. * * *" 43 C.F.R. § 1881.1–2(b)(1) (1985). The federal fiscal year for which payment was made was September 30, 1980, to September 30, 1981, during which period Cibola was a county only 28% of the time. The New Mexico statute would ignore the time frame for which PILT payments are to be computed. When there is a "direct and positive" conflict between a state law and a federal law, preemption may be inferred. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 199, 629 P.2d 231, 275 (1980), *cert. denied*, 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981) (quoting *Kelly v. Washington*, 302 U.S. 1, 10–11, 58 S.Ct. 87, 92, 82 L.Ed. 3, 11 (1937)).

The purpose of the PILT Act is to "recognize the burden imposed by the tax immunity of Federal lands by providing minimum Federal payments to units of local government within the boundaries of which these lands lie." S.Rep. No. 1262, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad.News 5968, 5969.

We recognize, too, as did the United States Congress, that local governments must provide additional services related to federal lands within the boundaries of the local government, such as law enforcement, search and rescue missions, emergency services, public health protections, sewage disposal, recreation, and other similar benefits. *See id.* at 9, 13.

During 103 days or 28.22% of the 1981 federal fiscal year, Cibola had within its boundaries 94.38% of the entitlement land which had previously been in Valencia County. Necessarily, Cibola was obligated during that period to provide services which were directly related to activities on federal lands within its boundaries and Valencia was responsible for such services on all of the entitlement lands during the remainder of that fiscal year, and upon 5.62% of the acreage for the other 103 days. PILT payments were intended by Congress to help defray such costs. Therefore, in accordance with clear Congressional intent, we hold that Cibola is entitled to 28.22% of 94.38% of the 1981 PILT payment, or $133,-373, plus interest at the rate of ten percent interest. NMSA 1978, §§ 56–8–3, –4 (Cum. Supp.1980); *Hillelson v. Republic Insurance Co.*, 96 N.M. 36, 627 P.2d 878 (1981).

The matter is reversed and remanded to the trial court for entry of judgment and interest from date of judgment until payment, in accordance with this Opinion.

IT IS SO ORDERED.

SOSA, Senior Justice, and FEDERICI, J., concur.

728 P.2d 458

STATE of New Mexico ex rel. Jacquelyn ROBINS, Chief Public Defender for the State of New Mexico, Petitioner,

v.

Hon. Norman HODGES, Sixth Judicial District Judge, et al., Respondents.

No. 16481.

Supreme Court of New Mexico.

Nov. 5, 1986.

Rehearing Denied Nov. 19, 1986.

Simmons, Cuddy & Friedman, Charlotte H. Hetherington, Santa Fe, for petitioner.

Paul Bardacke, Atty. Gen., G.T.S. Khalsa, Asst. Atty. Gen., Santa Fe, for respondents.

Peter Keys, Silver City, real party in interest.

OPINION

WALTERS, Justice.

The Public Defender has petitioned us to make permanent our earlier-issued temporary writ of superintending control. Although other respondents and real parties in interest were initially named in the petition and controlled by the alternative writ, this Opinion, in support of our permanent writ issued herein, concerns only that case relating to attorney fees allowed by the district court over and above the amount agreed upon in written documents exchanged between the Public Defender Department and the "farm-out" defense attorney, and in excess of the Public Defender's fee schedule.

Our decision is not premised solely upon the limits of the fee schedule promulgated by the Chief Public Defender for "attorneys who are not employees of the Department who serve as counsel for indigent persons under the Public Defender Act," as required by NMSA 1978, § 31–15–7A(11) (Repl.Pamp.1984). Our Rule 46.1, (NMSA 1978, Crim.P.R. 46.1 (Repl.Pamp.1985)), provides that in such criminal cases as require appointment by the court of defense counsel in indigent cases, the district court shall follow the fee schedule but may award greater fees when the complexity of the case warrants or exceptional circumstances exist.

In the matter of *State v. Short* in Grant County Cause No. CR. 85–052, the defense attorney, by written agreement, accepted employment to represent Short for a specific amount. Upon completion of the pro-

ceedings and at the request of the attorney, the district court ordered the Public Defender Department to pay an additional $3,000 to the attorney and ordered the defendant to reimburse the Public Defender Department $1,200 for earlier attorney fees paid in his case.

We note that the attorney was not appointed by the court; he represented the defendant expressly by contract with the Public Defender Department. We hold, therefore, that Rule 46.1 by its own terms does not apply in such a case. We hold, further, that the district court is without authority, under basic contract law, to alter or amend the terms of a contract freely entered into between the parties, but must enforce it as written. *Boatright v. Howard,* 102 N.M. 262, 694 P.2d 518 (1985); *Smith v. Price's Creameries,* 98 N.M. 541, 650 P.2d 825 (1982).

The alternative writ as applied to Grant County Cause No. CR 85–052 is, therefore, made permanent, and respondent therein is directed to vacate that portion of its order as awards or direct payments of attorney fees above the amount expressed in the written agreements between the attorney and petitioner.

IT IS SO ORDERED.

RIORDAN, C.J., and FEDERICI, J., concur.

SOSA, Senior Justice, and STOWERS, J., dissent.

728 P.2d 459

John KUNTSMAN [Kunstman] and Joan Kuntsman [Kunstman], his wife, Claimants-Appellants,

v.

GUARANTEED EQUITIES, INC., a New Mexico corporation, Respondent-Appellee,

v.

Dr. Manuel FERRAN, Receiver-Appellee,

and

Robert Holzapfel, Claimant-Appellee.

No. 16166.

Supreme Court of New Mexico.

Nov. 5, 1986.

George H. Perez, Bernalillo, for claimants-appellants.

Timothy J. Dreher, Albuquerque, for receiver-appellee.

Robert Holzapfel, Albuquerque, pro se.

OPINION

WALTERS, Justice.

The director of the Financial Institutions Division of the New Mexico Regulation and Licensing Department brought an action against Guaranteed Equities, Inc. (Equities), a mortgage broker, charging illegal and fraudulent activity. The court appointed a receiver and held a hearing on the receiver's motion to determine distribution of certain loan proceeds claimed by John and Joan Kuntsman [Kunstman] and by Robert Holzapfel. The trial court, finding that both Kuntsmans and Holzapfel were investors, apportioned the proceeds between the Kuntsmans and Holzapfel, and Kuntsmans appeal. We reverse.

Continental Mortgage Exchange, Inc. (Continental), the alter ego of Equities, offered a loan for the purchase of real property for sale, to be secured by a deed of trust. The loan, amounting to $14,435, was to be borrowed by Conkling and Wilson. In October 1982, the Kuntsmans entered into an "Agreement for Investment" in a deed of trust in the amount of $14,435. The Kuntsmans issued three checks payable to "CME Trust Fund" in the total amount of $18,435. Wilson executed a deed of trust and an installment promissory note, both in favor of Equities as trustee for the Kuntsmans. The Kuntsmans thereupon received title insurance and duly recorded the deed of trust on October 21, 1982.

In May 1983, Holzapfel also entered into an agreement with Continental to fund the Conkling-Wilson loan. This loan also was to be secured by a promissory note and a deed of trust. Holzapfel, however, received neither a promissory note nor a deed of trust. In the same month, Holzapfel issued a check to "CMI Trust Account," in the amount of $14,435. He did not purchase title insurance and his interest was not recorded in any manner. In October 1983, Capital Title Company issued a $16,-321.54 check payable to Equities, trustee for Holzapfel, and this amount is presently in the possession of the court-appointed receiver.

Kuntsmans contend that their recorded interest, being analogous to a mortgage, is superior to Holzapfel's unrecorded interest; that, therefore, Kuntsmans are entitled to the entirety of the loan proceeds. Holzapfel, of course, seeks to uphold the trial court's decision. He argues that Equities, the trustee and legal agent of both parties, acquired legal title and thereby placed the Kuntsmans and Holzapfel on equal footing as creditors.

New Mexico has never departed from the early definition of a "mortgage" as a "conveyance of real estate, or some interest therein, defeasible upon the payment of money or the performance of some other condition." *Palmer v. City of Albuquerque,* 19 N.M. 285, 298, 142 P. 929, 933 (1914). A deed of trust in the nature of a mortgage is "given under an agreement, with the intention that it is to act as security, or create a lien, for the performance of an obligation, usually the payment of a debt." 59 C.J.S. *Mortgages* § 5, at 31. "Such an instrument, although executed to trustees, instead of directly to the bondholders, and although in form a conveyance in trust, is essentially a mortgage, and will

be construed and enforced as such." *Id. See also Phoenix Title and Trust Co. v. Stewart,* 337 F.2d 978 (9th Cir.1964), *cert. denied,* 380 U.S. 979, 85 S.Ct. 1335, 14 L.Ed.2d 273 (1965); *Jaramillo v. McLoy,* 263 F.Supp. 870 (D.Colo.1967); *National Acceptance Co. of America v. Exchange National Bank of Chicago,* 101 Ill.App.2d 396, 243 N.E.2d 264 (1968).

We agree with the Kuntsmans that the deed of trust is, in essence, a mortgage and should be enforced as a mortgage. Kuntsmans' deed of trust, being treated as a mortgage, is governed by the recording provisions of NMSA 1978, Sections 14–9–1 to –2. Section 14–9–1 provides for all writings affecting title to real property to be recorded in the proper county clerk's office. Under Section 14–9–2, such recording gives "notice to all the world of the existence and contents of the instruments so recorded from the time of recording." We have held that New Mexico's recording statute is a notice statute which is intended to protect " 'innocent purchasers for value without notice of unrecorded instruments who have invested money in property.' " *Angle v. Slayton,* 102 N.M. 521, 523, 697 P.2d 940, 942 (1985) (quoting *Jeffers v. Doel,* 99 N.M. 351, 353, 658 P.2d 426, 428 (1982)). Holzapfel had constructive notice of the Kuntsmans' interest. *See Angle v. Slayton.* Indeed, Holzapfel admitted he had actual notice of Kuntsmans' interest. He therefore was not an innocent purchaser for value without notice. *See Jeffers v. Doel.* Having recorded their interest in the encumbered property prior to the time Holzapfel invested in the same property, the Kuntsmans did all that is statutorily required to protect their interest in the property and thus to gain priority status. *See Angle v. Slayton.*

Holzapfel attempts to persuade us that the appointment of a receiver affects the priority of the existing liens to the extent of making pro rata distribution appropriate in the present case. Kuntsmans cite *Ivy Hill Association v. Kluckhuhn,* 298 Md. 695, 472 A.2d 77 (1984), in answer, to maintain that even when a receiver is appointed, existing priorities are undisturbed.

We agree with the court's statement in *Ivy Hill,* that "[t]he appointment of a receiver neither affects title nor determines any rights to the property, but rather the receiver takes possession of the property subject to those liens and encumbrances which already may exist." *Ivy Hill Association v. Kluckhuhn,* 298 Md. at 704–705, 472 A.2d at 82. *See also S.W. Rawls, Inc. v. Forrest,* 224 Va. 264, 295 S.E.2d 791 (1982); *Barber v. Reina Nash Motor Co.,* 72 Wyo. 65, 260 P.2d 928 (1953); 3 *R. Clark, A Treatise on The Law and Practice of Receivers* § 667.4 (3d ed. 1959); 75 C.J.S. *Receivers* § 128 (1952). Accordingly, the Kuntsmans' superior interest in the property was not affected by the appointment of a receiver.

Consequently, although priorities ordinarily do not exist between creditors of the same class, and receivership assets are shared ratably, *State ex rel. Healy v. Smither,* 290 Or. 827, 626 P.2d 356 (1981), preferences will arise by reason of a statutory provision or a common law principle, 75 C.J.S. *Receivers* § 283 (1952), or when one claim intrinsically confers an equity superior to that of another claim. *State ex rel. Healy v. Smither.*

Having recognized the superiority of the Kuntsmans' interest by reason of recording, *see Angle v. Slayton,* the Kuntsmans are entitled to claim the entirety of the receivership assets in the Conkling-Wilson loan.

We reverse and remand for entry of judgment in favor of the Kuntsmans.

RIORDAN, C.J., and STOWERS, J., concur.

728 P.2d 462

Leo DOW and Arthur Dow, Plaintiffs-Appellees,

v.

CHILILI COOPERATIVE ASSOCIATION, Pedro Gutierrez, Jr., Adelicio Moya, Max Trujillo, Luciano Ortiz, Albert Joe Mora, Orlando Gurule, Elias Gutierrez, all individually and in their capacity as officers and members of the Chilili Cooperative Association, Eloy Gutierrez, Jr., Richard Gutierrez, Gilbert Gutierrez, Alfredo Ortiz, Gilbert Ortiz and John Does 1–10, Defendants-Appellants.

No. 16057.

Supreme Court of New Mexico.

Nov. 10, 1986.

Toulouse, Toulouse & Garcia, Narcisco Garcia, Jr., Albuquerque, for defendants-appellants.

Moses, Dunn, Beckley, Espinosa & Tuthill, Joseph Werntz, Albuquerque, for plaintiff-appellee Leo Dow.

Miguel Campos, Albuquerque, for plaintiff-appellee Arthur Dow.

OPINION

SOSA, Senior Justice.

Leo and Arthur Dow (Dows) commenced this action by seeking a temporary restraining order to prevent the Chilili Cooperative Association (Association) from interfering with the Dows' use and enjoyment of their lands and from entering or allowing others to enter into the Dows' land. The Association counterclaimed against Leo Dow in three counts. The first two counts challenged Dow's conduct while serving as president of the Association. Dow moved for partial summary judgment on count three, which concerned Leo Dow's purchase of the disputed property. The court granted Dow's motion, ruling that the claim was barred by the statute of limitations. The Association appeals; we affirm.

The sole issue is whether the trial court erred in granting the motion for summary judgment.

FACTS

Leo Dow was president of the Association from 1958 to 1968. On February 22, 1969, the Association executed a real estate contract for a parcel of land (approximately 545 acres) that is the subject of this appeal to Ernest and Gloria Leger. Ben Torrez, as president, and Carmen Gallegos, as secretary of the Association, signed the contract. On June 29, 1970, the contract was supplemented. On September 10, 1970, the contract and supplement were recorded.

The Legers assigned their interest in the real estate contract to Leo Dow on April 4, 1973. This assignment was recorded on July 3, 1974. Legers gave Dow a warranty deed dated April 17, 1973; it was recorded on July 8, 1974.

By letter of February 3, 1976, the Association's attorney requested a title insurance policy from New Mexico Abstract Company in Estancia, New Mexico. The letter refers specifically to the Leger's assignment of the contract to Dow on April 4, 1973. New Mexico Abstract secured a title policy dated June 16, 1976 and mailed it to the Association on June 29, 1976. Dow paid off the real estate contract on July 2, 1979 and received the deed from the Association to the Legers.

Finally, on September 19, 1983, Dows instituted this action for injunctive relief against the Association, alleging that Association members were preventing them from entering the property to cut wood and were attempting to establish a permit system under which others would be allowed to enter and cut wood on the land. The temporary restraining order was granted on September 19, 1983 and confirmed by preliminary injunction on September 29, 1983. The Association filed its counterclaim on October 4, 1983. It contained three counts:

I. A request for compensatory and punitive damages because, while president, Leo Dow allegedly conveyed away real

property of the Association for inadequate value and without proper record keeping, in breach of his fiduciary duty;

II. A demand for an accounting of all transactions over which Dow presided; and,

III. A prayer to set aside the allegedly fraudulent conveyances from the Association to Legers and from Legers to Dow.

Dow moved for partial summary judgment as to Count III on April 25, 1985. The court held a hearing on the motion on July 2, 1985. By order of July 19, 1985, the court granted the motion and, finding no just reason for delay, entered a final judgment in favor of Dow on Count III, pursuant to NMSA 1978, Civ.P.Rule 54(b)(1) (Repl.Pamp.1980), from which the Association appeals.

Appellant Association attacks the summary judgment from both flanks, arguing that the movant is not entitled to judgment as a matter of law and also that there remain genuine issues of material fact. *See Oschwald v. Christie,* 95 N.M. 251, 620 P.2d 1276 (1980); *see also Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). We address these arguments in the order raised by the Association.

A. Judgment as a matter of law.

The trial court stated that it was granting summary judgment on the basis of the statute of limitations. The Association concedes that the applicable statute specifies a four year limitation. NMSA 1978, § 37-1-4. Nevertheless, the Association urges the application of a second statute which tolls the limitation period for cases involving fraudulent concealment:

> In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved.

NMSA 1978, § 37-1-7.

In support of its position, the Association contends that it only "discovered" Dow's allegedly fraudulent actions within the past four years. This "discovery" was presented to the trial court through the affidavit of F.M. Trujillo, the present secretary of the Association. The court granted Dow's motion to strike most of the affidavit because it was not based upon personal knowledge.

There is nothing else in the record to indicate that Dow did anything, either actively or passively, to conceal his transactions from the Association, so as to justify the equitable tolling of the statute of limitations as provided by Section 37-1-7. In fact, the record indicates that the Association had actual knowledge of Dow's ownership, at least as long ago as June 29, 1976. "In a motion for summary judgment, the party claiming that a statute of limitations should be tolled has the burden of alleging sufficient facts that if proven would toll the statute." *Stringer v. Dudoich,* 92 N.M. 98, 99, 583 P.2d 462, 463 (1978). Here the Association failed to carry its burden. Thus we conclude that the trial court was correct in granting summary judgment as a matter of law.

B. Existence of material facts in dispute.

Despite the analysis above, the Association maintains that summary judgment was improper because Trujillo's affidavit at least puts into issue the factual question of when the Association knew, or by reasonable diligence should have learned, that it had a cause of action. The affidavit itself states that "[m]y investigation has revealed the following," but then it simply recites allegations similar to those of the counterclaim, with no reference to extrinsic facts by which the allegations could be proved.

Once Dow had made a prima facie showing that he was entitled to summary judgment, the burden then shifted to the Association to demonstrate the existence of specific evidentiary facts which would require a trial on the merits. *Spears v. Canon de Carnue Land Grant,* 80 N.M. 766,

461 P.2d 415 (1969). A party may not simply argue that such facts might exist, nor may it rest upon the allegations of the complaint. *Oschwald v. Christie.* Furthermore, the Association cannot convert the hearsay testimony of one of its officers into admissible evidence by the expedient of labeling the testimony as the fruit of an investigation.

We find the Association's contention to be disingenuous and unconvincing. It offers no plausible explanation for why (or even how) Dow's alleged constructive fraud was only "discovered" within the last four years, nor does it indicate why the matter was not raised directly, instead of waiting to counterclaim after Dows had filed suit.

Finally, we observe that the Association is not out of court altogether. If it can prove that Dow defrauded it or breached his fiduciary duties, then the remedy of damages remains available. The trial court simply concluded that the Association failed to make a showing sufficient to cause the court to exercise its equitable powers and overturn a long established sequence of publicly recorded transactions.

For the foregoing reasons, the judgment of the trial court is affirmed and the matter is remanded for trial of the remaining issues.

IT IS SO ORDERED.

RIORDAN, C.J., and FEDERICI, J., concur.

728 P.2d 465

Harold DAVIS, Petitioner-Appellant,

v.

NEW MEXICO EMPLOYMENT SECURITY DEPARTMENT and Hydro-Aire Industries, Inc., Respondents-Appellees.

No. 16344.

Supreme Court of New Mexico.

Nov. 13, 1986.

Henry S. Howe, Farmington, for petitioner-appellant.

C. Reischman, Albuquerque, for respondents-appellees.

OPINION

FEDERICI, Justice.

The Appeals Tribunal of the New Mexico Employment Security Department denied Harold Davis' (petitioner's) application for unemployment compensation, holding that he left his employment voluntarily without good cause in connection with his employment. Davis appealed that decision, and the Board of Review of the Employment Security Department (respondent) affirmed.

Petitioner applied to the San Juan County District Court for certiorari. After reviewing the administrative record, the district court made findings of fact and conclusions of law and affirmed the decision of the Employment Security Department. Petitioner appeals. We affirm.

Petitioner was employed by respondent as a salesman to be paid wages on the basis of commission on sales made by petitioner. Petitioner voluntarily quit his commission sales job because he could not make a living selling vacuum cleaners on a commission basis.

The issue on appeal is whether a claimant who voluntarily quits his employment as a salesman because he is dissatisfied with his earnings must be disqualified from receiving unemployment compensation if he accepted the job with full knowledge that his wages would be paid on a straight commission basis.

The following pertinent findings made by the district court are not challenged by petitioner and therefore constitute the controlling facts in the case. *See City of Roswell v. Reynolds,* 86 N.M. 249, 522 P.2d 796 (1974); NMSA 1978, Civ.App.R. 9(a)(3)(ii) (Supp.1985). The trial court found that petitioner worked part-time for respondent Hydro-Aire Industries, Inc. (employer) and subsequently accepted full-time employment with the employer selling vacuum cleaners on a straight commission basis. When petitioner accepted his full-time job selling vacuum cleaners, he had full knowledge of the job requirements and that his wages would be paid on a straight commission basis. The employer did not alter the agreement of hire nor did it misrepresent the terms and conditions of hire. Petitioner voluntarily quit his job because he could not generate sufficient sales and income to meet his expenses.

Based upon the facts of the case, both the respondent and the district court determined that the petitioner failed to meet his burden of establishing that his reason for quitting amounted to good cause connected with his work. The rationale for the good cause analysis applied by respondent and the district court was petitioner's knowing acceptance of the terms and conditions of work which remained unchanged throughout his tenure of employment.

This is a question of first impression in New Mexico. The rule generally adopted by other jurisdictions is that a claimant is not entitled to benefits after a voluntary separation because of dissatisfaction with wages unless he can show a substantial change or misrepresentation involving the rate or method of compensation. *Salvant v. Lockwood,* 400 So.2d 311 (La.App.1981); *Leshock v. Unemployment Compensation Board of Review,* 46 Pa.Cmwlth. 486, 406 A.2d 1182 (1979); *National Freight, Inc. v. Unemployment Compensation Board of Review,* 34 Pa.Cmwlth. 161, 382 A.2d 1288 (1978); *Murray v. Rutledge,* 327 S.E.2d 403 (W.Va.1985). These cases stand for the proposition that one who voluntarily accepts a job thereby admits its initial suitability. To assert successfully that the employment became so unsuitable as to be good cause for leaving, the employee must prove that employment conditions changed or that he was deceived or unaware of such conditions when he entered employment. In this case, petitioner was fully aware of the nature and scope of his employment and that his wages would be paid on a commission basis. There is no evidence in

the record that employment conditions changed or that petitioner was deceived when he entered upon his employment.

Petitioner concedes in his brief in chief that the application of this general rule by courts in other jurisdictions has resulted in the disqualification of claimants who voluntarily left their employment because they did not earn enough from their commission sales jobs to make a living; yet he requests that we ignore precedent and determine as a matter of law under the facts in this case that his voluntary separation from his employment did not disqualify him from benefits. We are convinced this result is not warranted under the facts and applicable law.

The following cases support the principle that a claimant is disqualified for unemployment security benefits if the claimant voluntarily quits his employment. *Stein v. Industrial Commission,* 503 P.2d 360 (Colo.App.1972); *Perry v. Brown,* 162 So.2d 446 (La.App.), *cert. denied,* 164 So.2d 355 (1964); *Perry v. Brown,* 162 So.2d 444 (La.App.), *cert. denied,* 164 So.2d 356 (1964); *Busfield v. Unemployment Compensation Board of Review,* 191 Pa.Super. 43, 155 A.2d 436 (1959). Claimants in these cases voluntarily quit their jobs after becoming dissatisfied with the amount of wages. They had accepted employment as salespersons with full knowledge that they would be paid on a straight commission basis.

The decision of the Board of Review of the Employment Security Department and the order and judgment of the district court are affirmed.

IT IS SO ORDERED.

RIORDAN, C.J., and STOWERS, J., concur.

728 P.2d 467

UNIVERSAL LIFE CHURCH,
Plaintiff-Appellant,

v.

David V. COXON, et al.,
Defendants-Appellees.

William R. LYNE, Plaintiff-Appellant,

v.

David V. COXON, et al.,
Defendants-Appellees.

Nos. 16117, 16212.

Supreme Court of New Mexico.

Nov. 18, 1986.

Rehearing Denied Nov. 4, 1986.

William R. Lyne, Lamy, pro se.

Jacob Carian, David Frizzel, Albuquerque, for defendants-appellees Coxon.

Eric Sommer, Santa Fe, for defendant-appellee Isaacs.

Michael S. & Esther Luby, Santa Fe, pro se.

Donald Montoya, Santa Fe, for defendant-appellee Lacy.

OPINION

STOWERS, Justice.

These two actions were consolidated for purposes of appeal as they involve the same subject matter and parties. Plaintiff in each case, Universal Life Church and William R. Lyne, appeals from the district courts' orders directing the sale of the subject property and dismissing plaintiff's action. We affirm each of the orders.

The first consolidated case, SF 80–1887(c), was filed October 3, 1980, as a partition action. After a hearing on the merits, the district court concluded that partition was impractical, determined the interests of the parties, and ordered the sale of the property. Judgment was entered on September 14, 1984. Subsequent orders were entered to give effect to the judgment and dispose of the pleadings and liens filed by plaintiff. The last order of the district court in this case was entered September 11, 1985, directing the special master to sell the property and hold the proceeds in escrow pending a court approved distribution. Plaintiff filed an appeal from this action on September 26, 1985.

Plaintiff filed the second consolidated case, SF 85–926(c), on June 14, 1985, as a foreclosure action. This second complaint involved the same parties and the same property as the first case. After a hearing on plaintiff's motion for summary judgment and defendants' motion to dismiss, the district court held that the judgment of September 14, 1984, in the first case disposed of the issues. Consequently, the district court dismissed the second action in an order entered December 16, 1985. Plaintiff filed an appeal from this order on December 16, 1985.

Plaintiff raises numerous issues in his initial appeal of September 26, 1985, case number SF 80–1887(c). However, many of the contentions listed in his notice of appeal are not appealable as they are not final judgments or decisions, interlocutory orders or decisions which practically dispose of the merits, final orders after entry of judgment which affect substantial rights, or judgments in any proceeding for civil contempt. *See* NMSA 1978, Civ.App.R. 3(a) (Repl.Pamp.1984). Even if these contentions were appealable issues, plaintiff failed to appeal items 1–13 and 15 within the thirty day period required by Appellate Rule 3(a). Plaintiff's appeal was timely only as to one order: item 14. For the above reasons, we dismiss plaintiff's notice of appeal items 1–13 and 15.

Plaintiff's notice of appeal item 14 is an order filed September 11, 1985, striking plaintiff's liens and ordering the special master to sell the property in question. We find that substantial evidence supports the district court's ruling on this issue and that plaintiff did not show that the district court clearly abused its discretion in its order. *See Newsome v. Farer,* 103 N.M. 415, 708 P.2d 327 (1985). We therefore affirm the district court in this first consolidated case.

Plaintiff's second appeal of December 16, 1985, case number SF 85–926(c), arises from the district court's order denying plaintiff's motion for summary judgment and granting defendants' motion to dismiss. The basis for defendants' motion to dismiss was that the issues complained of in the second cause of action were barred by the principles of res judicata.

Similar to the case presently before us, the defendant-appellant in *Three Rivers Land Co. v. Maddoux,* 98 N.M. 690, 652 P.2d 240 (1982) also raised the affirmative defense of res judicata in a motion to dismiss. In that opinion, this Court indicated that a motion to dismiss was not the appropriate pleading with which to raise the res judicata defense and recognized that the appeal, therefore, was improperly before them. *Id.* at 694, 652 P.2d at 244. Nevertheless, in the "interest of the speedy administration of justice," the Court went on to decide the issue on appeal: reversing the trial court and finding that the res judicata defense did in fact bar the subsequent action. *Id.* at 694, 696, 652 P.2d at 244, 246.

A review of this motion practice in the federal courts discloses the prevalent view

that a complaint clearly showing that relief is barred by an affirmative defense may be dismissed under a Rule 12(b) motion. *Fed. R.Civ.P. 8, 12; Larter & Sons, Inc. v. Dinkler Hotels Co.,* 199 F.2d 854 (5th Cir. 1952). Generally, the facts supporting the defense must appear plainly upon the face of the complaint and must reveal what specific evidentiary matter is the basis for the dismissal. *Miller v. Shell Oil Co.,* 345 F.2d 891 (10th Cir.1965). This now common expansion of the motion practice beyond the express scope of Rule 12(b) promotes speedier pretrial procedure and eliminates needless trials while preserving meritorious claims for full adjudication.

This examination of federal policy and procedure convinces us that the affirmative defense of res judicata may properly be raised in a motion to dismiss. Consequently, we now overrule *Three Rivers Land Company v. Maddoux* insofar as it discourages this motion practice and affirm the district court's order in this second consolidated case dismissing plaintiff's complaint with prejudice.

IT IS SO ORDERED.

RIORDAN, C.J., and FEDERICI, J., concur.

728 P.2d 469

In the Matter of Steven F. GROVER, III, an Attorney Admitted to Practice Before the Courts of the State of New Mexico.

No. 16712.

Supreme Court of New Mexico.

Nov. 19, 1986.

ORDER

This matter coming on for consideration by the Court upon Report and Recommendations of the Disciplinary Board, and the Court having considered the matter and being sufficiently advised, Chief Justice Riordan, Senior Justice Sosa, Justice Federici, Justice Stowers and Justice Walters concurring;

On April 16, 1986, Attorney Steven F. Grover, III, did plead guilty to the crime of misappropriation by Bankruptcy Trustee and, thereafter, received a sentence of three year's imprisonment and was ordered to make restitution in the amount of $40,000.00, as well as to pay a penalty assessment of $50.00.

NOW, THEREFORE, IT IS ORDERED that the Recommendations of the Disciplinary Board are hereby adopted, Steven F. Grover, III having submitted a Conditional Admission and Consent to Discipline dated June 19, 1986 after consultation with his attorney, and the said Steven F. Grover, III is hereby disbarred from the practice of law in all Courts of the State of New Mexico, and costs are hereby assessed against Steven F. Grover, III in the amount of $25.50 to be paid to the Disciplinary Board on or before December 1, 1986.

IT IS FURTHER ORDERED that the Clerk of the Court is hereby authorized and directed to publish this Order in the *New Mexico Reports* and *News and Views.*

728 P.2d 469

DATA GENERAL CORPORATION, Plaintiff-Appellant,

v.

COMMUNICATIONS DIVERSIFIED, INC., Defendant-Appellee.

No. 16015.

Supreme Court of New Mexico.

Nov. 21, 1986.

Louis J. Vener, Albuquerque, for plaintiff-appellant.

Richard L. Alvidrez, Keleher & McLeod. P.A., Albuquerque, for defendant-appellee.

OPINION

RIORDAN, Chief Justice.

Data General Corporation (Data General) brought this action for "bill backs" owed on a discount agreement with Communications Diversified, Inc. (Communications). Communications was awarded summary judgment by the trial court on the ground that the agreement was a contract for the sale of goods controlled by NMSA 1978, Section 55–2–725, and the statute of limitation had run before the complaint was filed. Data General appeals and we reverse.

On March 21, 1978, Data General and Communications entered into an agreement providing for scheduled discounts dependent upon future purchase by CDI. The specified term of the discount contract was fifteen months, which expired June 21, 1979. The contract specified that Communications was to purchase a minimum of eleven computers within the fifteen months to receive the calculated discount it received. The contract states:

> [i]f Buyer fails to * * * purchase and take delivery during the Delivery Period [eighteen months] of the minimum number of system units associated with the level specified [eleven to fifteen] * * *, [Data General] will recalculate the discounts previously granted in accordance with * * * the number of system units actually delivered * * *.

At the expiration of the ordering period, Communications had purchased one computer. Data General recalculated the discount and on December 18, 1979, it invoiced Communications for the unearned discount. Communications did not pay the invoice and on September 22, 1983, Data General filed suit to recover.

Two issues raised on appeal are whether the trial court erred in:

A. The calculation of when the "breach" occurred; and

B. the application of Section 55–2–725 instead of NMSA 1978, Section 37–1–3 for

the period of limitation in which an action may be brought.

Date of Breach

It is undisputed that the contract is for a term that is to last fifteen months beginning March 21, 1978, and extending until June 21, 1979. Since the contract is for a specified term, the parties would know when the contract expires and whether there is a breach. And accordingly, "[w]hen an agreement is absolute and unconditional the general rule is that no demand for performance is necessary." *In re Independent Distillers of Kentucky,* 34 F.Supp. 708 (W.D.Ky.1940). *See also* NMSA 1978, § 56–5–3 (Repl.Pamp.1986).

Data General argues that the amount due on bill-backs is unknown until it invoices the buyer as required by the contract. Thus, it alleges that notice was given of the amount due on December 18, 1979, and the breach occurred then.

However, at the end of the ordering period, which was June 21, 1979, both parties knew that CDI had not ordered eleven computers and that it had breached the discount agreement. CDI signed the contract with full knowledge of the minimum order requirement for the discount percentage it was given. However, CDI stated it did not know it would be held to this breach because it was told it did not have to order any minimum number of computers and that the minimum number clause was never enforced.

The unambiguous contract governs. *See Albuquerque National Bank v. Albuquerque Ranch Estates,* 99 N.M. 95, 645 P.2d 548 (1982). The breach occurred the day after the contract expired, June 22, 1979. Since the suit was brought September 22, 1985, the suit was brought more than four and less than six years after the breach.

Limitation Statute

The trial court applied Section 55–2–725, which is part of the New Mexico Uniform Commercial Code, which states: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Since the breach occurred on June 22, 1979, under this section the action would be barred by the statute of limitations, presuming a contract for sale is involved.

We must determine whether this is a contract for the sale of goods which the limitation period in the Uniform Commercial Code would govern. NMSA 1978, Section 55–2–106(1) states in pertinent part that a " '[c]ontract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price." Looking carefully at the discount agreement, it states that the "terms and conditions of sale (Form 100) prevailing at the time a purchase order is accepted by [Data General] will apply to all purchases...." This requires that another form, contract or invoice be used at the time of actual purchase. Further, there is no specific computer equipment to be purchased under this agreement. The agreement requires that a certain number must be purchased by a certain time, including five percent of the minimum contract amount at the time of contracting, in order for the discount to apply. No title is passed for a price by this agreement, and there is no requirement to purchase even one computer. Therefore, it is not a contract for sale.

CDI argues that a warranty is given in the agreement for the equipment and thus the contract is for the sale of computers. Since this warranty applies to all the equipment sold by Data General and not just specific pieces bought by CDI, it would not bring it within the contract for sale, as defined previously by Section 55–2–106(1).

Sale, as defined by the U.C.C., is the passing of title for a price. Section 55–2–106(1). Since there was no specific exchange of equipment with this agreement, no title passed. 1 A. Squillante & J. Fonseu; *Williston on Sales,* § 5–7 at 106 (1973).

The court in *Dynamics Corp. of America v. International Harvester Company,* 429 F.Supp. 341 (S.D.N.Y.1977), stated that

in determining whether a contract is for the sale of goods and thus covered by the U.C.C., it is necessary to look to the main objective or intent of the parties' agreement. The dominant objective in the present case was to provide a discount schedule, *if* sales were made.

We conclude that Section 55–2–725 would not govern this agreement. NMSA 1978, Section 37–1–3(A), with the limitation of six years would control this written contract. Thus, summary judgment on the grounds that the statute had run would be improper and the holding by the trial court is reversed. This case is remanded to the trial court for trial.

IT IS SO ORDERED.

SOSA, Senior Justice, and FEDERICI and WALTERS, JJ., concur.

STOWERS, J., dissents.

STOWERS, Justice, dissenting.

I agree with the majority's conclusion that the breach of contract in this case occurred on June 22, 1979, and concur in that portion of its opinion. I cannot agree with the majority's conclusion that the contract in issue was not a contract for sale and therefore dissent from the portion of its opinion discussing the applicable statute of limitations.

The trial court concluded that plaintiff Data General Corporation (Data General) and defendant Communications Diversified, Inc. (CDI) had entered into a contract for the sale of goods, computers, that was governed by the Uniform Commercial Code's four-year statute of limitations. *See* NMSA 1978, § 55–2–725. The majority of this Court reject the trial court's findings and reverse its order of summary judgment. In mischaracterizing this agreement as a contract to provide a discount schedule rather than a contract for the sale of goods, I believe the majority disregard the clear intent of the parties and miscontrue the letter and spirit of the Uniform Commercial Code.

A "contract" is the "total legal obligation which results from the parties' agreement," NMSA 1978, § 55–1–201(11) (Cum. Supp.1986), and an "agreement" is the "bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance," NMSA 1978, § 55–1–201(3) (Cum. Supp.1986). In addition to the "System Unit OEM Discount Agreement" (Discount Agreement) form upon which the majority focus, the March 21, 1978 agreement between Data General and CDI encompassed an amendment to that form, a purchase order from CDI to Data General for certain computer equipment and software, and a price quotation from Data General to CDI. *See Steiner v. Mobil Oil Corp.*, 20 Cal.3d 90, 141 Cal.Rptr. 157, 596 P.2d 751 (1977) (en banc) ("competitive allowance" or discount agreement found within package of form documents).

Goods are "all things ... which are movable at the time of identification to the contract for sale...." NMSA 1978, § 55–2–105(1). Computers unquestionably constitute "goods." As the majority opinion notes, the sale of goods consists in the passing of the title to the goods for a price. NMSA 1978, § 55–2–106(1).

Under the Uniform Commercial Code, however, a "contract for sale" may be a "present sale of goods" or a "contract to sell goods at a future time." *Id.* In a "present sale of goods," title passes from the seller to the buyer for a price by the making of the contract; in a "contract to sell goods at a future time," a contract is made obligating the parties to pass title for a price at a future time. *Id.* It is unnecessary to determine whether the agreement between Data General and CDI constituted a present sale of goods or a contract to sell goods at a future time, for the record amply supports the trial court's finding that there was a "contract for sale" within the meaning of the Uniform Commercial Code.

First, the trial court's finding is supported by admissions made in the pleadings. Data General's amended complaint alleged, and CDI's answer admitted, that

plaintiff and defendant had entered a written contract in which plaintiff "agreed to sell merchandise to [d]efendant at a discount specified in that contract." Indeed, Data General first raised the argument that this was not a contract for the sale of goods on appeal following the adverse judgment below.

Furthermore, the trial court's finding is supported by the language of the parties' written contract. The Discount Agreement provided that

> Data General (DGC) and the Original Equipment Manufacturer Communications Diversified, INc. [sic] (Buyer) agree that the following terms and conditions shall govern the sale, discounting and licensing of DGC Equipment and Software.
>
> ....
>
> ... Buyer must purchase upon the date of this Agreement and take delivery during the first 3 months of this Agreement at least 5% of the minimum number of System Units associated with the level specified....

It stated that "Buyer" would receive scheduled discounts provided that Buyer ordered within the ordering period a scheduled number of units; if Buyer failed to purchase and take delivery of the requisite number of units, Data General would recalculate the discount previously granted and invoice Buyer for the difference. The Discount Agreement at least twice referred to "equipment and software furnished under this ... Agreement" and included a warranty on Data General equipment.

These segments of the record alone clearly demonstrate that the parties incurred legal obligations as a result of their bargain to pass title to goods for a price at a future time. The trial court's finding that the parties entered into a "contract for sale" under the Uniform Commercial Code therefore should be affirmed. Because an action for breach of any "contract for sale" must be commenced within four years after the cause of action accrued, NMSA 1978, § 55–2–725, the trial court's order of summary judgment in favor of defendant CDI was proper and should be affirmed.

The Official Comment to Section 55–2–725 states that the purpose of the section is to introduce a uniform statute of limitations for sales contracts, one that is most appropriate to modern business practice. The majority opinion too narrowly interprets the meaning of "contract for sale" under the Uniform Commercial Code by concentrating on portions of the language of the Discount Agreement that merely reflect the parties' agreement regarding the price term of their contract for the future (and perhaps present) sale of computer equipment. *See* NMSA 1978, §§ 55–2–201, –202, –204. The majority's severing of the discount schedule from the contract for sale severely undercuts the purpose of promoting uniform application of modern business practices that underlies Section 55–2–725 and the Uniform Commercial Code generally.

For the foregoing reasons, I dissent from the portion of the majority's opinion discussing the statute of limitations.

728 P.2d 473

STATE of New Mexico,
Plaintiff-Appellee,

v.

Richard JOHNSON,
Defendant-Appellant.

No. 8904.

Court of Appeals of New Mexico.

Aug. 19, 1986.

Certiorari Denied Oct. 16, 1986.

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Paul G. Bardacke, Atty. Gen., John M. Paternoster, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Warren F. Reynolds, P.A., Hobbs, Winston Roberts-Hohl, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Judge.

Defendant appeals his convictions of twelve counts of fraud, one count of conspiracy, and one count of racketeering. We discuss defendant's claims of error as to: (1) failure of proof; (2) denial of mistrial; (3) unconstitutionality of the Racketeering Act, NMSA 1978, Sections 30–42–1 to –6 (Repl.Pamp.1980); (4) propriety of jury instruction; and (5) mistake in sentencing. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Shafer*, 102 N.M. 629, 698 P.2d 902 (Ct.App.), *cert. denied*, 102 N.M. 613, 698 P.2d 886 (1985). We affirm in part and reverse in part.

Defendant and his wife operated a used car and automotive repair business in Hobbs. A nineteen-count indictment charged defendant and his wife with fraud, conspiracy and racketeering arising out of allegations of overcharging for vehicle repairs, falsifying claims to insurance companies, charging for work not performed, billing for new automotive parts which were not installed, and falsifying documents regarding sales of vehicles.

I. SUFFICIENCY OF EVIDENCE

(A) *Variance.* Defendant contends that there was a failure of proof as to the offenses alleged in Counts I, III, V, VII, IX, XI, and XII because of a variance between the allegations of the indictment and the evidence presented at trial relating to the identification numbers of the motor vehicles. Each of these counts alleged that defendant had fraudulently obtained monies by filing false claims for automotive repairs with insurance companies.

At the close of the state's case-in-chief, defendant moved to dismiss the above counts on the ground of failure of proof. The trial court denied the motion. Defendant claims error because in five of the foregoing counts, there was a variance as to a single letter or number between evidence of the identification numbers presented at trial and the allegations of the indictment; in Counts III and IV, there was a two-character variance.

The state asserts that the differences in the vehicle identification numbers constituted harmless error arising from minor typographical mistakes constituting a one or two-character variance. We agree. *See State v. Trujillo*, 91 N.M. 641, 578 P.2d 342 (Ct.App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978); *State v. Lucero*, 79 N.M. 131, 440 P.2d 806 (Ct.App.1968). Defendant does not contend that he was misled into thinking that other vehicles were involved, nor does defendant argue that the preparation of his case or the conduct of his defense at trial was prejudiced by the variance. Instead, defendant asserts that the variance constituted a failure of proof and, consequently, his convictions on these counts place him in double jeopardy.

NMSA 1978, Crim.P. Rule 7(c) (Repl. Pamp.1995), states:

> (c) **Variances.** *No variance between those allegations of a* complaint, *indictment,* information or any supplemental pleading *which state the particulars of the offense,* whether amended or not, *and the evidence offered in support thereof shall be ground for the acquittal of the defendant unless such variance prejudices substantial rights of the defendant.* The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances. [Emphasis added.]

Each of the challenged counts specified the type of car involved in the alleged fraud, the owner of the vehicle, the date of the offense, and the nature of the illegal conduct. At trial, the state presented evidence bearing upon each of these matters. The trial court's denial of the motion to

dismiss was not error; there was no showing that any substantial right of defendant was affected, the convictions were supported by substantial evidence, and no prejudice has been demonstrated. *See State v. Pina,* 90 N.M. 181, 561 P.2d 43 (Ct.App. 1977); Crim.P.R. 7(c). A variance is not fatal unless the accused cannot reasonably anticipate from the indictment what the nature of the proof against him will be. *State v. Ross,* 100 N.M. 48, 665 P.2d 310 (Ct.App.1983).

Defendant's contention that these errors have subjected him to double jeopardy is also without merit. Defendant asserts that he could be convicted again on these charges because of the variance in the vehicle identification numbers. Under Crim.P. Rule 7(c), the variance is not treated as a different offense; defendant would be able to preclude a second prosecution by demonstrating the variance. *See State v. Kerr,* 142 Ariz. 426, 690 P.2d 145 (App. 1984); *State v. Bird,* 238 Kan. 160, 708 P.2d 946 (1985).

Defendant's reliance on *State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App.1974), is misplaced. In *Foster,* defendant was charged with the commission of the offense of sodomy "[o]n or about August, 1973." At trial, a juvenile testified that three separate sexual acts occurred within a span of approximately one month. Under the circumstances the court held that defendant was not placed on notice as to the specific act charged and that the lack of notice prejudiced his defense. Unlike the factual situation in *Foster,* defendant here has failed to demonstrate prejudice. In the instant case, there is no doubt as to each of the vehicles which were the subject of proof at trial. Sufficiency of an indictment is measured by whether it adequately apprises the accused of the offense intended to be charged, what he must be prepared to defend against, and by whether it is specific enough to make a plea of double jeopardy possible. *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Here, the variance was not prejudicial, and the indictment and proof were sufficient to avoid double jeopardy.

(B) Defendant also asserts that there was a variance between the indictment and the evidence at trial as to Counts V and XII (each alleging fraudulent claims for vehicle repairs). Count V of the indictment charged that defendant misappropriated or took money belonging to "T.B.A. Insurance Company" by filing a false claim with the "W.J. Agency" for alleged repairs on a 1977 Datsun 280 Z sold by Johnson Motor Company to Steve Patterson.

Count XII of the indictment alleged that defendant misappropriated or took money belonging to "T.B.A. Insurance Company" by filing a false claim with the "W.J. Agency" for alleged repairs on a 1979 Buick Regal sold by Johnson Motors Company to Plimpton Frailey.

Proof at trial and the instructions on Counts V and XII, indicated that defendant falsified repair estimates on the vehicles to the "T.B.A. Company." The variance omitting the word "Insurance" from the name of the corporate victim was not material.

When a variance between the indictment and proof at trial is claimed to constitute reversible error, the dispositive issue on appeal is whether the indictment sufficiently apprised the accused with sufficient specificity to allow him to prepare his defense and raise any resulting conviction as a bar to future prosecution arising out of the same conduct. *State v. Lott,* 73 N.M. 280, 387 P.2d 855 (1963). *See also England v. United States,* 174 F.2d 466 (5th Cir.1949) (variance in name of victim of larceny held not prejudicial); *People v. Montgomery,* 96 Ill.App.2d 994, 52 Ill.Dec. 545, 422 N.E.2d 226 (1981) (variance in name of victim of aggravated assault held not reversible error); *Bates v. State,* 486 N.E.2d 574 (Ind.App.1985) (variance in name of owner of property burglarized did not vitiate conviction). Here, the variance complained of was not prejudicial and our review of the record indicates that defendant's convictions were supported by substantial evidence. Counts V and XII of the indictment specifically referred to the ve-

hicles involved, the vehicle identification numbers, the owners of the vehicle, and the general dates the offenses were alleged to have been committed. Proof at trial conformed to the material allegations of the indictment.

Defendant also argues that Crim.P. Rule 7(c) is inapplicable because the state did not move to amend the indictment. We disagree. The fact that the state did not move to amend does not make Rule 7 inapplicable. Rule 7 states that, without a showing of substantial prejudice, defendant is not entitled to acquittal because of a variance, irrespective of whether the indictment is amended or not. Defendant relies on *State v. Crump,* 82 N.M. 487, 484 P.2d 329 (1971), where it was held that when a criminal offense is charged in general terms and is followed by a detailed statement of facts concerning the offense, the state is restricted to establishing the facts so detailed. The result in *Crump* is distinguishable from the present case. Here, defendant did not seek or obtain a detailed statement of facts, the charges are supported by substantial evidence and there has been no prejudice demonstrated.

Defendant argues further that the variance between the indictment and the two instructions naming the alleged victim as "T.B.A. Insurance Company" constitutes a failure of proof and subjects him to double jeopardy. We disagree. This objection was not raised at trial. Instructions 7 and 14, given by the trial court, list "T.B.A. Company" as the victim of the alleged fraud as to Counts V and XII. Absent fundamental error that is jurisdictional, instructions not objected to by defendant become the law of the case. *See State v. Dominguez,* 91 N.M. 296, 573 P.2d 230 (Ct.App.), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977); *see also State v. Cheadle,* 101 N.M. 282, 681 P.2d 708 (1983), *cert. denied,* 466 U.S. 945, 104 S.Ct. 1930, 80 L.Ed.2d 475 (1984). This slight difference in the name of the victim did not constitute a jurisdictional variance. The instructions correctly detail each of the essential elements of fraud. *See* NMSA 1978, UJI Crim. 16.30 (Repl.Pamp.1982). The instructions adequately alerted him to the offenses charged, the victim involved, and the convictions were supported by substantial evidence.

II. DENIAL OF MISTRIAL

During trial and prior to the close of evidence, the court notified counsel that it had been contacted by a juror. The judge spoke with the juror outside the presence of the parties and made a memorandum of the conversation. The juror reported that another panel member had made remarks which cast doubt on that juror's impartiality, mental stability, and willingness to follow the court's instructions. The juror purportedly stated that her phone was tapped; she was under investigation; the "whole case was a crock;" the state's witnesses were "paid off;" and "they" were trying to get her kicked off the jury. The trial judge asked the reporting juror whether her hearing of these remarks had prejudiced her in any way. The juror responded they had not. The court then spoke to the juror who allegedly made the statements. She denied telling any other juror that she was under "investigation." She admitted being acquainted with and speaking to a defense witness, but she denied speaking about the case. The trial judge excused this juror and reported the matter to counsel. Defendant moved for a mistrial. Following a hearing, the court denied defendant's motion.

After a preliminary showing that unauthorized jury contact has occurred, the court has a duty to inquire into the possibility of prejudice. *State v. Doe,* 101 N.M. 363, 683 P.2d 45 (Ct.App.1983). In a criminal case, however, any private communication between the court and members of the jury, outside the presence of defendant and his counsel, is improper and presumptively prejudicial. *See State v. Gutierrez,* 78 N.M. 529, 433 P.2d 508 (Ct.App.1967); NMSA 1978, UJI Crim. 1.00 (Cum.Supp. 1985); *see also State v. Melton,* 102 N.M. 120, 692 P.2d 45 (Ct.App.1984). This presumption, however, is not irrebuttable. In-

stead, the party resisting a mistrial must show that the communication was harmless and did not affect the verdict. *See State v. Melton.*

After being alerted to the comments of the juror, the trial court questioned the juror who purportedly made the statements. There was no showing that the juror's statement was heard by anyone other than the one juror who reported the incident. The jury member did not participate in deliberations, and there is nothing in the record indicating that any part of this conversation was communicated to other jurors. Determination of whether the presumption of prejudice has been overcome rests within the sound discretion of the trial court. *State v. Ho'o,* 99 N.M. 140, 654 P.2d 1040 (Ct.App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982). After reviewing the record, we find no error in the denial of the motion for mistrial.

III. CONSTITUTIONALITY OF RACKETEERING STATUTE

Defendant challenges the constitutionality of the New Mexico Racketeering Act, Sections 30–42–1 through –6, on a multitude of grounds.

(A) Defendant argues that the racketeering statute is constitutionally infirm because it permits a conviction based upon a standard of proof less than the requirement of "beyond a reasonable doubt." Defendant reasons that since the definition of "racketeering" in Section 30–42–3(A) provides that the offense includes "any act which is chargeable or *indictable*" under the laws of this state involving any of eighteen specifically enumerated felonies, the law does not require proof of guilt by the standard of "beyond a reasonable doubt." (Emphasis added.) Since a *charge* or *indictment* may be returned upon proof of probable cause, defendant contends that a conviction under the Racketeering Act may be based on an improper standard of proof.

Under this contention, defendant seeks to challenge the Racketeering Act on a basis factually different from the situation which is shown from the record. In the present case, defendant was both *indicted* and *convicted* of each of the predicate offenses involved in the offense of racketeering. The instructions given by the trial court properly advised the jury that each element of the offense of racketeering must be established by proof "beyond a reasonable doubt." A constitutional challenge is open only to a person who demonstrates that his constitutional rights are affected by the application of the challenged law. *State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982).

(B) Defendant also asserts the racketeering statute is unconstitutional because it irrationally applies to both legitimate and illegitimate business activities. We disagree. As stated in Section 30–42–2, the purpose of the Racketeering Act "is to eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and the use of legal and illegal enterprises to further criminal activities." Defendant does not explain how the statute prohibits "legitimate business activities." The statute does not condemn legal enterprise, only those enumerated illegal acts which are carried on through the auspices of legal or illegal enterprises. *See* §§ 30–42–3 & –4.

New Mexico's Racketeering Act was patterned after the federal statute, Title IX of the Organized Crime Control Act of 1970 (Racketeer Influenced & Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961 to 1968). The federal RICO Act has withstood numerous challenges to its constitutionality, including assertions that the "statute is unconstitutionally vague." *See United States v. Tripp,* 782 F.2d 38, 42 (6th Cir.), *cert. denied,* —— U.S. ——, 106 S.Ct. 1656, 90 L.Ed.2d 199 (1986), and cases cited therein. Because of the similarity of the two enactments, federal decisions interpreting the federal RICO Act are instructive.

Under the state Act, Section 30–42–4, subsections A, B and C, the offense of racketeering requires proof that defendant

has engaged in a "pattern of racketeering activity." A "pattern of racketeering activity" means participating in at least two other specifically enumerated predicate offenses with the intent to accomplish "any of the prohibited activities set forth in Subsections A through D of Section 30-42-4, NMSA 1978; provided at least one of such incidents occurred after the effective date of the Racketeering Act and the last of which occurred within five years after the commission of a prior incident of racketeering." § 30-42-3. The provisions of the state Racketeering Act are not unconstitutionally vague in proscribing clearly enumerated criminal activities which are perpetrated either through legitimate business or illegitimate business activities. *See United States v. Castellano,* 416 F.Supp. 125 (E.D.N.Y.1975).

(C) Next, defendant argues that the Racketeering Act violates the Due Process Clause of the federal and state constitutions and is overbroad in its application. Defendant contends that the state statute improperly restricts legitimate business activities which are unrelated to the express purpose of the statute. We disagree. Discussing a similar claim, the court in *United States v. Aleman,* 609 F.2d 298 (7th Cir. 1979), *cert. denied,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980), held that the broad scope of the federal RICO statute, which includes both legitimate and illegitimate enterprises, is not void for vagueness.

The offense of racketeering, like the crime of conspiracy, enjoins the use of lawful means to accomplish an illegal purpose. *See State v. Chavez,* 99 N.M. 609, 661 P.2d 887 (1983) (defining conspiracy as a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means). Here, the jury determined that defendant was using a legitimate business to carry out fraudulent activities against banks and insurance companies. Proscription and punishment of this type of activity is clearly within the intended purpose of the statute. The Racketeering Act, as applicable to defendant's convictions herein, is neither vague nor overbroad. *See United States v. Aleman; United States v. Hawes,* 529 F.2d 472 (5th Cir.1976); *see also* Tarlow, *RICO Revisited,* 17 Ga.L.Rev. 291, 313-15 (1982).

(D) Defendant contends that the Racketeering Act violates constitutional guarantees of equal protection because the legislation lacks a reasonable basis. Specifically, defendant claims there is no rational basis for a classification which prohibits the use of both legal and illegal enterprises to further criminal activities.

The test of whether a statute comports with the requirements of due process necessitates a determination as to whether the legislation has a real and substantial relation to the objective sought to be accomplished. *See Torres v. Village of Capitan,* 92 N.M. 64, 582 P.2d 1277 (1978); *see also State v. Collins,* 61 N.M. 184, 297 P.2d 325 (1956). The stated purpose of the Racketeering Act is "to eliminate * * * the use of legal and illegal enterprises to further criminal activities." § 30-42-2. The challenged legislation is reasonably formulated to achieve the proscribed objective. We conclude that the statute passes constitutional muster under both the state and federal constitutions on the grounds raised by defendant.

(E) Defendant claims that punishment for the predicate offense of fraud and additional punishment for the offense of racketeering is impermissible under the constitutional prohibition against double jeopardy, and that under the Racketeering Act, he is being punished twice for the same conduct.

The guarantee against double jeopardy protects against a second prosecution for the same offense, after acquittal or conviction, and against multiple punishments for the same offense. *Tipton v. Baker,* 432 F.2d 245 (10th Cir.1970). *See State v. Spillmon,* 89 N.M. 406, 553 P.2d 686 (1976). "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284

U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In the present case, defendant was charged with racketeering under Count XIX. The charge alleged defendant committed the predicate offenses of fraud as charged in Counts I through XIII, and XV through XVII. The charge of racketeering requires proof of matters in addition to those required by the predicate offenses. *See United States v. Hartley,* 678 F.2d 961 (11th Cir.1982), *cert. denied,* 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); *United States v. Rone,* 598 F.2d 564 (9th Cir.1979), *cert. denied,* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). Racketeering requires proof of a pattern of racketeering activity. *See id.;* 18 U.S.C. § 1962(c); § 30–42–4. Examination of the state Racketeering Act reveals a clear legislative intent to impose cumulative sentencing for the offense of racketeering as well as the underlying predicate offenses. *See United States v. Hartley; see also United States v. Rone.*

(F) Defendant contends that the sentence imposed incident to his conviction for racketeering constitutes cruel and unusual punishment because he was sentenced for each of the predicate offenses of fraud and also received a more severe penalty for racketeering. We disagree. Defendant was separately sentenced for twelve counts of fraud, and one count of conspiracy. These sentences were ordered to be served concurrently with his sentence for racketeering. The sentences imposed were not in excess of the penalties provided by law. The length of sentence is a legislative prerogative. *State v. Archibeque,* 95 N.M. 411, 622 P.2d 1031 (1981). An argument similar to the one advanced by defendant herein was rejected by the court in *United States v. Field,* 432 F.Supp. 55 (S.D.N.Y. 1977). There, the court held that Congress may validly make racketeering an independent criminal offense, punishable separately and apart from the penalty proscribed for each constituent offense.

(G) Defendant also attacks the proportionality of his racketeering sentence arguing that it constitutes cruel and unusual punishment. Defendant does not claim that the sentence enacted by the legislature or that imposed by the court below, is disproportionate to the sentence imposed for the commission of the same offense in other jurisdictions. Instead, defendant argues that an impermissibly greater sentence has been imposed for racketeering than for his convictions of fraud. This argument is flawed. Unlike the Racketeering Act, the fraud statute does not proscribe the commission of criminal acts carried out by a pattern of activity conducted through a legal or illegal enterprise. *See* NMSA 1978, § 30–16–6 (Repl.Pamp.1984). Since the racketeering statute has this proscription, it is reasonable to view racketeering as a more serious offense.

The predicate offenses of fraud do not merge into the offense of racketeering. *See United States v. Hartley; see also* 58 Notre Dame L.Rev. 382 at 391 (1982). The effect of the federal RICO statute is to create a separate offense for the commission of certain crimes, which are themselves indictable, where the predicate crimes are committed by an employee or associate of an enterprise in the conduct of its affairs, through "a pattern of racketeering activity." *Baines v. Superior Court in & for the County of Pima,* 142 Ariz. 145, 688 P.2d 1037 (Ct.App.1984). Included as a separate element in the federal RICO offense is the act of engaging in "a pattern of racketeering activity." 18 U.S.C. § 1962(c). *See Baines v. Superior Court in & for the County of Pima.* A similar provision appears in the state Racketeering Act. §§ 30–42–3 & –4.

In *United States v. Rone, United States v. Truglio,* 731 F.2d 1123 (4th Cir.), *cert. denied,* 469 U.S. 862, 105 S.Ct. 197, 83 L.Ed.2d 130 (1984), and *United States v. Aleman,* the courts, applying federal law, found that the predicate offenses do not merge with the RICO offense. Those decisions were grounded upon the findings of congressional intent. New Mexico's Racketeering Act, we similarly conclude, evinces an implicit legislative intent that the crime of racketeering constitutes a separate and distinct offense apart from the enumerated

predicate crimes. *See* §§ 30–42–3 & –4. Thus, a separately imposed punishment for racketeering, apart from the sentences levied for the predicate offenses, does not constitute double jeopardy. Under New Mexico's Act, engaging in "a pattern of racketeering activity," is a separate element of the offense of racketeering, distinct from the existence of the enterprise and the participation of the individual therein. *See* § 30–42–4.

(H) A further claim of unconstitutionality is grounded upon the argument that the state Racketeering Act conflicts with the habitual criminal statute and, hence, is void. *See* NMSA 1978, § 31–18–17 (Repl.Pamp.1981). Defendant argues that the Act should be declared invalid in order to preserve the enhancement scheme of the Habitual Criminal Act. Defendant misperceives the legislative purpose and plan underlying the Racketeering Act. Defendant's conviction for violating Section 30–42–4(C) of the Racketeering Act constitutes a violation of a substantive offense. The Racketeering Act, as applicable to defendant herein, does not merely enhance the penalty for committing two or more predicate offenses; it punishes for racketeering activities carried out by means of an individual's participation in the affairs of an enterprise. In contrast, the habitual offender proceeding is a sentencing procedure and does not constitute a substantive offense. *State v. James,* 94 N.M. 604, 614 P.2d 16 (1980). There is no conflict between the two enactments.

IV. INSTRUCTIONS

Under this point, defendant argues that his convictions for fraud, under Count I, and racketeering, under Count XIX, are invalid because of the existence of a variance between the instructions and the evidence at trial concerning the dates on which the two alleged offenses occurred.

The indictment charged that the offense of fraud alleged in Count I was committed between December 13, 1981 and January 1, 1982. Instruction No. 3, given to the jury, recited that the charge of fraud, as alleged in Count I, occurred "between December 13, 1982 and January 1, 1983." Defendant asserts that the variance resulted in an irrational verdict and a conviction unsupported by substantial evidence. Defendant argues a failure of proof because the jury was not correctly instructed on the dates of the alleged offense as stated in the indictment.

Defendant failed to alert the court to this contention at trial, and, thus, waived this claim of error. Objections to jury instructions which are not jurisdictional in nature cannot be raised for the first time on appeal when defendant did not alert the court to these objections concerning the instructions at trial. *State v. Martin,* 101 N.M. 595, 686 P.2d 937 (1984); *State v. Garcia,* 99 N.M. 771, 664 P.2d 969, *cert. denied,* 462 U.S. 1112, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983). The claim here is not jurisdictional and does not reach the essential elements of the offenses charged. *Cf. State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct.App.), *rev'd on other grounds,* 90 N.M. 191, 561 P.2d 464 (1977). Moreover, defendant has shown no prejudice. As held in *State v. Pina,* defendant must show that prejudice in fact exists in order to establish reversible error based on a claimed error in the date of the commission of an offense. *See also State v. Selgado,* 78 N.M. 165, 429 P.2d 363 (1967); *State v. Foster.*

In reviewing the discrepancy as to the time frame of the alleged offense, the key question is whether there was a fatal variance between the indictment and the evidence. A variance is not critical unless the accused could not have anticipated from the indictment what the proof would be, or unless a conviction on the indictment would not bar a subsequent prosecution for the same offense. *United States v. Cowley,* 452 F.2d 243 (10th Cir.1971). *See also White v. State,* 610 S.W.2d 504 (Tex.Crim. App.1981) (en banc). Defendant does not contend he was misled or prejudiced in defending on this claim. We find no error.

Defendant also contends that the jury was instructed that they could find him guilty of racketeering if they found him guilty of any two of the fraud counts, even though some of the acts of alleged

fraud occurred outside the time frame of December 13, 1981 to July 28, 1982, as alleged in the racketeering charge. We disagree. The trial court's Instruction No. 21 instructed the jury that they could not find defendant guilty of the offense of racketeering unless they found him guilty of two counts of fraud "as charged in the Indictment." This instruction was not inconsistent with Instruction No. 20. The latter instruction instructs the jury that in order to convict the defendant of racketeering, they must find that defendant committed at least two incidents of fraud between the time period of December 13, 1981 to July 28, 1982. This is the same time frame alleged in the indictment for the charge of racketeering. Jury instructions must be considered as a whole, and the jury is adjured to consider the instructions in their entirety without singling out one instruction or parts of other instructions. NMSA 1978, UJI Crim. 39.42 (Repl.Pamp.1982). *See also White v. State* (twelve-month variance between date alleged in indictment and that contained in instruction held not material where defendant failed to object to the instruction, the jury was not misled, and the instructions when read as a whole, contained the correct date of the alleged offense).

Viewed in their entirety, the instructions properly covered the essential elements of the charged offenses and conformed to the proof presented at trial. *See State v. Coulter,* 84 N.M. 647, 506 P.2d 804 (Ct. App.1973).

V. ERROR IN SENTENCING

At the close of the state's case, the court granted defendant's motion to reduce the claim of fraud alleged in Count XII, from fraud over $2,500, to a claim of fraud in excess of $100, but not more than $2,500. This ruling had the effect of reducing the penalty for the alleged offense from a third degree felony to a fourth degree felony. *See* § 30-16-6.

The basic sentence which may be imposed for a fourth degree felony is eighteen months and, in addition, a fine not to exceed $5,000. NMSA 1978, § 31-18-15 (Repl.Pamp.1981). The trial court, however, sentenced defendant to serve a term of three years imprisonment, with two years of parole on his conviction under Count XII. The state concedes error on this point. We remand for correction of the judgment and resentencing on this count. *See State v. Ross.*

The judgment and sentences are affirmed, except as to Count XII. The case is remanded for correction of the judgment and for resentencing on the charge of fraud, under Count XII of the indictment.

IT IS SO ORDERED.

BIVINS and ALARID, JJ., concur.

728 P.2d 483

Fred A. ROMERO, Plaintiff-Appellant,

v.

COTTON BUTANE CO., INC., and Northwestern National Casualty Company, its insurer, Defendants,

and

Vicente B. Jasso, Superintendent of Insurance of the State of New Mexico, and the New Mexico Subsequent Injury Fund, Defendants-Appellees.

William HATHAWAY, Plaintiff-Appellant,

v.

The ZIA COMPANY, United States Fidelity & Guaranty Company, insurer, Defendants,

and

Vicente B. Jasso, Superintendent of Insurance of the State of New Mexico, and the New Mexico Subsequent Injury Fund, Defendants-Appellees.

Nos. 9082, 9163.

Court of Appeals of New Mexico.

Oct. 28, 1986.

John P. Faure, Santa Fe, for plaintiffs-appellants.

Marshall G. Martin, Orlando Lucero, Poole, Tinnin & Martin, P.C., Albuquerque, for defendants-appellees.

OPINION

FRUMAN, Judge.

This consolidated appeal from the granting of motions for summary judgment in favor of the New Mexico Subsequent Injury Fund raises a question of first impression with regard to the Subsequent Injury Act, NMSA 1978, Sections 52–2–1 through –13.[1] That question is: may a worker, who brings a workmen's compensation action against his employer and its insurer and who also alleges his right to payment from the Subsequent Injury Fund, continue his action against the Fund following a settle-

1. All references to the Subsequent Injury Act are to its provisions prior to being repealed in part and reenacted in part by 1986 N.M. Laws, ch. 22, §§ 45–52, 102 and 1986 N.M. Laws, ch. 57, §§ 1–3.

ment with the employer and insurer? We reverse and remand.

PROCEEDINGS

Each worker filed an amended complaint for workmen's compensation benefits from his respective employer, the employer's compensation carrier, and the Fund. *See* § 52-2-5(A). Each worker alleged that, as a result of his prior injury and disability, his present disability is materially and substantially greater than that which would have resulted solely from his second injury, and thus he was entitled to contributions from the Fund.

Each worker subsequently entered into a stipulation with his employer and its compensation carrier. Each stipulation provided for the settlement of the claims and liabilities of those parties by the payment of workmen's compensation benefits for the injury that arose out of a specified second employment accident. Each stipulation also provided that any rights that the worker may have against the Fund were not to be prejudiced or diminished. The Fund was not a party to and did not sign either stipulation.

Each stipulation for a lump-sum settlement was approved and adopted by the trial court by the entry of judgment. Each judgment also barred any further action by the employer and its insurance carrier against the Superintendent of Insurance and the Fund.

The Superintendent and the Fund then filed a motion for summary judgment against each worker. The motions sought the dismissal of the amended complaints on the theory that the Fund's "liability is derivative from that of the employer and no action can be maintained solely against [the Fund] by [the workmen.]" The trial court found that no issues of material fact existed and that summary judgment would be appropriate as a matter of law. It then granted each motion. Both workers appeal from these orders.

THE WORKERS' POSITION

The workers maintain that the Subsequent Injury Act provides a cause of action against the Fund that is separate and distinct from a cause of action against the employer. In support of this contention, the workers distinguish the Fund's liability from that of the employer. In reliance on this contention, the workers reason that in settling their claims against their employers they did not affect their own rights against the Fund. They also maintain that the Fund should be estopped from denying its liability because it now takes a position inconsistent with the position taken during the settlement process. As this last contention was not presented to the trial court by either worker, it will not be considered for the first time on appeal. *Wolfley v. Real Estate Commission,* 100 N.M. 187, 668 P.2d 303 (1983). The remaining arguments will be discussed below.

THE FUND'S POSITION

The Fund maintains that the Subsequent Injury Act does not permit an injured worker to recover additional compensation benefits from the Fund once he has settled for a lump-sum compensation payment with his employer. This premise is based upon the Fund's interpretation of the Act and upon various appellate decisions. Our interpretation of the Act will follow our discussion of those decisions.

The Fund has referred to various out-of-state decisions for the propositions that the Act only establishes a means to reimburse an employer rather than to pay a worker directly and that the Fund's liability derives only from the employer's liability. The Fund's argument, in effect, is that the Act creates limited rights against the Fund and the workers' claim is not among those rights. We note that *Arduser v. Daniel International Corp.,* 7 Kan.App.2d 225, 640 P.2d 329 (1982), does support these propositions in a factual setting similar to ours. The court determined that the statutory language regarding payments from the fund to the worker was procedural only and did not disclose any right to maintain an action directly against that fund. Thus, the fund's liability was dependent upon and derived from the employer's liability.

The Fund next cites *Cabe v. Popham,* 444 S.W.2d 910 (Ky.1969), which we find distinguishable on several points. The worker first received an award that, in part, ordered the Special Fund to reimburse the employer for a portion of the award. The worker then sued a third-party tortfeasor and subsequently settled that suit. The settlement relieved the employer from further liability for compensation benefits under the initial award and gave the worker an amount that exceeded the amount still owed him under the initial award. The worker then sought direct recovery from the Special Fund for the amount which the fund had previously been ordered to reimburse to the employer. The court held that since the employer's liability had been discharged by the third-party settlement and the fund's liability under the initial award was only for reimbursement to the employer, the fund could not be held liable to the worker.

While *Cabe v. Popham* applied the "derivative liability" principle, Kentucky also requires, by statute, that compensation awarded against the Special Fund is to be paid directly by the employer. More commonly, however, the employer is required to pay only for the disability attributable to the second injury, and the employee must apply directly to a second or subsequent injury fund for his additional compensation. *See* 2 A. Larson, *The Law of Workmen's Compensation,* § 59.31(f) (1983).

From *Levi v. Special Indemnity Fund,* 389 P.2d 620 (Okla.1964), the Fund again extracts the proposition that a second injury fund's liability derives from the employer's liability and that a suit solely against the fund cannot be maintained. The claimant there sought to reopen a prior award from the fund because of a change in his condition, and the court held that he must first obtain a determination of greater disability against his employer before the fund could be held liable for an additional amount. The court also found that a settlement with the employer precluded the claimant from seeking a determination of additional primary liability on the part of the employer. Thus the settlement, in effect, precluded an additional award against the fund. The workers in our case, however, are not seeking to increase a prior award of compensation from the Fund. *See* NMSA 1978, § 52–1–56.

The Fund then cites *White v. Weinberger Builders, Inc.,* 397 Mich. 23, 242 N.W.2d 427 (1976), as further support of its propositions. Regardless of the merits of that case, the Michigan Supreme Court, in *Clark v. Cadillac Gage,* 416 Mich. 38, 94, 330 N.W.2d 376, 379 (1982), limited *White's* "derivative liability" language to that case only and further said: "The fact that the statute provides fund liability only under circumstances wherein it provides employer liability does not convert employer liability into the source of the fund's liability. The only source of liability is the statute."

The concept of "derivative liability" in Michigan has further limitations. In *Truss v. Marian Manor Nursing Home, Inc.,* 327 N.W.2d 923 (Mich.App.1983), the court observed that the principle does not control when the fund's interests differ substantially from that of the employer. The court reaffirmed the rule that the fund's right to appeal is independent of an employer's right to appeal or admit liability.

In addition to the distinctions noted between the Fund's authorities and the circumstances of this case, one additional, primary distinction pertains—none of those authorities construe the New Mexico Subsequent Injury Act. While the decisions from other jurisdictions have been helpful in identifying the issue and suggesting an approach, our own statutory language and cases require a different result.

SUBSEQUENT INJURY ACT

The legislative intent of the Act has been set forth in *Fierro v. Stanley's Hardware,* 104 N.M. 50, 716 P.2d 241 (1986) and in *Gutierrez v. City of Gallup,* 102 N.M. 647, 699 P.2d 120 (Ct.App.1984), *cert. quashed, Jasso v. City of Gallup,* 102 N.M. 734, 700 P.2d 197 (1985), and its legislative history has been discussed in *Vaughn v. United Nuclear Corporation,* 98 N.M. 481, 650 P.2d 3 (Ct.App.), *cert. quashed, Jasso v.*

Vaughn, 98 N.M. 478, 649 P.2d 1391 (1982). Neither will be reiterated here. The basic nature of the Act is to "make the employer liable for only the amount of disability attributable to the second injury, while the Fund pays the difference between that amount and the total amount to which the worker is entitled as a result of both of his injuries." *Gutierrez v. City of Gallup*, 102 N.M. at 650, 699 P.2d at 123.

We interpret the several provisions of the Act as it applies to this appeal in the following manner (the emphasis is added):

1. Section 52–2–2(C): the legislative declaration that the Act makes "a logical and equitable *adjustment* of employer's liability under the Workmen's Compensation Act[.]" The word "adjustment" is commonly understood as meaning a determination and apportionment of an amount due which, in the context of this case, would be the amount of liability due from an employer and from the Fund. *See Black's Law Dictionary* 40 (rev. 5th ed. 1979); *cf. Ditmars—31' Street Development Corp. v. Punia*, 17 A.D.2d 357, 235 N.Y.S.2d 796 (1962).

2. Section 52–2–5(A): the worker, when he is not receiving compensation benefits, may sue his employer and its compensation carrier and may also allege "his *right* to payment from the fund[.]" The normal, customary meaning of "right" is an ascertainable and legally enforceable claim. *Cf. United States v. Byrum*, 408 U.S. 125, 92 S.Ct. 2382, 33 L.Ed.2d 238 (1972).

3. Section 52–2–7: a judgment may authorize lump-sum payments from the fund to reimburse the employer or its carrier "for payments made in excess of his or its *apportioned liability* [.]" More importantly, this section shall not prevent the employer or its carrier "from effecting a lump-sum settlement of his or its liability under the Workmen's Compensation Act[.]" The plain meaning of an "apportioned liability" denotes a determination of relative liabilities. *Cf. Thomas v. Henson*, 102 N.M. 417, 696 P.2d 1010 (Ct.App.1984), *aff'd in part and rev'd in part on different grounds*, 102 N.M. 326, 695 P.2d 476 (1985); *see also Armstrong v. Industrial Electric and Equipment Service*, 97 N.M. 272, 639 P.2d 81 (Ct.App.1981). This meaning also applies to the emphasized words in the next two paragraphs.

4. Section 52–2–11: "*Liability* for payments compensable from the subsequent injury fund shall be *apportioned* between the employer or his insurance carrier and the fund" according to the applicable schedule set forth in this section as established by a judgment. At subsection (E) we find that if the employer or its carrier settles "his or its liability under the Workmen's Compensation Act with court approval, then the installment payments for which the fund is liable shall be paid direct to the person entitled thereto" as specified.

5. Section 52–2–11(F): "the term '*liability shall be apportioned* by the judgment' means": (a) "a judicial determination of the extent of an employer's or his insurance carrier's liability under the Workmen's Compensation Act without regard to any further and additional liability imposed upon him or it by the Subsequent Injury Act and" (b) "a further judicial determination of the benefits to which the employee is entitled to receive as compensation for the combined condition of disability."

In our view, the import of these provisions is that the liability of the Fund to a subsequently-injured worker is coexistent with, rather than derivative from, the liability of the employer and its carrier and that these coexistent liabilities may be addressed separately in settlement. *Cf.* Section 52–2–11(C) (where the employer and its carrier have sole liability to pay all compensation benefits for the first eight weeks for the combined condition of disability or for death). Consequently, a court-approved lump-sum settlement between the worker and his employer or its carrier does not preclude a further adjudication of the Fund's liability to the workman. *See Clark v. Cadillac Gage; Grant v. Neal*, 381 S.W.2d 838 (Mo.1964). A contrary view would have us render the permissive settlement language of Sections 52–2–7 and 52–2–11(E) meaningless. Such a construc-

tion would have us read something into the statutes that is not there, and this we will not do. *Redding v. City of Truth or Consequences,* 102 N.M. 226, 693 P.2d 594 (Ct. App.1984).

Given the statutory requirement for a judicial determination of the coexistent, relative liabilities of an employer and the Fund, we hold that the potential liability of the Fund does not terminate upon a settlement between the worker and his employer, unless, of course, there has been a judicial determination that the Fund is not liable for any portion of the subsequent injury, *see* § 52–2–11(F), or unless the settlement releases the liability of the Fund.

We recognize that in *Smith v. Trailways, Inc.,* 103 N.M. 741, 745, 713 P.2d 557, 561 (Ct.App.1986), this court held that the employer:

> * * * has the burden of proving apportionment between itself and the Fund. Once the worker has established his right to recovery, it makes little difference to him how he is paid. Because the employer or its carrier seeks repayment from the Fund, the burden rests with those parties to prove apportionment.

Since the fact of settlement was not an issue in *Smith v. Trailways, Inc.,* our allocation of the burden upon the employer does not apply here, especially since the employers and their carriers are not seeking repayment from the Fund. The party alleging the affirmative of an issue has the burden of proving that issue. *Smith v. Trailways, Inc.* Therefore, since the workers are the parties who are alleging the affirmative, i.e., the liability of the Fund directly to themselves, they will have the burden of proving that issue.

REMAND

Upon our remand of these actions, each worker will have the initial burden of proving the several requisites for his eligibility for relief under the Subsequent Injury Act as set forth in *Ballard v. Southwest Potash Corp.,* 80 N.M. 10, 450 P.2d 448 (Ct.App.1969). In addition, each appellant will have the burden of establishing the difference between the compensation payable for his combined injury and the compensation that would have been payable as a result of the second injury alone. That difference will be the measure of the Fund's liability. *See Smith v. Trailways, Inc.; Gutierrez v. City of Gallup.* At that hearing, the amount previously awarded by the court-approved settlement between each worker and his employer need not equate to the amount of compensation, if any, that is due as a result of the second injury alone. *See Clark v. Cadillac Gage.*

Therefore, these causes are remanded to the trial court to set aside both orders granting summary judgment in favor of the Fund and for further proceedings consistent with this opinion. Attorney fees are not being awarded at this time. *See Phelps Dodge Corp. v. Guerra,* 92 N.M. 47, 582 P.2d 819 (1978).

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

728 P.2d 488

Loretta MEDINA, Plaintiff-Appellant,

v.

ORIGINAL HAMBURGER STAND, and United Pacific Insurance Co., Defendants-Appellees.

No. 9155.

Court of Appeals of New Mexico.

Oct. 28, 1986.

Roger V. Eaton, Messersmith, Eaton & Keenan, Albuquerque, for plaintiff-appellant.

John P. Massey, Butt, Thornton & Baehr, P.C., Albuquerque, for defendants-appellees.

OPINION

BIVINS, Judge.

Plaintiff appeals from a judgment dismissing her claim for worker's compensation benefits. As a result of our decision in *Fierro v. Stanley's Hardware,* 104 N.M. 401, 722 P.2d 652 (Ct.App.1985), *rev'd on other grounds,* 104 N.M. 50, 716 P.2d 241 (1986), holding a psychologist could not render "expert medical testimony" as to causation under NMSA 1978, Section 52–1–28(B), the trial court disallowed plaintiff's osteopathic physician from rendering expert medical testimony as to causation. This appeal presents the question of whether the trial court erred in disallowing that testimony. We hold it did and reverse.

Section 52–1–28(B) provides:

> In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a *medical probability by expert medical testimony.* No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists. [Emphasis added.]

We focus on the emphasized phrase "medical probability by expert medical testimony." May an osteopathic physician licensed under NMSA 1978, Sections 61–10–1 to –21 (Repl.1986) qualify to give expert medical testimony as to causation under Section 52–1–28(B)? In answering that question in the affirmative, we address here only the statutory language, that is, whether osteopaths, as a profession, are by definition qualified to give causation testimony. We are not concerned with the individual qualifications of an osteopath since that is a matter to be determined by the trial court. *See Sturgeon v. Clark,* 69 N.M. 132, 364 P.2d 757 (1961).

In holding that psychologists did not qualify under Section 52–1–28(B), *Fierro* relied primarily on the provisions of the Professional Psychologist Act, NMSA 1978, Sections 61–9–1 to –18 (Repl.1986), and specifically Section 61–9–17 thereof which prohibits psychologists from engaging in the practice of medicine as defined by the laws of this state. In *Fierro,* to demonstrate that the practice of medicine did not include psychology, we cited to NMSA 1978, Section 61–6–15 (Repl.1986) which defines the "practice of medicine." Instead of comparing that definition with the definition of the "practice of psychology" as found in Section 61–9–3(D), we took a shortcut and simply noted that the legislation covering medicine and surgery as contained in NMSA 1978, Sections 61–6–1 to –28 (Repl.1986) did not apply to or affect the practice of psychology. § 61–6–16(F)(6). The problem caused by that reference, as applied to this case, comes about because the same section says Sections 61–6–1 to –28 shall not apply to or affect the practice of osteopathy. § 61–6–16(F)(1).

No doubt the trial court in the case before us saw no reason to make any distinction between the practice of osteopathy and the practice of psychology since both are excluded from the provisions of the act governing medicine and surgery under Section 61–6–16(F)(1) and (6). Defendants forcefully argue for that distinction on appeal. By taking the shortcut and relying in part on Section 61–6–16(F), the rationale in *Fierro* broke down. We take this opportunity to fix it.

Had we compared the definition of "practice of medicine" as defined in Section 61–6–15 with the definition of the "practice of psychology" under Section 61–9–3(D) in light of the plain language of Section 52–1–28(B), we would have determined that "expert medical testimony" does not include psychologists. When a statute is free from ambiguity, there is no room for construction and it is to be given effect as written. *Grauerholtz v. New Mexico Labor & Industrial Commission,* 104 N.M. 674, 726 P.2d 351 (1986). Also, absent clearly expressed legislative intent requiring otherwise, words or phrases in a statute will be given their usual, ordinary meaning. *Tafoya v. New Mexico State Police Board,* 81 N.M. 710, 472 P.2d 973 (1970). Thus, we reached the correct result in *Fierro.*

We note, however, that Section 61–6–16(F) excepts the listed professions from the general licensing requirements of Article 6 (medicine and surgery). Chapter 61 provides separate licensing requirements for the listed professions. These professions are not necessarily excluded from the practice of medicine; rather, we must look to the specific definition of each profession to determine if it involves the practice of medicine.

Applying the same approach here, we reach a different result. Again, Section 61–6–15 defines the practice of medicine. Section 61–10–14, dealing with the privileges of osteopathic physicians and surgeons, provides in part:

> Osteopathic physicians and surgeons licensed hereunder shall have equal rights, privileges and obligations in the handling of cases and rendering of medical services in all branches and phases of the healing arts as are accorded or permitted physicians and surgeons of other schools of practice; that such general rights shall extend to the rendering of medical services under the provisions of public health, welfare, assistance laws and other fields of public medicine, and no regulations shall be made with respect thereto limiting, excluding or discriminating against osteopathic physicians and surgeons.

When those provisions are compared, we see no basis for excluding osteopaths, as a profession, from giving expert medical testimony under Section 52–1–28(B).

Defendants attempt to make distinctions in education and training between medical physicians and surgeons and osteopathic physicians and surgeons, referring us to *Munroe v. Wall,* 66 N.M. 15, 340 P.2d 1069 (1959), which upheld a declaratory judgment that the governing board of a public hospital did not have to afford osteopathic physicians and surgeons the same treatment as is given to doctors of medicine. We are not concerned here with distinctions between the professions. We are only concerned with the question of whether, by statutory construction, an osteopath qualifies to give expert medical testimony. We hold osteopathic physicians and surgeons may give expert medical testimony under Section 52–1–28(B).

Plaintiff raised two additional issues. Commendably, both have been resolved which allows us to focus on the true controversy. One issue challenged the trial court's findings which plaintiff interpreted to exclude her expert's testimony on the language used in expressing his opinions as well as his lack of qualifications to testify as a medical expert. Although it is not clear that the trial court excluded the testimony on any ground other than qualifications, defendants concede, and we agree,

that it is not the choice of words that is at issue; rather, it is whether an osteopathic physician qualifies as an "appropriate speaker." We hold he does.

Finally, plaintiff challenged the disallowance of medical expenses, claiming that failure to prove disability would not necessarily require disallowance of otherwise legitimate medical bills. Without admitting liability, defendants paid these expenses after the brief-in-chief had been filed.

We reverse and remand with directions to complete the trial of this case in accordance with this opinion.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

728 P.2d 833

STATE of New Mexico, Petitioner,

v.

Melvin Ray SUMMERALL, a/k/a Melvin Ray Sears, Respondent.

No. 16388.

Supreme Court of New Mexico.

Oct. 30, 1986.

Paul Bardacke, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for petitioner.

William A. L'Esperance, Albuquerque, for respondent.

OPINION

RIORDAN, Chief Justice.

Defendant was convicted of residential burglary and conspiracy to commit residential burglary. He appealed his conviction, and the Court of Appeals reversed and remanded for a new trial. The State petitioned this Court for certiorari. We reverse the Court of Appeals and reinstate defendant's conviction.

The facts surrounding defendant's arrest and conviction are adequately set out in the Court of Appeals' opinion. At trial, a codefendant by the name of Michael Barela (Barela) was granted immunity in exchange for his testimony against defendant. This grant of immunity, however, contained a grant of immunity from prosecution for perjury committed while Barela testified in defendant's trial. The Court of Appeals correctly concluded that such a grant of immunity is contrary to New Mexico law. *See* NMSA 1978, Evid.R. 412 (Repl.Pamp. 1983); NMSA 1978, § 31-6-15 (Repl.Pamp. 1984). The Court of Appeals stated that: "[t]he trial court cannot give a witness permission to perjure himself by an immunity order under [NMSA 1978,] Crim.P. Rule 58 (Repl.Pamp.1985), Evid. Rule 412, and Section 31-6-15." *State v. Summerall,* 25 SBB 556, 558, 728 P.2d 835, 838 (Ct.App.1986). On the basis of the defective grant of immunity, the Court of Appeals held that the trial court had committed plain error and therefore reversed defendant's conviction. It is with this portion of the Court of Appeals' opinion that we disagree.

For plain error to exist, " 'grave errors which seriously affect substantial rights of the accused,' 'errors that result in a clear miscarriage of justice,' [and] errors that 'are obvious or * * * otherwise seriously affect the fairness, integrity, or pub-

lic reputation of judicial proceedings,'" must be committed. *State v. Marquez,* 87 N.M. 57, 61, 529 P.2d 283, 287 (Ct.App.), *cert. denied,* 87 N.M. 47, 529 P.2d 273 (1974), (quoting *United States v. Campbell,* 419 F.2d 1144, 1145 (5th Cir.1969)). A defendant must show prejudice before a claim of plain error can stand. *See State v. Olguin,* 88 N.M. 511, 513, 542 P.2d 1201, 1203 (Ct.App.1975).

In the instant case, Barela testified under the defective grant of immunity. Contrary to the implication in the opinion of the Court of Appeals that defendant's conviction [was] based on such testimony, Barela's testimony was completely exculpatory of defendant. He testified that defendant was not involved in the burglary. Defendant claimed on appeal that the mere fact that Barela testified under a defective grant of immunity was grounds for plain error and the Court of Appeals agreed. However, as stated previously, a defendant must show prejudice before a claim of plain error can stand. *Id.* We determine that defendant failed to show any prejudice resulting from Barela's exculpatory testimony given under the defective grant of immunity. Nor were any of defendant's substantial rights affected by Barela's testimony. *See State v. Marquez,* 87 N.M. at 60, 529 P.2d at 286.

We reverse the Court of Appeals and hold that, despite the defective grant of immunity given to Barela, his subsequent testimony under that grant of immunity was not prejudicial to defendant. Therefore, no plain error occurred, and defendant's conviction is hereby reinstated.

We also take this opportunity to point out that Section 31–6–15 applies only to immunity for testimony before grand juries and not to immunity for testimony at trial. The Court of Appeals stated that "[t]aken together, Crim.P. Rule 58, Evid. Rule 412, and Section 31–6–15 (formerly NMSA 1978, Section 31–3A–1 (Cum.Supp. 1981)), give the trial court the authority to grant use immunity * * *." *State v. Summerall,* 25 SBB at 558, (citing *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct. App.), *cert. denied,* 98 N.M. 478, 649 P.2d 1391 (1982)). However, in *State v. Romero,* 96 N.M. 795, 635 P.2d 998 (Ct.App.1981) (certiorari not applied for), the defendants asserted that Section 31–3A–1 (presently compiled as 31–6–15) did not authorize the grant of use immunity except for grand juries. The Court of Appeals stated:

> Laws 1979, ch. 337 contains thirteen sections; twelve of those sections refer to proceedings before the grand jury. The one section that does not refer to grand jury proceeding is § 10, on use immunity, compiled as § 31–3A–1.

State v. Romero, 96 N.M. at 796, 635 P.2d at 999. The title of 1979 N.M.Laws, ch. 337 is "Relating to Grand Juries; Providing Safeguards and Improving Procedures." Section 31–3A–1 was compiled erroneously independently of the sections on grand juries. But in 1982, it was recompiled as Section 31–6–15 and included under the title of grand juries. *Compare* NMSA 1978, § 31–3A–1 (Cum.Supp.1981) *with* NMSA 1978, § 31–6–15 (Cum.Supp.1982). Read in light of the title requirements of N.M. Const. art. IV, Section 16, Section 31–6–15 must apply only to grand juries. This does not overrule *State v. Sanchez,* or *State v. McGee,* 95 N.M. 317, 621 P.2d 1129 (Ct.App.1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981). When *Sanchez* and *McGee* were decided, Section 31–6–15 was compiled as Section 31–3A–1 and not included under the title of grand juries. From the placement of the statute at the time these cases were decided, it could not be inferred that the statute applied only to grand juries. With the recompilation, the statute clearly does now.

IT IS SO ORDERED.

FEDERICI and WALTERS, JJ., concur.

STOWERS, J., specially concurs.

SOSA, Senior Justice dissents and adopts the Court of Appeals opinion as his dissent.

STOWERS, Justice, specially concurring.

I concur with the result reached by this Court, but write separately to emphasize

that we do not condone defective grants of immunity. In *State v. Boeglin,* 100 N.M. 470, 471, 672 P.2d 643, 644 (1983), this Court held that implicit in every grant of immunity in return for testimony is the condition that the witness testify truthfully or be subject to prosecution for perjury or contempt. The Legislature clearly intended to impose that condition when it enacted NMSA 1978, Section 31–6–15 (Repl.Pamp. 1984), just as this Court intended when it promulgated NMSA 1978, Evid. Rule 412 (Repl.Pamp.1983). The district court's authority under NMSA 1978, Crim.P. Rule 58 (Repl.Pamp.1985) is limited to the issuance of orders of immunity that properly embody this principle, and defective grants of immunity should not be permitted or approved.

The plain error rule, however, should be applied with caution and invoked only to avoid a miscarriage of justice. *State v. Marquez,* 87 N.M. 57, 61, 529 P.2d 283, 287 (Ct.App.), *cert. denied,* 87 N.M. 47, 529 P.2d 273 (1974) (quoting *United States v. Robinson,* 419 F.2d 1109, 1111 (8th Cir. 1969). The Court of Appeals here held that it was plain error to give Barela "a license to lie" and a miscarriage of justice to allow a conviction "possibly based on court-authorized perjury" to stand. *State v. Summerall,* 25 SBB 556, 560 (Ct.App. 1986). A review of the record indicates that Barela's testimony was exculpatory of defendant. This Court concluded Barela's testimony could not possibly have formed the basis for defendant's conviction, which was supported by the other evidence in the record.

I agree with the majority of the Court that, under the extraordinary circumstances of this case, although the order of immunity was erroneous the testimony presented under the defective grant of immunity in no way contributed to a miscarriage of justice. The plain error rule therefore should not be invoked here, and I concur in the Court's decision to reverse the Court of Appeals decision and to affirm defendant's conviction.

728 P.2d 835

STATE of New Mexico, Plaintiff-Appellee,

v.

Melvin Ray SUMMERALL, a/k/a Melvin Ray Sears, Defendant-Appellee.

No. 8629.

Court of Appeals of New Mexico.

March 25, 1986.

Paul G. Bardacke, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

William A. L'Esperance, Albuquerque, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from his convictions for residential burglary and conspiracy to commit residential burglary. Defendant was charged with one count of residential burglary, in violation of NMSA 1978, Section 30–16–3(A) (Repl.Pamp.1984); one count of larceny over $2,500, in violation of NMSA 1978, Section 30–16–1 (Repl.Pamp. 1984); and one count of conspiracy to commit burglary, in violation of NMSA 1978, Section 30–28–2 (Repl.Pamp.1984). Count II was later changed to larceny over $100. Defendant was acquitted of count II, and convicted of counts I and III. Defendant filed a timely notice of appeal and docketing statement. The case was placed on the limited calendar.

Defendant raises only one issue on appeal: whether the trial court erred in ordering immunity from perjury for a co-defendant witness. We agree that the trial court's order deprived defendant of a fair trial. We reverse the trial court, and remand for a new trial.

FACTS

The facts surrounding defendant's indictment follow. We have drawn these facts from defendant's docketing statement, and the state does not dispute them. On February 15, 1984, Charles Sanchez saw a vehicle pull up to his neighbor's house at 2308 Headingly, N.W., in Albuquerque. One man got out, rang the doorbell, and then got back into the car. The car then turned and disappeared into a ditch bank. Sanchez called the owner of the house at 2308 Headingly, and the owner called the police.

The police responded to the call and went to the ditch bank near the house. They found defendant's car parked along the ditch bank. He had a rag in his hands. Defendant claimed he was by himself. The police found wallets belonging to Paul Torres and Michael Barela in defendant's car. Torres and Barela were seen running from the house at 2308 Headingly, and items from the house were found on Torres and Barela when they were apprehended.

Testimony and exhibits indicated that the burglary scene was not visible from the location of defendant's vehicle. Defendant testified that he had given his co-defendants a ride that day and that he was waiting for them. He said he thought they were going to buy drugs.

The charges against the co-defendant Barela were dropped as part of a plea agreement. On May 3, 1985, defendant moved for an order compelling a statement from Barela because Barela refused to talk to defense counsel. On May 8, 1985, the assistant district attorney applied for a grant of immunity for Barela. Immunity from prosecution for perjury was granted on May 9, 1985. The order appears to read as follows:

ORDER OF IMMUNITY

This matter coming before the Court on the application of the State for a grant of immunity for Michael Barela, the Court being fully advised by the argument of counsel,

HEREBY FINDS:

> That Michael Barela be granted immunity from prosecution [for] perjury as a result of his testimony in this cause based on Rule 58 Criminal Procedure and is and is [sic] therefore ordered to testify.
>
> s/ Joseph Baca
> District Judge

The order was also "read" to the jury at the request of defense counsel at trial. Judge Baca spoke as follows:

> There has been an application for a grant of immunity by the District Attorney's Office, and an order signed by this court:
>
> This matter coming before the court on the application of the state for a grant of immunity for Michael Barela, the court, being fully advised by the arguments of counsel, hereby finds:
>
> That Michael Barela be granted immunity from prosecution for his testimony, based on Rule 58 of the Criminal Rules of Procedure, and is hereby ordered to testify and any perjury as a result of his testimony ... that he would be granted immunity from prosecution for perjury.

The order granting immunity to Michael Barela forms the basis of this appeal.

Barela was given immunity because his counsel told the court he would refuse to answer questions unless he was given immunity. The court granted the immunity because Barela had given two prior statements, not under oath, which were inconsistent with each other. The court felt that any statement given at trial would be inconsistent with at least one of those, and expose Barela to a perjury charge. The court felt that immunity was proper under the circumstances, based on NMSA 1978, Crim.P.Rule 58 (Repl.Pamp.1985). Defense counsel did not object to the grant of immunity at trial.

DISCUSSION

Defendant argues that the witness, Barela, was granted use immunity, and that is not authorized under New Mexico law. Defendant argues that the grant of immunity was plain error because, interpreting it as he did, it gave the witness a license to lie on the stand. Under the theory advanced by defendant, the orders recited above gave the witness immunity from prosecution for perjury for any testimony that the witness might give at the trial of defendant. Defendant contends that the grant of immunity did away with the requirement that Barela testify truthfully at trial, and so defendant was denied his fifth amendment rights.

The state argues that the issue was not preserved for review because defendant failed to object at trial. The state also argues that defendant failed to show how he was prejudiced by the immunity order, and so defendant has no fundamental or plain error claim on appeal.

It is clear from the record that the trial court, through its immunity order, was encouraging Barela to testify. Also, under Crim.P. Rule 58, "the district court * * * may * * * issue a written order requiring [a] person to testify * * * notwithstanding his privilege against self-incrimination." Crim.P.R. 58. Under Evidence Rule 412, "[e]vidence compelled under an order requiring testimony * * * may not be used against the person compelled to testify * * in any criminal case, except a prosecution for perjury committed in the course of the testimony * * *" NMSA 1978, Evid.R. 412 (Repl.Pamp.1983). These rules taken together create the witness immunity generally available in New Mexico. In addition, NMSA 1978, Section 31-6-15 (Repl.Pamp. 1984), codifies it.

Taken together, Crim.P. Rule 58, Evid. Rule 412, and Section 31-6-15 (formerly Section 31-3A-1 (Cum.Supp.1981)), give the trial court the authority to grant use immunity when it is applied for by the prosecutor. *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct.App.1982). Defendant argues that only transactional immunity is authorized under the rules. That is not correct.

> In 1979, the Legislature passed a statute covering immunity. Section 31-3A-1, N.M.S.A. 1978 (1980 Supp.) [identical to present Section 31-6-15], provides only

> for use and derivative use immunity * * Under *Campos v. State,* 91 N.M. 745, 580 P.2d 966 (1978), a grant of immunity is governed by the Rule of Criminal Procedure only in the absence of applicable statute. Rule 58 [which used to authorize transactional immunity] was * * * amended to conform to the statute * *

State v. McGee, 95 N.M. 317, 320, 621 P.2d 1129, 1132 (Ct.App.1980). The trial court, therefore, under both Crim.P. Rule 58 and Section 31–6–15, only had the authority to grant the witness use immunity.

> "Use" immunity means that "the witness' testimony or any information derived from such testimony may never be used against the witness in a subsequent prosecution. Under a statute authorizing 'use and derivative use' immunity, the witness may still be prosecuted for the offense to which the compelled testimony relates. However, the prosecution would have the burden of proving that the evidence it proposed to use was 'derived from a legitimate source wholly independent of the compelled testimony.' "

Sanchez, 98 N.M. 428, 433 n. 3, 649 P.2d 496, 501 n. 3 (quoting 3 Wharton's Criminal Procedure § 409, at 94 (12th ed. C. Torcia 1975)).

A witness may not be given permission to testify untruthfully in any immunity order.

> There is no basis in the statute [§ 31–6–15(A)] for the contention that the legislative intent was other than to have a witness testify truthfully whatever his status when he takes the witness stand. Furthermore, the very purpose of the granting of immunity is to reach the truth. * * *
>
> Implicit in Section 31–6–15(A) is the fact that a witness must testify truthfully or be subject to being prosecuted (1) for perjury committed in such testimony or in producing such evidence, or (2) for contempt for failure to give an answer or produce evidence. To hold otherwise would make this statute meaningless.

State v. Boeglin, 100 N.M. 470, 471, 672 P.2d 643, 644 (1983) (citations omitted). The trial court cannot give a witness permission to perjure himself by an immunity order under Crim.P. Rule 58, Evid. Rule 412, and Section 31–6–15.

It appears that immunity may be given from prosecution for past perjury. There is no New Mexico case on the subject, but other jurisdictions have ruled on the issue. In *People v. Baker,* 88 Cal.App.3d 115, 124, 151 Cal.Rptr. 362, 367 (1978), the court held:

> It is clear that the order granting immunity from prosecution for any perjury committed up to, but not including the trial testimony, was proper. [The witness] was not forced to lie at trial * * * for she was granted immunity from prosecution for perjury she committed before the Grand Jury. [The witness'] only obligation was to testify truthfully at trial.

In *In re Contempt Findings Against Schultz,* 428 N.E.2d 1284 (Ind.App.1981), the court, after finding that its statute authorized only use immunity, held that it did not protect defendant from perjury committed during his testimony. The court did find, however, that "[a]s to any perjury antedating the immunity order, the [trial] court's grant of use immunity would apparently protect [defendant] from being prosecuted for this perjury based upon the testimony he was compelled to give at [his co-defendant's] trial." 428 N.E.2d at 1289–1290. In *State v. Richards,* 457 So.2d 1124 (Fla.App.1984), the court held that witnesses must testify when their testimony is immunized. The court held that:

> [w]hile any testimony which these witnesses give at trial under the grant of immunity may not be used as evidence against them in a prosecution for perjury by making inconsistent or contradictory statements, these witnesses are not entitled to immunity from *prosecution.* They may be prosecuted for committing perjury during their trial testimony providing only that their trial testimony is proved to be perjurious by independent proof rather than by merely showing

> that it conflicts with prior testimony, and they may be prosecuted for perjury for making any previous sworn statement so long as the statement is proved perjurious by other than the use of the witnesses' immunized trial testimony.

Id. at 1125 (emphasis in original). The trial court's intent may have been to grant the witness immunity for prior perjurious statements. The immunity order, however, had the effect of immunizing the witness from prosecution for false statements he might make at trial.

While it seems that immunity may be given for past perjury, our statute clearly prohibits immunity from perjury in connection with present testimony. The trial court, therefore, had authority to give Barela immunity for past perjury, but not for perjury committed during defendant's trial.

Either the court gave the witness use immunity consistent with Crim.P. Rule 58, Evid. Rule 412, and Section 31–6–15, or it did not. If it did not, it appears to have given transactional immunity, or immunity from perjury committed in the cause, not authorized under New Mexico law. As noted previously, Crim.P. Rule 58 and Evid. Rule 412 create a procedure for use immunity. The witness in this case was granted "immunity from prosecution [for] perjury as a result of his testimony in this cause based on Rule 58 Criminal Procedure." Criminal P. Rule 58 was cited as the basis for this order in both its written and oral forms.

The parties also seemed to understand that transactional immunity was granted to the witness. This is evident from the questioning of the witness by both the prosecutor and defense counsel:

> DEFENSE COUNSEL: That's right, Mr. Barela, so you did get some promise for your testimony—
>
> BARELA: That I wouldn't get charged for this charge.
>
> DEFENSE COUNSEL: And you can't be prosecuted for perjury, isn't that right?
>
> BARELA: Yeah.
>
> DEFENSE COUNSEL: Even if you lie, but you stood up there and took an oath to tell the truth, right?
>
> BARELA: Yeah.
>
> DEFENSE COUNSEL: Even though you know you can't be prosecuted for lying. Isn't that right?
>
> BARELA: Yes.

A similar exchange took place later with the prosecutor:

> PROSECUTOR: Now, Mr. Barela, the immunity you received for testifying here today, that goes to anything you say here today while you're on the stand. Is that right?
>
> BARELA: Yes.
>
> PROSECUTOR: And that was done on the advice of your attorney, right?
>
> BARELA: Yes.
>
> PROSECUTOR: And the immunity you were given didn't have anything to do with past charges did it? Or does it? [Pause] The immunity you were given for testifying today, anything you might say here today, does not apply to past charges, right?
>
> BARELA: I don't think so.

The parties appear to view the order as granting the witness immunity from a perjury prosecution which might result from testimony given at the trial of defendant. In other words, the parties seemed to think Barela was given immunity for his testimony at the trial, not for the statements he made prior to trial. If this is the case, Barela was, in effect, given a "license to lie" on the stand.

An immunity order which gives the witness a "license to lie" is plain error and defendant's conviction, based on such testimony, must be reversed. Plain error was defined in *State v. Marquez,* 87 N.M. 57, 529 P.2d 283 (Ct.App.1974). " 'Plain error' has been characterized in various ways such as 'grave errors which seriously affect substantial rights of the accused,' 'errors that result in a clear miscarriage of justice,' errors that 'are obvious or * * * otherwise seriously affect the fairness, integrity, or public reputation of judicial pro-

ceedings.' " *Id.* at 61, 529 P.2d at 287, quoting *United States v. Campbell,* 419 F.2d 1144 (5th Cir.1969). A plain error claim may be raised for the first time on appeal. NMSA 1978, Evid.R. 103(d) (Repl. Pamp.1983); *State v. Lara,* 88 N.M. 233, 539 P.2d 623 (Ct.App.1975). Under Evid. Rule 103(d), the claim must relate to some evidentiary ruling of the trial court. *State v. Wall,* 94 N.M. 169, 608 P.2d 145 (1980); *State v. Sanchez,* 86 N.M. 713, 526 P.2d 1306 (Ct.App.1974). That was the case here because the witness' testimony was only available because of the immunity ruling. Otherwise, the testimony would not have existed at all. Defendant's claim relates to an evidentiary ruling because it is based on an order to a witness to testify. It may be raised for the first time on appeal.

" '[T]he plain error rule should be applied with caution, and invoked only to avoid a miscarriage of justice.' " *State v. Marquez,* 87 N.M. 57, 61, 529 P.2d 283, 287, quoting *United States v. Robinson,* 419 F.2d 1109 (8th Cir.1969). In this case, it would be a miscarriage of justice to allow a conviction possibly based on court-authorized perjury to stand. Such a conviction would be based on "obvious error" and would "seriously affect the integrity of the judicial proceedings." *See Marquez.* If the witness was given immunity from prosecution for perjury committed at defendant's trial, it is clear that plain error occurred.

Therefore, defendant's conviction is reversed and the cause remanded for a new trial.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

728 P.2d 840

In the Matter of Walter NAILS, An attorney admitted to practice before the Courts of the State of New Mexico.

No. 16610.

Supreme Court of New Mexico.

Nov. 25, 1986.

Virginia Ferrara, Chief Disciplinary Counsel, Randall Van Vleck, Deputy Disciplinary Counsel, Albuquerque, for Board.

Houston Ross, George Morrison, Albuquerque, for respondent.

OPINION

PER CURIAM.

This matter is before this Court after disciplinary proceedings conducted pursuant to NMSA 1978, Rules Governing Discipline (Repl.Pamp.1985) wherein attorney Walter Nails was found to have committed numerous violations of NMSA 1978, Code of Professional Responsibility (Repl.Pamp. 1985), arising out of an incident unrelated to his practice of law. We adopt the Disciplinary Board's findings and conclusions as well as accept its recommendation that Nails be suspended from the practice of law for a period of at least six (6) months.

In January 1985, Nails shared a law office with another attorney who had a client named Steve Duran. Duran, an automobile mechanic, happened to be present in the office one afternoon when Nails' car refused to start. At Nails' request, Duran towed the vehicle to his shop and performed the necessary repairs. When these were completed, Duran drove to Nails' office and gave him a ride to the shop to get his car. Upon arrival, Nails stated to Duran that he had forgotten his checkbook but would pay Duran the $111.29 for repairs the following day. Although Duran was not in the habit of extending credit, he felt that Nails, as an attorney, was someone who could be trusted so Duran released the car.

For several days, Duran attempted without success to reach Nails and obtain payment. On January 9, 1985, he finally went to Nails' office and waited there until he was given a check by Nails. Duran went directly to the bank where Nails' account was located and attempted to cash the check. He was advised that there were insufficient funds in the account. Bank records and testimony at the hearing indicated that the account was overdrawn by ninety-two cents ($.92) on that date and that Nails had been advised of this problem by the bank. It is obvious that Nails was aware of the situation when he wrote the check to Duran. No funds sufficient to cover the check to Duran were deposited in the account until January 26, 1985.

Duran returned to the bank on at least two subsequent occasions, and each time the check was dishonored. He then called Nails to discuss the problem, but Nails refused to speak with him. On January 14, 1985, Duran went to Nails' office with his brother and personally advised Nails that unless payment was forthcoming he would repossess the automobile pursuant to his rights under NMSA 1978, Section 48-3-1(B). Nails again refused to discuss the matter. Duran and his brother immediately proceeded to prepare the car to be towed, at which point Nails telephoned the police and reported that his car was being stolen. When the police arrived and became apprised of all the facts, Duran was allowed to take the automobile.

Thereafter, Nails made no efforts to pay Duran. In April 1985, Duran hand-delivered to Nails a letter advising him of the mounting storage charges and requesting that he either claim his vehicle by paying the amount owed or transfer title to Duran

so he could sell the car and apply the proceeds to the bill. Nails ignored this letter.

On June 12, 1985, Duran filed a *pro se* action against Nails in Metropolitan Court seeking payment of the bill, which by then, had arisen considerably. Nails answered the allegations, denying that work had been performed by Duran or that money was owed. At a pre-trial conference in September, 1985, Nails represented to Judge Diane del Santo that he would transfer title of the car to Duran so that it could be removed from storage and sold to keep charges from accruing. He also advised the judge that the reason his check to Duran had not been honored by the bank was because he had stopped payment on it.

Nails never did transfer title to Duran, and his statements concerning the check were blatant misrepresentations.. At a trial held in October, 1985, Nails presented no evidence in support of his position, as stated in his Answer. Judgment was entered for Duran in the amount of $1,649.45 plus interest, but has yet to be fully satisfied despite the issuance of three (3) writs of execution.

The matter was referred to the Disciplinary Board by the judge, who enclosed with her letter the taped transcript of the trial as well as copies of the pleadings in the case. Nails was contacted by Disciplinary Counsel on November 6, 1985, and asked to address the problem. Nails requested a copy of the taped transcript and more specific information regarding the nature of the complaint. The tape was provided. Thereafter, Disciplinary Counsel advised Nails more precisely of the judge's concerns and what disciplinary rules could be involved. Nails responded by demanding that the judge personally state her concerns in writing, accused Disciplinary Counsel of substituting her opinion for the complainant's, and insisted that his due process rights were being violated. Disciplinary Counsel wrote two more letters to Nails in which she explained that she was simply conducting an initial investigation pursuant to NMSA 1978, Disc.Brd.P.Rule 8(c) (Repl.Pamp.1985), and requesting that Nails address the allegations against him. Nails did not respond to these letters.

On January 31, 1986, Nails was advised that records pertaining to his checking account for the period of January, 1985, were being subpoenaed. At this point, Nails responded by threatening Sunwest Bank with legal action if the subpoena was honored. He also accused Disciplinary Counsel of being unfit to conduct an investigation and threatened her with legal action if she attempted to "tamper" with his bank records. He, however, filed no motion to quash the subpoena.

Nails' conduct toward Duran, the Court, Sunwest Bank, and Disciplinary Counsel is violative of Code of Prof.Resp.Rules 1–101(C), 1–102(A)(3), 1–102(A)(4), 1–102(A)(5), 1–102(A)(6), 7–102(A)(1), 7–105(A) and 7–106(C)(6).

This case raises several issues which we will address separately.

Nails claims that the Disciplinary Board had no authority to investigate any allegations which involved actions occurring outside of the scope of his professional capacity and that this Court may not discipline him for personal conduct not involving his practice of law. Nails overlooks NMSA 1978, Rules Governing Discipline, Rule 10 (Repl.Pamp.1985) (emphasis added), which directs in part that it is the duty of any attorney licensed by this Court "to conduct himself *at all times, both professionally and personally,* in conformity with standards imposed upon members of the bar" and that acts or omissions which violate the Code of Professional Responsibility provide grounds for discipline "whether or not the act occurred in the course of an attorney-client relationship."

This is not to say that the Disciplinary Board and this Court will take action against an attorney for an ordinary display of human foibles or act as a collection agency when he or she is delinquent in meeting personal financial obligations. If, however, an attorney engages in fraudulent acts or other conduct prejudicial to the

administration of justice or reflecting adversely upon his or her fitness to practice law, then the attorney can and will be disciplined regardless of the context in which the misconduct occurs. We have taken this position in the past and will continue to do so. *See Matter of Quintana,* 103 N.M. 458, 709 P.2d 180 (1985) (among other violations, threatening a neighbor with criminal prosecution in an argument concerning a boundary separating their property); *In re Norrid,* 100 N.M. 326, 670 P.2d 580 (1983) (failure to file income tax return); *In re Rickard,* 93 N.M. 35, 596 P.2d 248 (1979) (fraudulent filing of insurance claim); and *In re Morris,* 74 N.M. 679, 397 P.2d 475, 17 A.L.R.3d 681 (1964) (involuntary manslaughter resulting from driving while intoxicated).

Nails also has asserted the position that his right to due process was violated by the failure of the initial written complaint to state with specificity the precise acts which the complainant deemed violative of the Code of Professional Responsibility. Nowhere is it mandated that a complainant must adhere to any particular formula when filing a complaint with the Disciplinary Board. Obviously, when an attorney is asked to respond to a complaint he or she must be given some idea of the nature of the alleged problem in order to provide any meaningful information with respect to his or her position. The attorney, however, does not need to know what the complainant personally views as a violation of a particular disciplinary rule. To require potential complainants to phrase their allegations with legal precision would be unreasonable and would discourage members of the public from bringing their concerns about an attorney's conduct to the attention of the disciplinary board. Many complaints are by laymen unversed in the law.

Furthermore, the complainant is not a real party to any action commenced before the disciplinary board. The purpose of attorney discipline is not to litigate any cause of action that someone may have against an attorney nor to provide personal remedies to complainants. The purpose of attorney discipline is to protect the public and the profession from unscrupulous attorneys. It is disciplinary counsel rather than the complainant who, in the final analysis, must make the determination whether there is probable cause to believe that an attorney's actions might be violative of a particular rule of the Code of Professional Responsibility.

In the instant case, the complainant included with her complaint copies of documents from the court file and a copy of the trial transcript, all of which were provided to Nails. Disciplinary Counsel also complied with Nails' demands for more specific information by discussing the matter with the complainant and, thereafter, advising Nails of the particulars of her concerns. Pursuant to NMSA 1978, Disciplinary Board Rules of Procedure, Rule 8(c) Nails had the right to be advised of the general nature of the allegations against him and to be given a reasonable opportunity to respond. He was accorded these rights. Pursuant to Code of Professional Responsibility Rule 1–101(C), Nails had the duty to give his full cooperation and assistance to disciplinary counsel in discharging her duty to investigate the complaint against him. He offered no cooperation or assistance whatever, and charges were filed only after his obdurate refusal to supply any explanation for his actions.

If Nails felt that he had a valid Fifth Amendment privilege, then he could have asserted it. Similarly, if he felt that the subpoena for his bank records had been improvidently issued, then his remedy was to apply to this Court to have the subpoena quashed pursuant to NMSA 1978, Disc.Brd. P.Rule 7(d) (Repl.Pamp.1985). Simply threatening Disciplinary Counsel and criticizing the disciplinary process in general will not relieve an attorney of his or her duty to cooperate during investigations into allegations of misconduct.

IT IS THEREFORE ORDERED that Walter Nails be and hereby is suspended from the practice of law for a peri-

od of at least six (6) months pursuant to NMSA 1978 Rules Governing Discipline, Rule 11(a)(2) (Repl.Pamp.1985).

IT IS FURTHER ORDERED that prior to any application for readmission Nails must show proof that he has taken and passed the Multistate Professional Responsibility Examination and paid the costs of this action and fully complied with all of the requirements of NMSA 1978, Rules Governing Discipline, Rule 17 (Repl.Pamp. 1985).

If he has done this prior to the expiration of the six-month period, reinstatement will be automatic in six (6) months; otherwise, he will not be automatically reinstated until such time as he has taken and passed the examination.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court forthwith strike the name of Walter Nails from the roll of those persons permitted to practice law in New Mexico and that this Opinion be published in the *New Mexico Reports* and in the State Bar of New Mexico *News and Views.*

Costs of this proceeding in the amount of $915.45 are assessed against Nails and must be paid to the Disciplinary Board on or before May 1, 1987.

IT IS SO ORDERED.

RIORDAN, C.J., SOSA, Senior Justice, and FEDERICI, STOWERS and WALTERS, JJ., concur.

[redacted]

728 P.2d 1364

STATE, ex rel. J.Y. Jr. McADAMS and Annie McAdams, Petitioners,

v.

DISTRICT COURT OF the EIGHTH JUDICIAL DISTRICT, State of New Mexico, Respondent.

No. 16545.

Supreme Court of New Mexico.

Dec. 10, 1986.

Jones, Gallegos, Snead & Wertheim, James G. Whitley, Santa Fe, for petitioners.

Keleher & McLeod, Arthur O. Beach, Albuquerque, Ray A. Floersheim, Robert S. Skinner, Raton, for real parties in interest.

OPINION

FEDERICI, Justice.

This action arose out of an alleged default on a promissory note. Real party in interest Buena Vista Land and Cattle Company (Buena Vista), plaintiffs below, brought this mortgage foreclosure suit against real parties in interest Donald and Cherry Reif (Reifs), who executed the promissory note and who are the mortgagors, and against petitioners, the alleged guarantors of the note. Buena Vista seeks a judgment establishing the debt, requiring a foreclosure sale, and ordering a deficiency against Reifs and petitioners.

Petitioners filed an amended answer and cross-claim together with a timely jury demand. Petitioners' amended answer denied any liability under the alleged guaranty and raised several legal defenses to Buena Vista's complaint. Buena Vista filed a motion to strike petitioners' jury demand. The motion was granted. Petitioners then filed in this Court their petition for writ of mandamus, or, alternatively, for writ of prohibition and/or writ of superintending control, seeking to have their jury demand reinstated. We issued the alternative writ. We now make the writ permanent in part, and quash the writ in part.

The issue before us is whether under the facts of this case petitioners are entitled to a jury trial of their alleged guarantor liability and of their liability for any deficiency judgment. We hold that under *Evans Financial Corp. v. Strasser*, 99 N.M. 788, 664 P.2d 986 (1983), petitioners are entitled to a jury trial of these issues since their guarantor liability is a legal issue independent of the foreclosure suit.

Two New Mexico cases are particularly pertinent to the issue before us, *Strasser* and *Young v. Vail*, 29 N.M. 324, 222 P. 912 (1924) (overruled in part in *Strasser*). In *Young*, the Court held that in a suit to foreclose a mortgage, the parties have no right to a jury trial of the issue of indebtedness, nor of the issue of deficiency. The Court also held that a defendant in a foreclosure suit who voluntarily interposed a cross-complaint of a legal nature was not entitled to a jury trial of the issues raised thereby. No issue of guarantor liability was presented by the facts of *Young*.

In *Strasser*, the Court held:

> When the applicable rule of procedure requires or allows the defendant to assert as a counterclaim any claim he has against the plaintiff if it arises out of the subject matter of the original action, the defendant is entitled to a jury trial of the legal issues presented in the counterclaim.

99 N.M. at 791, 664 P.2d at 989. *Young* was specifically overruled in *Strasser* to the extent it was inconsistent with this holding (i.e., to the extent *Young* held that a defendant in a foreclosure suit who voluntarily interposed a cross-complaint of a legal nature was not entitled to a jury trial of the issues raised thereby). No issue of guarantor liability was presented by the facts in *Strasser*.

[redacted] *Young* is still good law to the extent it held that there is no right to jury trial of *incidental legal issues* in a foreclosure suit. By "incidental legal issues" we mean legal issues which are necessarily decided in the foreclosure suit. A legal issue which is necessarily decided in a foreclosure is either one upon which the right to foreclose depends, or one which is disposed of in the course of the equitable proceeding. To illustrate, in *Young*, the Court pointed out that "the existence of a present indebtedness on the part of the defendants is the very foundation of the right to foreclose," 29 N.M. at 353, 222 P. at 917–18, and reasoned that since "[t]he issue of indebtedness * * * was an issue lying across the very threshold of the chancellor's jurisdiction to decree a foreclosure * * * the parties were not entitled to a jury for the trial thereof." *Id.* at 355, 222 P. at 918. Likewise, since the *amount* of any deficiency merely follows from the amount of indebtedness and the amount received at the foreclosure sale, it being a matter of simple calculation, the amount of any deficiency is a matter which is necessarily decided in, and therefore incidental to, the foreclosure suit.[1]

This interpretation of *Young* is consistent with *Strasser*. *Strasser* dealt with whether there was a right to jury trial of *independent legal issues* raised by compulsory counterclaim in a foreclosure suit. By "independent legal issues" we mean legal issues which are not necessarily controlling or decided in the foreclosure suit. To illustrate, in *Strasser*, to accomplish the foreclosure, the trial court established the debt,

1. We distinguish between a determination concerning the amount of any deficiency, and a determination concerning who, other than the primary debtor, is liable for said deficiency.

required a foreclosure sale and determined, by simple calculation, the amount of any deficiency. The findings and judgment of the trial court concerning the equitable issues did not depend on a prior adjudication of the legal issues raised by the counterclaim, nor did the equitable proceeding dispose of the legal issues raised by the counterclaim. Therefore, the issues raised by the counterclaim were independent legal issues and the parties were entitled to a jury trial thereof.

Similarly, whether petitioners in this case are liable as guarantors for any deficiency is a legal issue independent of the foreclosure. Buena Vista's right to foreclosure is not dependent on a prior adjudication of petitioners' liability as guarantors for any deficiency. Neither is petitioners' liability as guarantors for any deficiency an issue which will be disposed of during the foreclosure. We therefore hold, consistent with *Strasser,* that petitioners are entitled to a jury trial of their alleged liability as guarantors and of their alleged liability as guarantors for any deficiency.

Nevertheless, the New Mexico authorities, including *Strasser,* have held that when legal and equitable issues are joined in a lawsuit the trial court should first decide the equitable issues, and then if any independent legal issues remain, those issues may be tried to a jury upon appropriate request. *See, e.g., Martinez v. Mundy,* 61 N.M. 87, 295 P.2d 209 (1956) (overruled in part in *Strasser*). We reaffirm this rule. It has the salutary effect of facilitating separation of independent legal issues from essentially equitable causes of action.

The trial court erred in granting Buena Vista's motion to strike petitioners' jury demand insofar as the independent legal issue of whether petitioners are liable as guarantors and are subject to a deficiency judgment. However, the trial court did not err in ruling that the equitable issues relating to the foreclosure and the incidental legal issues of indebtedness and amount of any deficiency for which Reifs may be liable should first be tried to the court. Thereafter, petitioners are entitled to a jury trial on the question of their liability as guarantors and whether they are subject to a judgment for any deficiency.

In reaching this result, we note that Buena Vista has represented that no personal money judgment subject to immediate execution is sought against either Reifs or petitioners and that it seeks to hold petitioners liable as guarantors only for the amount of any deficiency.

The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

RIORDAN, C.J., SOSA, Senior Justice, and STOWERS, J., concur.

WALTERS, J., specially concurs.

WALTERS, Justice (specially concurring).

I agree that judges should decide equitable issues and juries should decide legal issues when both are presented in a trial before a jury. I do not agree that in all cases any equitable issue must *first* be decided by the trial judge. It appears unwise to me to adopt an inflexible rule of procedure without extensive study or consideration of all possible circumstances that might invoke a reverse order of determining the separate issues.

728 P.2d 1366

Freddie SANCHEZ, Plaintiff-Appellant,

v.

NATIONAL ELECTRIC SUPPLY CO., Employer, and State Farm Insurance Co., Insurer, Defendants-Appellees.

No. 9315.

Court of Appeals of New Mexico.

Oct. 30, 1986.

Roger V. Eaton, Messersmith, Eaton & Keenan, Albuquerque, for plaintiff-appellant.

Randal W. Roberts, Farlow, Simone, Roberts & Weiss, P.A., Albuquerque, for defendants-appellees.

OPINION

BIVINS, Judge.

Having found that plaintiff suffered no disability as a result of his alleged work-related injury, and that defendants had paid all temporary compensation due, as well as medical expense, the trial court entered judgment against plaintiff. From that judgment plaintiff appeals. In his docketing statement plaintiff raised two issues. We proposed summary affirmance on both. Plaintiff's memorandum in opposition challenged summary disposition only as to the second issue: "Whether Plaintiff was prejudiced by the failure of the Defendants to provide Plaintiff's counsel with a copy of Dr. Schultz's independent medical report dated December 5, 1985, until said report came to the attention of Plaintiff's counsel at trial during the testimony of Dr. Miller." That is the sole issue on appeal. *See* NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 501(a)(2) (Cum.Supp.1985). We affirm.

During cross-examination of defendants' medical expert, Dr. Miller, plaintiff's counsel discovered in that physician's file a copy of a report from Dr. Schultz dated December 5, 1985. After asking Dr. Miller several questions about the report and concluding his cross-examination, plaintiff's counsel objected to an independent medical examination having been performed by Dr. Schultz without plaintiff being furnished a copy of the report. He also objected to being unable to conduct additional discovery based on the report. Counsel claimed prejudice by not having the report. Defense counsel's response implied that the report had not been furnished to plaintiff's counsel because defendants did not intend to call Dr. Schultz as a witness. The trial court ruled that it would not "abort this proceeding" because of the failure to obtain a copy of the report. The trial court did, however, admit the report since Dr. Miller indicated "some reliance" on it and plaintiff's counsel had had no opportunity to explore the report. The trial court noted that having the report in evidence would take care of any prejudice. Dr. Miller injected that he placed no reliance on Dr. Schultz's report and had not seen the report when he expressed his opinion. The trial court indicated that its notes reflected Dr. Miller had relied on the report. No objection was made to the admission of the report in evidence. Although plaintiff's objection asked for no specific relief, the trial court treated it as a motion for continuance and we will do likewise.

Contrary to defendants' argument, we believe the issue was properly preserved for review. Although the trial court apparently considered the question as a disclosure of a fact underlying an expert opinion, *see* NMSA 1978, Evid. Rule 705 (Repl. Pamp.1983), counsel's objection sufficiently

alerted the trial court that a claim of prejudice was being made by not having received a copy of the report and by not having had an opportunity to pursue further discovery. The trial court felt that having the report in evidence cured any possible prejudice. Although not necessary to the resolution, a review of Dr. Miller's testimony reveals that he had early testified that he "reviewed" Dr. Schultz's report, but did not say when. He later clarified that the report was received a year after his opinion had been formulated.

While we do not condone defense counsel's failure to provide opposing counsel with a copy of Dr. Schultz's report, that failure does not require reversal. Plaintiff and his attorney were aware of the independent medical examination conducted on October 25, 1985, yet never requested or demanded the results before the trial which commenced on April 3, 1986. It was only during the examination of Dr. Miller that plaintiff's counsel, while looking through the witness's file, accidentally found the report. Although NMSA 1978, Section 52–1–51(G) requires the claimant be furnished with a copy of the report, failure to comply does not automatically require a continuance. In this case, defendants' failure to provide the report is not reversible error. Error to be reversible must be prejudicial. *State v. Wright,* 84 N.M. 3, 498 P.2d 695 (Ct.App.1972).

A review of the report does not suggest any prejudice to plaintiff in not having it before trial. Dr. Schultz did not recommend psychological testimony because he believed plaintiff was suffering from that problem; he recommended it in order "to see *if* we are dealing with any type of significant functional overlay." (Emphasis added.) Dr. Schultz, like other physicians who had examined plaintiff, could find no basis for his complaints. The recommendation for psychological testing, as with other recommendations made, was not suggestive of an opinion of the existence of other alternative sources for the complaints. The clear import of the letter indicates that all of the recommendations were made in an effort to try and solve an enigmatic problem: What is the basis for plaintiff's complaints? Undoubtedly, the lack of any indication of prejudice in the report prompted the trial court to admit it into evidence. Plaintiff did not object.

In answering plaintiff's claims, we note that plaintiff never requested a copy of the report; that Dr. Schultz's report was not surprise evidence offered by the defense at trial; that the record clearly shows that it was plaintiff, not the defense, who brought up the report; that Dr. Miller did not rely on the report in formulating his opinion; and that there is no indication the trial court relied on the report in deciding the issues.

Those factors, alone or cumulatively, distinguish this case from *Camp v. Bernalillo County Medical Center,* 96 N.M. 611, 633 P.2d 719 (Ct.App.1981), and other cases relied on by plaintiff. *See, e.g., Springett v. St. Louis Independent Packing Co.,* 431 S.W.2d 698 (Mo.Ct.App.1968). Moreover, the proper procedure, as reflected in several of the cases, is to refuse admission of the nondisclosed evidence. *See, e.g., Springett.* That would have been proper here, but defendants did not offer the report and had no intention of doing so. Of course, if their failure to provide a copy was intentional and willful, proper sanctions are available under the Code of Professional Conduct and under NMSA 1978, Civ.P. Rule 37 (Repl.Pamp.1980). We are not concerned here with sanctions, only with the question of whether plaintiff should have been granted a continuance.

We disagree that plaintiff was prevented from adequately preparing for trial. He and his counsel were aware of the examination in October 1985, yet took no steps to seek information as to the results either by discovery or motion, a factor considered in several of the cases cited by plaintiff. We do agree that plaintiff has a right to full access to all information regarding his medical condition. Nothing prevented plaintiff from obtaining this in the five-month span between the examination and trial.

Finally, it has long been the rule that denial of a motion for continuance is discretionary and, absent clear abuse, an appellate court will not reverse. *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982). Plaintiff argues he has no obligation to demonstrate abuse in the form of prejudice. We disagree. Given that plaintiff made no effort to obtain the report, that it was not utilized as evidence against plaintiff, and that the information contained therein was insubstantial, we are unable to say the trial court abused its discretion in denying plaintiff's request for a continuance.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

MINZNER and FRUMAN, JJ., concur.

728 P.2d 1369

Dorothy K. GONZALES, Plaintiff-Appellant,

v.

MOUNTAIN STATES MUTUAL CASUALTY CO., and Penasco Independent Schools, Defendants-Appellees

No. 8855.

Court of Appeals of New Mexico.

Nov. 4, 1986.

James A. Burke, Santa Fe, for plaintiff-appellant.

Peter N. Ives, Campbell & Black, P.A., Santa Fe, for defendants-appellees.

OPINION

GARCIA, Judge.

This is a workmen's compensation appeal involving the computation of the disabled worker's average weekly wage, the denial

of prejudgment interest and the award of attorney's fees.

FACTS

Plaintiff was an owner-operator of a school bus and, pursuant to a contract, transported school children for the Penasco Independent School System (defendant). Plaintiff suffered an injury causally related to her employment. As a result, she was found to be totally disabled by the trial court.

The owner-operator transportation contract was based on a detailed and comprehensive formula developed by the State Transportation Department and the Director of Public School Finance, covering various categories and projected expenses. The contract required that plaintiff provide, maintain and operate a bus for a specified number of days and provide transportation for school children over a designated route. In return, plaintiff would receive the total sum of $12,055.71 for the 180 day school year, payable in ten monthly installments.

The contract amount was based on the aggregate amount entered into a production worksheet. The production worksheet breaks down the amounts to be paid to the owner-operator of the bus into seven categories: (a) vehicle depreciation allowance; (b) operation and maintenance; (c) profit on operational revenue; (d) fuel allowance; (e) driver's salary and institute increment; (f) employee benefits; and (g) gross receipts tax.

In fixing plaintiff's average weekly wage, the trial court considered only that portion of plaintiff's contract within the category "driver's salary and institute increment," $4,002.73, paid in ten equal monthly installments. By multiplying that figure by twelve and dividing it by fifty-two, the court determined that plaintiff's average weekly wage was $92.37 and, pursuant to NMSA 1978, Section 52-1-41(A), her disability entitlement was set at $61.58.

During the contract year, plaintiff operated and maintained her bus at a cost far below that provided in the projected expenses and realized a net profit of $3,842.60 over and above her salary and institute increment.

Defendant has no requirement that the funds it allocates for the individual categories be actually spent. Defendant does not monitor the owner-operator's operation and maintenance records nor does defendant require that any specific amount of money be expended for any particular purpose so long as the buses operate according to applicable rules and regulations. In the event operation and maintenance costs exceed the projected expenses contained in the contract, the owner-operator is required to pay all additional expenses without reimbursement. Similarly, defendant testified "[T]he contractor [owner-operator] is paid the set contract amount and I would imagine that if the contractor has lesser expenses than those for which he or she were remunerated by their school district, that they do whatever they want with it." In this case, plaintiff kept the excess profits and utilized them for her own personal benefit. Plaintiff precisely calculated her excess profits and reported them to defendant and to the Internal Revenue Service for tax purposes.

The evidence also indicates that for social security and educational retirement purposes, defendant reported sixty percent, or $7,233.43 as "salary" on plaintiff's personnel forms. Finally, evidence was presented to indicate that for purposes of workmen's compensation premium computations, defendant reported only the driver's salary paid, including institute increments.

ISSUES

(1) Whether the trial court erred in finding that plaintiff's salary for workmen's compensation purposes was $4,002.73;

(2) Whether the trial court abused its discretion in denying plaintiff's request for prejudgment interest; and

(3) Whether the trial court abused its discretion in awarding plaintiff $8,000 as attorney fees.

ANALYSIS

Once the trial court determines that a worker is disabled and entitled to com-

pensation benefits, its task is to determine the worker's average weekly wage. Compensation benefits paid to disabled workers are computed in accordance with the various formulae contained in NMSA 1978, Section 52–1–20. In relevant part, Section 52–1–20(A) defines wages as:

> [T]he money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, either express *or implied,* and shall not include gratuities received from employers or others, nor shall it include the amounts deducted by the employer under the contract of hire for materials, supplies, tools and other things furnished and paid for by the employer and necessary for the performance of such contract by the employee, but the term "wages" shall include the reasonable value of board, rent, housing, lodging or any other similar advantages received from the employer, the reasonable value of which shall be fixed and determined from the facts in each particular case[.] [Emphasis added.]

In this appeal, plaintiff contends that the trial court erred in failing to consider other portions of the contract, apart from the driver's salary and institute increment, in calculating her average weekly wage. Specifically, because plaintiff was able to earn excess profits during the contract year and gained an economic advantage, she contends that those profits, or portions thereof, should be included in the calculation. We agree.

The general rule touching on this issue is stated by Larson in his treatise on workmen's compensation. He writes:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips and bonuses, and room and board, constituting real economic gain to the employee. A car allowance is includable as wage only if it exceeds actual travel expenses.

2 A. Larson, *The Law of Workmen's Compensation,* § 60.12 (1983).

This general rule was adopted in New Mexico in *Hopkins v. Fred Harvey, Inc.,* 92 N.M. 132, 584 P.2d 179 (Ct.App.), *cert. denied,* 92 N.M. 180, 585 P.2d 324 (1978). The question in *Hopkins* was whether tips were wages to be considered for purposes of determining the rate of compensation. In addressing the question, *Hopkins* indicates that Larson's general rule is applicable to Section 52–1–20(A). The rule requires that the court consider anything of value received as consideration for work when such consideration constitutes real economic gain to the employee. The *Hopkins* opinion determined that the tips involved came under the general rule and concluded that those tips should have been considered in calculating wages because they were intended by the parties to be further compensation for services rendered.

While the precise issue in *Hopkins* differs from the issue presented in the case on appeal, we deal with the same essential principle: has plaintiff received something of value under the contract constituting real economic gain that should be included in the calculation of her wages?

For wage calculation purposes, a distinction is drawn between the "real economic gain" test for the worker and dollar-for-dollar reimbursement paid by the employer. The former may be included in the wage calculation; the latter may not. This distinction is noted in *Thibeault v. General Outdoor Advertising Co.,* 114 Conn. 410, 158 A. 912 (1932). The court in *Thibeault,* in considering whether a daily allowance for board and lodging of plaintiff-employee when he was out of town should be included in his weekly earnings, set out the general test which was to guide later courts in addressing similar questions: "In each case the test to be applied is, Does the allowance represent a real and reasonably definite economic gain to the employee, reasonably within, or at least not contrary to, the fair intent of the parties?" *Id.* at 913.

For example, cases decided since *Thibeault* essentially follow the view that employer provided meals help a workman meet his personal expenses and, therefore, represent a real economic gain. Yet, when an employee is merely reimbursed for amounts he is called to spend in the course of his employment and activities which he has no occasion to pursue when not employed, the amount so paid cannot be regarded as part of his earnings. *See Rusty Pelican Restaurant v. Garcia,* 437 So.2d 754 (Fla.App.1983); *Lavin v. Alton Boxboard Co.,* 431 So.2d 202 (Fla.App.1983); *Rhaney v. Dobbs House, Inc.,* 415 So.2d 1277 (Fla.App.1982); *Fairway Restaurant v. Fair,* 425 So.2d 115 (Fla.App.1982); *Bananno v. Employer's Mutual Liability Insurance Co. of Wisconsin,* 299 So.2d 923 (La.App.1974).

The case of *Moorehead v. Industrial Commission,* 17 Ariz.App. 96, 495 P.2d 866 (1972) dealt with the issue of whether travel expenses paid by an employer should be included in the workman's average weekly wage. The appellate court disallowed inclusion of monies paid for mileage expenses in the average monthly wage of the injured workman. The court held:

> We think the principle to be derived from the foregoing is that "wages" do not include amounts paid to the employee to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment. Such payments are simply not intended as compensation for services rendered. Before any part of such allowances or reimbursements can be considered as a part of the employee's "wages" there should be some showing that the payments are more than sufficient to reimburse the employee for the work-related expense so that in effect the excess can be considered as extra compensation to the workman for his services performed.

Id. at 99, 495 P.2d at 869.

In our present case, plaintiff argued to the trial court that the entire sum received under the contract should be included in her wage base. Plaintiff's argument is not supportable by law. When an employer reimburses an employee for expenses incurred, that reimbursement is not to be included as part of the employee's wages for compensation purposes. *Cf. Thompson v. Cloud,* 166 So.2d 28 (La.App.1964). On the other hand, the cases indicate that when an employer provides remuneration in excess of actual expenses and the employee is free to keep the excess for his own use, the employee has received an economic advantage which may be considered as part of his wages for compensation purposes. *See Thibeault; Weingarten v. Democrat & Chronicle,* 19 A.D.2d 566, 239 N.Y.S.2d 980 (1963).

With the evidence presented, it is clear that portions of the payments under the contract reimbursed plaintiff for actual expenses incurred in operating and maintaining the bus. Those dollar-for-dollar reimbursements may not be included in the calculation of the worker's average weekly wage. It is equally clear that plaintiff received more than her salary and dollar-for-dollar reimbursement and was able to "pocket" the difference between what was paid and her actual expenses in providing, operating and maintaining the bus. This difference constitutes a real economic gain to plaintiff and constitutes extra compensation which may properly be included in plaintiff's wage calculation.

The *Hopkins* standard that additional compensation be within the contemplation of the parties is met here. Defendant reported sixty percent of plaintiff's total contract price for social security and educational retirement purposes. This amount, $7,233.43, was very close to the actual amount earned by plaintiff by combining her salary and institute increment with her excess profit, much closer than her salary and institute increment standing alone. Also, defendant neither monitored plaintiff's expenditures nor expected a payback of any excess. Therefore, the additional economic gain realized by plaintiff by virtue of operating and maintaining the bus below the production worksheet estimates

constituted an implied compensation within the meaning of Section 52–1–20(A).

The Workmen's Compensation Act is to be liberally construed in favor of the injured worker so as to insure the full measure of the worker's exclusive statutory remedy. *Evans v. Stearns-Roger Manufacturing Co.*, 253 F.2d 383 (10th Cir.1958). A primary purpose of the Act is to keep injured workers from becoming dependent on the welfare programs of the state by compensating them with some portion of the wages they would have earned had it not been for the work-related disability. *Casias v. Zia Co.*, 93 N.M. 78, 596 P.2d 521 (Ct.App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979); *see also Aranda v. Mississippi Chemical Corp.*, 93 N.M. 412, 600 P.2d 1202 (Ct.App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979). We determine the court's exclusion of the funds paid to plaintiff which did not constitute a dollar-for-dollar reimbursement denied the injured worker benefits authorized under the Workmen's Compensation Act. Accordingly, we remand this matter to the trial court for a redetermination of plaintiff's average weekly wage. Plaintiff presented evidence concerning her net profit over and above her salary and institute increment for the school year 1981–82. The trial court may wish to consider that testimony, or take additional testimony to accurately determine which portions of the transportation contract constitute actual reimbursement for expenses incurred and which portions are properly includable in plaintiff's average weekly wage.

PREJUDGMENT INTEREST

■ Plaintiff contends the trial court erred in refusing to award prejudgment interest. NMSA 1978, Section 52–1–38(B) provides in part that judgments in worker's compensation cases: "[S]hall be governed by the laws of this state with respect to judgments or executions in civil cases * * " NMSA 1978, Section 56–8–4(B) (Repl.1986) permits an award of prejudgment interest in civil actions in the discretion of the trial court. The statute requires that the court consider whether plaintiff was the cause of unreasonable delay and further requires the court to consider whether reasonable and timely offers of settlement were made.

In denying plaintiff's request for prejudgment interest, the trial court found defendants acted in good faith in defending against plaintiff's "aggressively presented" computation of weekly wage claim; that defendants were required to spend an "inordinate [amount of] time" in defending against plaintiff's claim; that plaintiff's position concerning wage computation was "unduly emphasized time-wise;" and that a timely offer of settlement was made to plaintiff before trial.

By virtue of our disposition of the wage calculation issue, the basis for the trial court's denial of prejudgment interest no longer stands. We do not substitute our own judgment for that of the trial court in determining whether prejudgment interest should or should not be awarded. Because we vacate the judgment and remand the case for a recomputation of plaintiff's entitlement, the trial court will have another opportunity to consider whether an award of prejudgment interest is proper in this case.

ATTORNEY FEES

■ Plaintiff complains that the trial court abused its discretion in its award of fees. The trial court denied plaintiff's additional award of attorney fees because she was unsuccessful in her attempt to establish plaintiff's average weekly wage at a higher level. Because we have determined the trial court erred in its wage calculation and remand for a redetermination of benefits, it will be necessary to reconsider the attorney fee award. Additionally, plaintiff's pursuit of a higher wage claim is no longer unsuccessful and the trial court may properly consider this, together with the other *Fryar v. Johnsen*, 93 N.M. 485, 601 P.2d 718 (1979) factors, in setting a reasonable attorney fee. We award plaintiff $2,000 as a reasonable appellate attorney fee.

Reversed and remanded.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

729 P.2d 503

Fabian SANDOVAL, Plaintiff-Appellant,

v.

UNITED NUCLEAR CORPORATION, Employer, and the Travelers Insurance Company, Insurer, Defendants-Appellees.

No. 8968.

Court of Appeals of New Mexico.

Oct. 30, 1986.

Avelino V. Gutierrez, Avelino A. Gutierrez, Gutierrez Law Offices, Albuquerque, for plaintiff-appellant.

Robert Bruce Collins, Thomas S. Udall, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for defendants-appellees.

OPINION

GARCIA, Judge.

Plaintiff appeals the termination of his worker's compensation benefits. Our calendaring notice proposed summary reversal. Defendants filed a timely memorandum in opposition and the case was assigned to the limited calendar. After consideration of the parties' briefs, we view our preliminary analysis as correct and reverse the trial court.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, a citizen of Mexico, was employed at defendant United Nuclear's uranium mine near Grants, New Mexico. In 1977, he suffered a serious, crushing leg injury during a mine cave-in. In a subsequent worker's compensation proceeding, he was found to be totally and permanently disabled and entitled to compensation benefits.

In the fall of 1983, plaintiff was indicted by a federal grand jury on charges of importation of heroin, possession with the intent to distribute heroin and unlawful distribution of a controlled substance. Following his arrest, he posted an appearance bond and was released from custody. Plaintiff returned to Mexico and failed to appear for trial. The federal district court forfeited his appearance bond and plaintiff was indicted on a new charge related to bail-jumping.

In November of 1983, defendants filed a motion to terminate worker's compensation benefits pursuant to NMSA 1978, Section 52–1–56 stating that plaintiff's disability had terminated and he was no longer entitled to benefits. In their responses to interrogatories, defendants indicated that the basis for their motion to terminate benefits was plaintiff's involvement in "other work," namely heroin trafficking. Defendants filed notice to take plaintiff's deposition. Plaintiff responded by filing a motion to stay the deposition, or in the alternative, to require that discovery be by way of written interrogatories. The trial court denied plaintiff's requests and ordered that the deposition be taken as scheduled.

Plaintiff did not appear for the deposition. Plaintiff's counsel informed defendants that plaintiff had moved and he did not have plaintiff's new address. Plaintiff's counsel claimed that plaintiff did not have notice of the deposition. Due to plaintiff's non-appearance, defendants sought and obtained, as a discovery sanction, an order terminating further compensation benefits. Plaintiff appealed.

This court reversed the trial court's order by a memorandum opinion which was filed on March 21, 1985, (Ct.App. No. 7675). We noted that defendants failed to comply with a mandatory two-step procedure to obtain discovery under NMSA 1978, Section 52–1–34 since they had not filed a motion seeking court approval for discovery nor had the trial court determined that good cause existed and that the evidence to be obtained would be material. Further, this court determined the trial court's order failed to find that plaintiff had actual notice of the scheduled deposition and that the order failed to make a finding that plaintiff had willfully, in bad faith, or through his own fault, failed to appear for the deposition. Our memorandum indicated that trafficking in heroin was not "any work" within the meaning of the Workmen's Compensation Act, and that defendants, therefore, could not base a Section 52–1–56(A) review on that claim. Un-

der these circumstances, we concluded the termination of benefits, as a sanction under NMSA 1978, Civ.P. Rule 37(D) (Repl.Pamp. 1980), was improper. A mandate was issued, sending the case back for further proceedings and findings consistent with our decision.

Following remand, defendants filed a motion to undertake discovery. After a hearing, the trial court issued an order pursuant to Section 52–1–34 in which it found that good cause existed for the taking of plaintiff's deposition, for an independent medical evaluation and for a vocational skills analysis of plaintiff, and that the evidence sought in the deposition would be material to the issues of the case. The trial court directed that plaintiff present himself to the forum for deposition.

Two days prior to the scheduled deposition, plaintiff, through counsel, filed a new motion to stay the deposition and medical evaluation. In the motion, plaintiff's counsel argued that plaintiff could not enter the United States under the provisions of the United States Code in that he was an excludable alien pursuant to 8 U.S.C.A. Section 1182(a)(23) (West 1970). In addition to this contention, plaintiff's counsel sought to stay the deposition on grounds previously argued and denied: evidence of involvement in drug trafficking was not material to the termination of disability; drug trafficking was not employment; plaintiff had a constitutional right to remain silent; it would be oppressive and burdensome for him to come to the United States from Mexico to attend the deposition; that he was innocent of any crime, but would be arrested if he came into this country; and that his physical condition was such that he could not make the trip. In the alternative, plaintiff's counsel argued that should good cause exist for the taking of plaintiff's deposition, then the deposition should be taken in the Republic of Mexico or by way of written interrogatories. Plaintiff's motions were denied and plaintiff was ordered to appear for his deposition.

On September 27, 1985, plaintiff failed to appear for the scheduled deposition. Plaintiff's counsel conceded that while his client had notice of the deposition, he was unable to appear due to the reasons cited in his motion. Following plaintiff's non-appearance, defense counsel again moved for sanctions pursuant to Civ.P.Rule 37(D). The trial court granted defendants' motion and, for a second time, terminated plaintiff's compensation benefits.

ISSUES

While defendants' motion for review under Section 52–1–56(A) had its genesis in allegations of serious criminal wrongdoing, it is important to note that plaintiff's criminal status is not before us. We are not deciding plaintiff's guilt. That issue is reserved to another court in another forum. Rather, our inquiry is limited in scope and goes to the propriety of the discovery sanctions imposed in this workmen's compensation proceeding.

Plaintiff raises two issues: (1) whether the trial court erred in terminating plaintiff's workmen's compensation benefits; and (2) whether the trial court erred in ordering plaintiff to appear for a deposition, a medical evaluation and vocational skills analysis and in denying his motion that his deposition be taken by written interrogatories or by oral deposition in Mexico and that the medical evaluation and medical analysis be conducted in Mexico.

ANALYSIS: ISSUE I

In our prior memorandum opinion we noted that specific findings were prerequisites for imposition of discovery sanctions under Civ.P.Rule 37(D). The trial court's latest order terminating plaintiff's compensation benefits stated "That Plaintiff Fabian Sandoval knew of said deposition and failed to appear for his deposition...." The trial court did not further find that plaintiff's failure to appear was willful, in bad faith or due to his own fault, as mandated by this court. The opinion we issued following the prior appeal provided that, "[a]bsent a finding of willful noncompliance, bad faith, or fault in failing to comply with discovery, dismissal of a party's right to workmen's compensation benefits, previously awarded, is not proper." Our man-

date incorporated this ruling. On remand, the trial court must comply with the mandate of the appellate court. *Weaver v. Weaver,* 100 N.M. 165, 667 P.2d 970 (1983); *Burnworth v. Burnworth,* 93 N.M. 714, 605 P.2d 222 (1980).

Defendants argue the trial court's findings were adequate because of the case law standard that the trial court look at the total circumstances surrounding the order and not just look for the specific litany of phrases in an order. *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 629 P.2d 231 (1980).

Under the facts of this case, we cannot agree. It cannot be said, as a matter of law, that plaintiff's failure to appear was willful. A wrongful intent to disregard the trial court's discovery order is not necessary to constitute a willful failure to appear, but a willful failure does imply a conscious or intentional failure, as distinguished from an accidental or involuntary non-compliance. *Kalosha v. Novick,* 77 N.M. 627, 426 P.2d 598 (1967). *See also Tessier v. White,* 76 N.M. 748, 418 P.2d 200 (1966); *Potomac Insurance Co. v. Torres,* 75 N.M. 129, 401 P.2d 308 (1965); *Gough v. Famariss Oil & Refining Co.,* 83 N.M. 710, 496 P.2d 1106 (Ct.App.1972). The opinion of this court on the first appeal upon which the mandate was predicated, constituted the law of the case. *Fortuna Corp. v. Sierra Blanca Sales Co.,* 89 N.M. 187, 548 P.2d 865 (1976).

Even if the trial court's language was deemed to be in compliance with our mandate, the trial court's finding was erroneous. Plaintiff is an excludable alien under 8 U.S.C.A. Section 1182(a)(23). In pertinent part, that statute provides:

> **Excludable aliens—General classes**
>
> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (23) * * * [A]ny alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs[.] [Which includes heroin.] [Parenthetical material added.]

Thus, under federal law, plaintiff is strictly prohibited from entering this country for any purpose.

Defendants argue that plaintiff could enter this country lawfully by virtue of 8 U.S.C.A. Section 1182(d)(5). Under that section, the United States Attorney General has discretion to parole excluded aliens for emergent reasons or reasons deemed in the public interest. It would stretch the limits of our credulity to imagine the attorney general would parole a fugitive into this country for the limited purpose of allowing him to give a deposition in a workmen's compensation case. Moreover, as pointed out earlier, the attorney general has discretion to parole excluded aliens for emergent reasons or reasons deemed in the public interest, but otherwise there is no provision for the release of an excluded alien. *Chin Ming Mow v. Dulles,* 117 F.Supp. 108 (S.D.N.Y.1953). Among other things, the courts have construed "public interest" to mean prosecution. *Klapholz v. Esperdy,* 201 F.Supp. 294 (S.D.N.Y.1961) (attorney general did not abuse discretion, under statute permitting him to parole aliens in the public interest, in paroling arriving alien for purpose of prosecuting him for smuggling). Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter. *Jean v. Nelson,* 727 F.2d 957 (11th Cir.1984). Excludable aliens cannot challenge either admission or parole decisions under any claim of constitutional rights. *Id.* at 972.

By virtue of the fact that plaintiff is an excludable alien, that any grant of parole would only be for the purposes of prosecution and, even if parole were a possibility, any denial of such would be unappealable, it was impossible for plaintiff to comply with the discovery order.

While we need not reach this issue, it may be important to note that plaintiff also attempted to offer evidence to the effect that he was physically unable to make the journey to comply with the deposition order. The trial court denied admission of the tendered testimony on the grounds that the hearing was a show cause hearing for defendants and they had shown good cause for the necessity of the deposition. Because the trial court was required to determine whether plaintiff's non-appearance was willful, in bad faith or due to his own fault, and because evidence of plaintiff's physical condition was relevant, we believe the denial of the tender was erroneous. Plaintiff's offer of proof made known the substance of the evidence plaintiff wished to introduce. We must assume that plaintiff's counsel could have shown what he offered to show in his oral tender. *See State v. Chambers,* 103 N.M. 784, 714 P.2d 588 (Ct.App.1986); *cf. State ex rel. Nichols v. Safeco Insurance Co. of America,* 100 N.M. 440, 671 P.2d 1151 (Ct.App.), *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983).

A crucial element of plaintiff's argument against defendants' motion was that plaintiff's medical condition prohibited him from coming to the deposition and that any such order would be overly burdensome. Naturally, the trial court need not have accepted the tendered testimony as true but, under the circumstances, it should have been admitted and considered. Moreover, under NMSA 1978, Section 52-1-51(C), it is not necessary for a claimant who lives outside the state to come into this state for a medical examination. Had defendants wished to rebut evidence that plaintiff was too physically incapacitated to come to New Mexico for deposition, they could have done so by requesting he have an examination in Mexico in conformance with the law.

Finally, we think it worthwhile to discuss plaintiff's contention that the deposition order was burdensome because plaintiff's entry into this country would subject him to arrest. Plaintiff's fear of arrest provides a faulty foundation on which to build a valid argument. We are not impressed with this position. It is not the function of this court to protect fugitives from justice nor do we consider submitting oneself to the due process of law burdensome.

ISSUE II

It is a well-settled general rule that a non-resident plaintiff shall make himself available and submit to oral examination in the forum where he has brought his action, absent a showing of special circumstances or undue hardship. *Salitan v. Carrillo,* 69 N.M. 476, 368 P.2d 149 (1961). The court in *Salitan* noted: "Upon such a showing, a defendant may be required to examine plaintiff outside the forum, and this may be by written interrogatories *if they are suitable and appropriate for the purpose of eliciting the information to which defendant is entitled.*" *Id.* at 481–82, 368 P.2d 149 (emphasis in original).

For example, in *Kalosha v. Novick,* plaintiffs were citizens and residents of the Soviet Union. In noting the existent laws in the Soviet Union as well as the expense involved in travel, the supreme court concluded that there was a practical inability of plaintiffs to appear in New Mexico to give their depositions. Likewise, in *Ali Akber Kiachif v. Philco International Corp.,* 10 F.R.D. 277 (S.D.N.Y.1950), the court denied a motion to dismiss when plaintiff was out of the country, in ill health and had consented to discovery by means of interrogatories.

The situation in the instant case is analogous to these two cases. By virtue of his excludable alien status as well as the proffer as to his health, plaintiff demonstrated a legal and physical inability to appear in New Mexico for purposes of a deposition. Moreover, plaintiff has consented to either deposition in Mexico or written interrogatories. He also consents to any physical examinations in Mexico. Certainly, the discovery sanctions provided for in Rule 37(D), including dismissal, are appropriate when a party refuses discovery or takes a cavalier approach to its discovery obligations and in so doing denies a litigant his right to discovery. *See United*

Nuclear Corp. v. General Atomic Co. Here, however, plaintiff presented evidence that he was legally not eligible to enter the United States, constituting an excuse for non-compliance and alternative methods of discovery were available and could be utilized to provide defendants with the information they required.

ATTORNEY'S FEES

Attorney's fees are allowable for services in securing worker's rights other than increased compensation. *Mann v. Board of County Commissioners,* 58 N.M. 626, 274 P.2d 145 (1954); *accord Romo v. Raton Coca Cola Co.,* 96 N.M. 765, 635 P.2d 320 (Ct.App.1981). We are impressed with plaintiff's counsel's tenacity and the ability he exhibited in this appeal; due to his success in this proceeding, we award him $2,000.

The trial court's termination of plaintiff's worker compensation benefits was in error and is hereby reversed; the trial court's denial of plaintiff's motion for alternative means of discovery was also in error and is reversed. We remand this case to the trial court for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

729 P.2d 1366

Ike BEYALE, Sr., Plaintiff-Appellee,

v.

ARIZONA PUBLIC SERVICE COMPANY, Self-insurer, Defendant-Appellant.

No. 8758.

Court of Appeals of New Mexico.

July 17, 1986.

Byron Caton, Tansey, Rosebrough, Roberts & Gerding, P.C., Farmington, for defendant-appellant.

Bruce P. Moore, Moscow, Idaho, Randall S. Roberts, Roberts & Jolley, P.C., Farmington, for plaintiff-appellee.

OPINION

MINZNER, Judge.

Defendant appeals an award of workmen's compensation benefits, claiming (1) the trial court erred when it refused to allow defendant to argue that plaintiff did not give notice of the alleged accident pursuant to NMSA 1978, Section 52–1–29, when the issue was raised for the first time on the morning of trial; and (2) that the award is not based on substantial evidence. We affirm.

Facts and Procedural Background

In 1980, plaintiff was employed as a lubrication man by defendant at its power plant located in San Juan County. He had worked for defendant for eighteen years.

Plaintiff testified that on March 27, 1980, he got up and drove to work feeling fine. He started off to grease his first piece of machinery. Because the elevator was not working, he walked up five flights of stairs. Arriving at the machinery, he was out of breath. He was bent over an I-beam, reaching with both hands in front of him to attach the nozzle of his lubricating gun to a piece of machinery, when he felt a pain in his body. He tried to walk away the pain but could not.

When the pain still did not go away, plaintiff went to the nurse's station. He told the nurse that something was wrong, but he did not go into detail. Eventually, he was taken to the hospital in an ambulance.

There was testimony at trial that plaintiff told the first doctor who treated him that he had experienced pain upon waking that morning and suffered severe pain on his way to work. Plaintiff, however, testified that he did not remember making this statement.

Plaintiff's doctor referred him to Dr. Haines, a neurosurgeon, when plaintiff began to lose function in his right leg and bladder. The surgery revealed a congenital abnormality; plaintiff had large veins wrapped around his spinal cord which were susceptible to rupture. These veins had ruptured, and blood leaked into the spinal canal.

After the initial surgery, plaintiff was released to light duty work. He worked for about a month and then on August 12, 1980, fell at work, injuring his back. After several days at work, he went back to the hospital, and an infection was discovered. Plaintiff was hospitalized again in September for an infection. As a result of the infections, plaintiff experienced low back pain and leg weakness.

The complaint was filed in March 1982. Defendant's answer contained a general denial and, additionally, raised two affirmative defenses. Following extensive discovery and a number of continuances, the matter came on for trial in April 1985. At the beginning of trial, defendant stipulated that plaintiff was totally disabled and had been since August 17, 1980.

During its opening statement, defendant announced that it would no longer rely on one of the defenses contained in its answer but rather would raise the issue of notice. Plaintiff objected, claiming failure to give notice was an affirmative defense, *see Mosher v. Bituminous Ins. Co.*, 96 N.M.

674, 634 P.2d 696 (Ct.App.1981), and asserting prejudice. The court reserved ruling.

At the end of the first day of trial, after plaintiff and Dr. Haines had testified, defendant moved to amend the pleadings to raise the issue of notice on the ground that there had been evidence on that issue. *See* NMSA 1978, Civ.P.R. 15(b) (Repl.Pamp. 1980). Plaintiff again objected; the court orally ruled that failure to give notice was an affirmative defense which defendant had waived.

The trial court found that plaintiff was injured on the job when he suffered an internal rupture of a preexisting spinal malformation while lubricating a machine. The trial court also found that the failure to give notice was not raised as an issue until the first day of trial; after judgment was entered for plaintiff on the basis of total disability, defendant timely moved for a new trial on the ground that it should have been permitted to litigate the issue of notice. The motion was denied.

On appeal, defendant contends that failure to give notice is not an affirmative defense, that plaintiff knew that failure to give notice was going to be an issue through informal discussions shortly before trial, and that the court decided the issue of failure to give notice by making findings on it. Under these circumstances, defendant asks us to hold that the issue should be litigated on its merits. Defendant also contends that: (1) plaintiff's impeached testimony is not sufficient evidence to support the decision that an accident happened; (2) the medical testimony of causation is insubstantial; and (3) plaintiff's disability did not arise from a risk of his employment.

Whether the Trial Court Erred in Refusing to Allow Defendant to Raise the Issue of Notice Pursuant to Section 52-1-29

An affirmative defense ordinarily refers to a state of facts provable by defendant that will bar plaintiff's recovery once a right to recover is established. *Bendorf v. Volkswagenwerk Aktiengeselischaft,* 88 N.M. 355, 540 P.2d 835 (Ct.App. 1975). Such a defense must be pleaded and proved by defendant. *See id.;* NMSA 1978, Civ.P.R. 8 (Repl.Pamp.1980).

In *Mosher v. Bituminous Ins. Co.,* we said, in dicta and without citation to authority, that notice was not essential to establish liability and that it was an affirmative defense which must be asserted and proved by the employer. Only a part of this statement is correct. Notice is not an essential element of plaintiff's case that must be pleaded and proved in every case; nevertheless, notice is a condition precedent to plaintiff's right to recover. *Clower v. Grossman,* 55 N.M. 546, 237 P.2d 353 (1951). Consequently, if notice is "placed in issue," it is plaintiff's burden to prove it. *Aguilar v. Penasco Independent School District No. 6,* 100 N.M. 625, 674 P.2d 515 (1984); *Geeslin v. Goodno, Inc.,* 75 N.M. 174, 402 P.2d 156 (1965). Although plaintiff must prove notice if placed in issue, defendant had the obligation to raise the issue initially. *Accord Cook v. Clinkenbeard,* 524 P.2d 27 (Okla.1974). In this respect, notice is an affirmative defense. *See Gallegos v. George A. Rutherford, Inc.,* 67 N.M. 459, 357 P.2d 50 (1960).

This appeal raises the issue of whether the failure to give notice was "properly raised," *see Clower v. Grossman,* or "placed in issue," *see Geeslin v. Goodno,* under the facts of this case. This is an issue of first impression in New Mexico.

Defendant contends that the notice matter was properly raised by informal discussions between the parties a few days before trial. We do not answer this contention because there is no evidence of any such discussions. Arguments of counsel are not evidence that we may consider. *See State v. Jacobs,* 102 N.M. 801, 701 P.2d 400 (Ct.App.1985); *Phillips v. Allstate Ins. Co.,* 93 N.M. 648, 603 P.2d 1105 (Ct.App. 1979).

Next, defendant contends that the trial court treated it unfairly by refusing to allow it to litigate the issue of notice and then by making findings upon the very issue to which it would not listen. This contention is based on an erroneous premise. The failure to give notice issue went to the March accident, and the trial court made no findings on this issue.

Finally, defendant contends that it had no obligation to raise the notice issue prior to trial. We disagree.

The Rules of Civil Procedure apply to workmen's compensation actions except when the provisions of the Act "directly conflict" with the rules. NMSA 1978, § 52-1-34. The general rules of pleading do not conflict directly with the Act, although pleading is informal in workmen's compensation actions. 3 A. Larson, *Law of Workmen's Compensation* § 77A.00 (1983). The supreme court has recognized the applicability of the rules governing amendment of pleadings in workmen's compensation actions. *See Winter v. Roberson Constr. Co.*, 70 N.M. 187, 372 P.2d 381 (1962).

Even under a rule allowing liberality in pleadings and liberality in the amendment of pleadings, an amendment should not be allowed if the effect is one of undue surprise or prejudice to the opposing party. Larson, *supra*, at § 77A.43. The purpose of pleadings is to give the party opponent notice of the claims being made. *See Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 636 P.2d 322 (Ct.App.1981). This purpose would hardly be accomplished by a ruling that the issue of notice need not be "placed in issue" until opening statements.

In New Mexico, the allowance of amendment of pleadings is discretionary with the court, and the key factor in the exercise of discretion is prejudice to the opposing party. *Winter; Gallegos. See also Bagwell v. Shady Grove Truck Stop*, 104 N.M. 14, 715 P.2d 462 (Ct.App.1986). Consistent with this, a New Jersey county court addressing a workmen's compensation case had the following to say:

> Speaking of the practice to be followed in workmen's compensation proceedings, the then Judge William J. Brennan, Jr., analyzed quite clearly the guiding principles to be applied. The following quotation indicates conclusively that, as to defenses, he considered the prime criterion to be fair notice.
>
> > "* * * The petitioner is entitled to fair notice of the defenses he will be called upon to meet at the hearing. Respondent's answer here merely denies that petitioner met with an accident arising out of and in the course of his employment. This hardly sufficed to put the petitioner on notice * * * indeed, petitioner could logically infer from the answer filed that he was not to be confronted with that defense. * * *" *Stein v. Felden*, 17 N.J.Super. at page 315, 86 A.2d at page 20.
>
> * * * * * *
>
> * * * Upon near-completion of its defense, a party, albeit a party in a workmen's compensation court where niceties of pleadings have never been required, who has proceeded throughout on one issue, will not be permitted to then suddenly present a totally new attack.

Hannigan v. Goldfarb, 55 N.J.Super. 260, 263-63, 150 A.2d 515, 517-18 (1959).

Although the facts in this case differ, the application of the *Hannigan* language is clear. Plaintiff was surprised that defendant raised the issue of failure to give notice. He objected to it. The court found that plaintiff would have been prejudiced had the notice issue been litigated. Defendant does not challenge this finding on appeal.

Defendant does argue, however, that the prejudice could have been cured by a continuance. This case, however, had been pending for three years. Workmen's

compensation cases are to be advanced on the calendar and decided as promptly as possible. NMSA 1978, § 52–1–35. We have adversely commented on unnecessary delay in workmen's compensation cases in a number of opinions. *See, e.g., Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985). The grant or denial of a continuance is within the discretion of the trial court, *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.,* 99 N.M. 95, 654 P.2d 548 (1982), and continuances are not favored. *El Paso Electric v. Real Estate Mart, Inc.,* 98 N.M. 490, 650 P.2d 12 (Ct.App.1982). Under these circumstances, the trial court was not required to grant an amendment to the pleadings and then grant a continuance to cure the prejudice to plaintiff.

In so ruling, we do not hold that defendants must raise a failure to give notice defense in their answer. Where notice is put in issue informally and plaintiff fails to object, as was apparently the case in *Aguilar,* or where the evidence relating to the issue is admitted without objection and the court grants an amendment to conform to the evidence under Civ.P. Rule 15(b), the issue may be deemed to have been properly raised. However, neither of these situations is present in this case. Plaintiff objected and, if any evidence on the notice issue was admitted without objection, it was admitted either pursuant to the court's ruling that it would hear evidence on the notice issue and make up its mind later, or it was admitted on other issues as well. *See Moya v. Fidelity and Casualty Co. of New York,* 75 N.M. 462, 406 P.2d 173 (1965). In neither case may it be said that plaintiff impliedly consented to trial on the notice issue.

The trial court did not abuse its discretion. It correctly refused to allow defendant to litigate the issue of notice when defendant first raised the issue in its opening statement and where plaintiff would have been prejudiced either by its inclusion as an issue in the case or by another continuance. A new trial was not required.

Substantial Evidence

Plaintiff's view that he had suffered an injury while lubricating a machine was supported by his own testimony, as well as by the testimony of others, who said that plaintiff did not complain to them of feeling any pain earlier in the day. When presented with plaintiff's view, the doctor said that the rupture was caused by leaning over and reaching with the tool in hand. In these circumstances, the trial court's decision to believe plaintiff's view must be upheld. *See Sanchez v. Homestake Mining Co.*

Defendant has relied on the "physical facts" rule, *see Ortega v. Koury,* 55 N.M. 142, 227 P.2d 941 (1951). For lack of reference to relevant portions of the transcript, we do not address this contention. *State v. Reese,* 91 N.M. 76, 570 P.2d 614 (Ct.App. 1977).

Defendant also contends that the medical evidence was inadequate to establish the requisite causation under NMSA 1978, Section 52–1–28(B). Defendant's argument proceeds upon a misconstruction of the doctor's testimony. Defendant contends that the doctor never testified that plaintiff's infections caused any disability. Defendant is incorrect.

In his testimony, Dr. Haines described plaintiff's disability as of the last time he saw plaintiff. He was then asked and answered the following:

> Q: Dr., again, returning to the present state of disability, do you have an opinion now as to a reasonable medical probability, again, whether or not Mr. Beyale's current disability is the natural and direct result of the rupture that occurred and the resultant treatment?
>
> A: Yes, I believe it is.

Later, Dr. Haines testified that plaintiff's disc space infection contributed to his chronic pain problem and that the infection was caused by an incomplete catheteriza-

tion, leading to a urinary tract infection, and inadequate treatment of that, leading to the disc space infection.

Defendant finally contends that, because the rupture could have been caused by anything that increased thoracic pressure, such as coughing, sneezing, straining, exerting, or bending over to work at home, it should not be liable for plaintiff's disability because the event that caused the rupture fortuitously happened at work. This is an "arising out of" issue, *see Berry v. J.C. Penney Co.*, 74 N.M. 484, 394 P.2d 996 (1964), and its resolution depends on the application of substantial evidence rules. *Schober v. Mountain Bell Telephone*, 96 N.M. 376, 630 P.2d 1231 (Ct.App.1980).

In this case, as in *Schober*, there was medical testimony that the rupture was, in fact, caused by plaintiff's work. This evidence meets the test outlined in *Berry* and *Schober* and supports the conclusion that plaintiff's accident and injury arose out of his employment.

Conclusion

Plaintiff is awarded $3,000 for the services of his attorney on appeal. The judgment appealed from is affirmed in all respects.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

729 P.2d 1371

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert James TAFOYA, Defendant-Appellant.

No. 9004.

Court of Appeals of New Mexico.

Oct. 7, 1986.

Certiorari Denied Dec. 4, 1986. See 105 N.M. 94, 728 P.2d 845.

Paul G. Bardacke, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

John L. Walker, Albuquerque, for defendant-appellant.

OPINION

GARCIA, Judge.

The convictions in this case arose out of a series of violent incidents in Albuquerque's Northeast Heights area in the fall of 1984. The jury found that defendant broke into the homes of six young girls and one adult woman in the middle of the night, woke them and committed sexual offenses on them. Victims two, five and seven identified defendant at a line-up. Defendant's

fingerprints were found at the crime scenes of all victims but victim four. Serology evidence consistent with defendant's characteristics was present in the cases of victims one and four. Defendant's defense was an alibi; he and family members testified that he was home, asleep, on the nights of all of the offenses.

Convicted of various counts of aggravated burglary, kidnapping, criminal sexual penetration with a deadly weapon, criminal sexual penetration of a minor, criminal sexual contact with a minor and aggravated battery, defendant appeals.

Defendant raises seven issues on appeal: (1) a claim of error in allowing five of the child victims to give videotaped testimony under circumstances in which defendant was made to sit in a control booth, thus denying him face-to-face confrontation with these victims; (2) a claim of error in allowing a prior consistent statement of one of the victims into evidence; (3) several claims of error in refusing to excuse certain jurors for cause; (4) a claim of error in the court's failure to strike expert testimony on fingerprints; (5) a claim of error that the line-up identification was unnecessarily suggestive; (6) a claim of error that the evidence was insufficient to support defendant's convictions as they relate to victim four; and (7) a claim of error that the sentence is illegal. Other issues, listed in the docketing statement but not briefed, are abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We find no error and affirm the convictions and sentences.

1. Face-to-Face Confrontation

Defendant contends that the court's allowance of a videotaped deposition procedure that required defendant to remain in a control booth during the taking of the testimony violated his right to confront the witnesses against him, contrary to U.S. Const. amend. VI. He also contends that the procedure violated the statute and rule permitting videotaped depositions, NMSA 1978, Section 30-9-17 (Repl.1984) and NMSA 1978, Crim.P.R. 29.1 (Repl.Pamp. 1985).

The statute and the rule require the deposition to be taken "in the presence of defendant" or require defendant to be "present." In relevant part the statute provides: "The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys."

The statute and rule were enacted pursuant to the strong public policy of sparing child victims of sexual crimes the further trauma of in-court testimony. *State v. Vigil,* 103 N.M. 583, 711 P.2d 28 (Ct.App. 1985). Webster's Third New International Dictionary, p. 1793 (1971), defines "present" or "presence" as "being in one place and not elsewhere," "within reach," and "at hand." According to these definitions, defendant was present at the taking of the videotaped depositions. He was in a control booth and could view all of the proceedings. His attorney had a headset and microphone so that he could be in constant contact with defendant. Defendant was at hand and within reach. While he was not within the sight of the witnesses, in light of our strong public policy, we believe the requirement of presence intended by the legislature and our supreme court was satisfied. *Cf. State v. Lujan,* 103 N.M. 667, 712 P.2d 13 (Ct.App.1985).

We now turn to whether the procedure used in this case satisfied defendant's constitutional rights. We have already held in *Vigil* that upon a proper showing of unreasonable and unnecessary mental or emotional harm to the victim, a videotaped deposition, taken prior to trial and then shown to the jury, where the deposition is presided over by the court and where defendant has the opportunity to cross-examine the victim, does not violate the right of confrontation. The issue of face-to-face confrontation was not raised in *Vigil.* This

case requires us to answer the question of whether the absence of actual face-to-face confrontation can be justified under the rationale of *Vigil.* We hold that it can.

Defendant urges us to follow the cases of *United States v. Benfield,* 593 F.2d 815 (8th Cir.1979), and *Herbert v. Superior Court,* 117 Cal.App.3d 661, 172 Cal.Rptr. 850 (1981). *See generally* Annot., 19 A.L.R.4th 1286 (1983). In their requirement of face-to-face confrontation, these cases were concerned with the intangible effect that requiring the witness to testify in the face of his accuser has on the truth-seeking process:

> Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge.
>
> * * * * * *
>
> The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the accused [sic] when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.

Herbert, 117 Cal.App.3d at 670, 671, 172 Cal.Rptr. at 855.

Defendant also relies on United States Supreme Court cases such as *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), and *Dowdell v. United States,* 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753 (1911). These cases contain language indicating that face-to-face confrontation is part of the sixth amendment. However, these cases also make clear that the general rule favoring confrontation sometimes must give way to considerations of policy and necessity. Thus, for example, dying declarations have always been an exception to the general rule regarding confrontation, lest the courts be put in the untenable position of saying that criminals should go free because their victims die. *Mattox. See also Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In cases of necessity, such as where the witness is unavailable, *State v. Martinez,* 99 N.M. 48, 653 P.2d 879 (Ct.App.1982), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982), or where a child witness would suffer unreasonable and unnecessary mental or emotional harm, a specific species of unavailability, *see Vigil,* and where the out-of-court statements bear adequate indicia of reliability, the sixth amendment does not preclude their admission.

The state, on the other hand, urges us to follow Wigmore's approach, 5 Wigmore, *Evidence* §§ 1365, 1395 (Chadbourne rev. 1974); *see also State ex rel. Human Services Dept. v. Gomez,* 99 N.M. 261, 657 P.2d 117 (1982), and hold that demeanor and other such intangibles form no part of the right of confrontation. Rather, they are simply incidental benefits of cross-examination, the major benefit of the right of confrontation. Indeed, Wigmore has gone so far as to say that cases requiring a face-to-face meeting between the accused and the accuser are "amusing legal pedantry," whose reasoning is "absurd." 5 Wigmore, *Evidence,* § 1399, n. 1 (Chadbourne rev. 1974).

We accept neither extreme position, but consider the rights of defendant together with those of the victims in light of the particular facts of this case. The cases on which defendant relies are not necessarily to the contrary. In neither *Herbert* nor *Benfield* was there a strong showing of necessity for dispensing with the requirement of face-to-face confrontation before the factfinder. By contrast, the testimony in this case was abundant that each child subject to the videotape procedure would suffer unreasonable and unnecessary mental or emotional harm from testifying face-to-face with defendant.

The primary reason for seeking the videotaped depositions in this case was that

the child victims did not want to see defendant and did not want defendant seeing them. The child victims ranged in age from four to eleven. All were suffering ill effects from the trauma of the crimes. A nine year old was refusing to sleep in her own room. She insisted on sleeping with two sets of undergarments and two sets of nightclothes on, in a sleeping bag on the floor of the family room in which her grandfather was staying. A four year old would not walk from room to room alone in her own house. An eleven year old regressed to insisting on sleeping with a nightlight on and with a teddy bear.

The expert testimony was that all the children were abnormally anxious and expressed their anxiety in particular when talking about the prospect of testifying in court in front of defendant. If required to testify in court in front of defendant, each child would have to undergo therapeutic intervention to repair the damage brought by simply testifying in that setting. Each professional who saw these children testified that the children would suffer unreasonable and unnecessary mental or emotional harm from having to testify in front of defendant. Some testified that the children ran the risk of becoming incoherent or "freezing" were they to see defendant. Both the statute and the court rule seek to protect victims from this kind of harm.

In addition, we question the need for face-to-face confrontation in this case. This is not a case in which the defense is that the child is fabricating the events and in which the moral suasion of facing the accused might influence the child to tell the truth. *Cf. Herbert.* In this case, a complete stranger invaded the bedrooms, sleep, and bodies of young victims. Only two of them were able to identify defendant in a line-up. They were not frightened of telling the truth in front of a known defendant. Rather, they were frightened at the prospect of being in the same room with the person believed to be their attacker.

Because the utility of face-to-face confrontation as an aid to eliciting the truth was remote, *cf. State v. Owens,* 103 N.M. 121, 703 P.2d 898 (Ct.App.1984); *cert. quashed,* 103 N.M. 62, 702 P.2d 1007 (1985); *see also State v. Taylor,* 103 N.M. 189, 704 P.2d 443 (Ct.App.1985), because there was a sufficient showing that these children were unavailable to confront defendant face-to-face, *see Vigil,* and because the videotape procedure provided defendant with a full opportunity to cross-examine the victims, *Vigil,* we hold that his confrontation rights were not abrogated by the procedure. *See Ohio v. Roberts.*

2. Prior Statement

Victim six was four years old. She was awakened by a man in her bedroom, carried into the family room, forced to perform fellatio, and put back to sleep. At first, she thought the man was her father because he was the only adult male she knew. Later, she came to understand that the "bad man" was not her father.

Victim six gave a videotaped statement to the police four days after the incident. During her videotaped deposition, taken as a substitute for trial testimony, she was cross-examined about her initial impression that it was her father who took her out of her room. She was further cross-examined about the number of times she had gone over her story with her mother or others. Included in the cross-examination was reference to the prior videotaped statement. During the redirect examination, the state moved for admission of the prior statement, pointing out that, while the state did not wish it to be played during the deposition, it would want it played for the jury after the videotaped deposition was played at trial. Defense counsel pointed out that he was not present during the police statement and asked the court to review the statement before making a decision on the matter. The court took the matter under advisement and the videotaped deposition was concluded. At trial, defendant objected to the introduction of the police statement and he contends, on appeal, that the

statement was inadmissible under the rules of evidence and denied him his right of confrontation.

NMSA 1978, Evid.Rule 801(d)(1)(B) (Repl.Pamp.1983) allows the introduction of prior consistent statements if they are offered to rebut an expressed or implied charge of recent fabrication or improper influence or motive. Defendant contends that, while he cross-examined victim six as to her general credibility and as to confusion regarding who her attacker was, he did not charge recent fabrication or improper influence. We disagree. An attack on general credibility satisfies the recent fabrication element. *State v. Vigil.* Moreover, the cross-examination concerning the victim's change in story and the number of times she discussed her testimony with her mother and others amounts to a charge of improper influence.

Nor were defendant's confrontation rights violated by the procedure. Defendant argues the issue as though he had no inkling that the police statement would be introduced until the trial, at which time he had no opportunity to cross-examine the victim on her statement. This argument ignores the procedure in the trial court, in which the statement was first introduced at the deposition, which defendant knew was being taken as a substitute for trial testimony and at which time he could have cross-examined the victim. Actual cross-examination is not the test for whether confrontation rights are satisfied; it is the *opportunity* for cross-examination which is the key. *State v. Massengill,* 99 N.M. 283, 657 P.2d 139 (Ct.App.1983). Under the circumstances, the trial court did not err in admitting the prior consistent statement.

3. Jury Issues

Defendant contends that he was denied his right to a trial by a fair and impartial jury. His brief details several complaints. We need not repeat them here. With regard to some of the complaints, defendant declined the court's offer of cure and, therefore, cannot now be heard to claim reversible error. *Cf. State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979), *cert. denied,* 93 N.M. 172, 598 P.2d 215 (1979). With regard to others, defendant informed the trial court that he was satisfied with the particular jurors and cannot complain on appeal of actions he consented to in the trial court. *Cf. State v. Gilbert,* 100 N.M. 392, 671 P.2d 640 (1983). Finally, a juror who was alleged to be sleeping during portions of testimony was not proved to be sleeping. The juror admitted she had her eyes closed and was nodding, but denied she slept during the trial. The conflict between what appeared and the juror's testimony was for the trial court to resolve. *See State v. Case,* 100 N.M. 714, 676 P.2d 241 (1984). There was no abuse of discretion in either this or any of defendant's jury issues.

4. Fingerprint Evidence

Latent prints were found at the scene of each of the crimes charged in the indictment. Officer Gallegos was qualified as an expert in fingerprint analysis without objection from defendant. He testified that the workable latent prints found at the crime scenes were defendant's prints. On cross-examination, he explained generally, but not specifically, how he compared the latent prints against defendant's known set of prints. He explained that he looked for patterns and characteristics and then, once characteristics were the same, he compared the number of ridges between the characteristics. There were no unexplainable discrepancies, and the officer did not feel that it was useful to speak in terms of a certain number of points of comparison. As far as he was concerned, a positive comparison was a matter of the examiner's judgment as to when he feels comfortable with his opinion.

Defendant expended a great deal of time and energy cross-examining all of the officers who lifted and examined the latent

prints. The thrust of this examination was to show that the police could have, but did not, photograph the latent prints to show that they were, in fact, on the objects from which the officers claimed to have lifted them. The police had a set of defendant's fingerprints, which did not include palm prints, from several years before these incidents when defendant was arrested for a similar crime. The officers admitted that it was possible to tamper with prints but, contrary to defendant's assertion, they did not say it was possible to transfer prints from one card to another.

In closing argument, defendant argued to the jury that it was possible in this case for the police to have tampered with the print evidence so that the latents allegedly found at the crime scenes were, in fact, taken from defendant's prior known set of prints. He argued that this possibility would have been excluded had the police photographed the latent prints as they were found on the various objects. The officers had testified, however, that the purpose of print photography was not to exclude the possibility of tampering but was rather to preserve the latent print and exclude the possibility that it would be destroyed in the attempt to transfer it onto a card.

Based on these facts, defendant raises two issues on appeal. First, he contends that the court should have stricken the testimony of the fingerprint expert because the expert was unable to satisfactorily explain how he arrived at his opinion. *See Smith v. Klebanoff,* 84 N.M. 50, 499 P.2d 368 (Ct.App.1972). Second, he contends that the state deprived him of due process by not preserving, by photography or otherwise, the evidence upon which the latent prints were allegedly found. *See State v. Lovato,* 94 N.M. 780, 617 P.2d 169 (Ct.App. 1980).

Defendant's brief does not inform this court how the second issue was preserved for appellate review. *See State v. Martin,* 90 N.M. 524, 565 P.2d 1041 (Ct.App.1977), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977). Issues not preserved for review in the trial court need not be considered on appeal. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp. 1983). For these reasons, we consider defendant's due process issue no further. On the merits, however, *see State v. Chouinard,* 96 N.M. 658, 634 P.2d 680 (1981), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1982); *State v. Duran,* 96 N.M. 364, 630 P.2d 763 (1981).

With regard to the first issue, defendant's complaint is that:

> Mainly, the witness testified that there was no generally accepted scientific requirement that a print examiner find, and be able to explain, any particular number of points of similarity or comparison. As trial counsel indicated at the motion hearing, this testimony flies in the face of scientifically established fingerprint techniques relied upon by most examiners, including the Federal Bureau of Investigation in its training of other cc [sic] examiners.

There are several problems with defendant's argument. First, Gallegos was the only fingerprint expert that testified at trial, and despite defendant's complaint about his testimony, his testimony stands uncontradicted that there are no particular number of points of comparison necessary to a valid opinion. Arguments of counsel are not evidence. *See State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App.1976). Second, for purposes of the hearing on defendant's motion to strike the fingerprint examiner's testimony, defendant relied on a book appearing to require twelve points of comparison. The book is not before this court as part of the record on appeal. It is defendant's burden to bring up the necessary record on appeal, and failing that, there is nothing for this court to review. *State v. Duran,* 91 N.M. 756, 581 P.2d 19 (1978).

Third, within the context of his testimony, the witness satisfactorily explained how

he arrived at his opinion. He spoke about pattern, characteristics, ridges and the absence of unexplainable discrepancies. On cross-examination, defendant never sought to shake the expert from his opinion and did not point to a single comparison in which there was any discrepancy whatsoever. Under NMSA 1978, Evid.Rule 705 (Repl.Pamp.1983), the expert may testify to his opinion and may be required to disclose the underlying facts on cross-examination. In this case, defendant never pressed him on the underlying facts on cross-examination. Accordingly, there was no error in the refusal to strike his testimony.

5. Line-up

We have considered defendant's claim that the line-up identification was unnecessarily suggestive and we have found it to be without merit.

6. Sufficiency of Evidence

Defendant asserts that the convictions for the crimes relating to victim four are not supported by substantial evidence. We disagree. While there was neither an identification nor fingerprint evidence for victim four, the state relied on serology evidence and on the fact that the crimes against victim four fit the same pattern or modus operandi as defendant's pattern in the other crimes for which he was convicted. Evidence of other crimes has a strong probative value when there is sufficient evidence of similar characteristics of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which defendant has been charged is one and the same person. *Mayes v. State,* 95 Nev. 140, 591 P.2d 250 (1979). Here, there is evidence of sufficient similarity between the crimes against victims two, three and five to give logical force to an inference that the one who committed these crimes also committed the crimes against victim four.

Victim four falls into a grouping of four incidents that involved young girls between the ages of nine and eleven who were targets of sexual assault, committed by a stranger who entered their homes without consent, at night, after the household was asleep. All of the attacks occurred in the same small geographical area of town and two of the victims, including victim four, lived on the same street. Moreover, these attacks occurred within close temporal proximity, since they occurred in approximate two-week intervals. The evidence supports an inference that someone identified these children in advance and entered the houses looking for a specific victim. This is a distinctive pattern from which the jury could infer that the person who committed the offenses as to victim four was the same one whose fingerprints were found and who was identified by the victims in two of the other incidents.

The state also presented serology evidence. Victim four is blood type A, PGM 1 and is a secreter. Defendant is blood type B, PGM 1 and also is a secreter. Evidence of B acid phosphatase was found on the clothing of victim four. On the basis of the evidence presented, the jury could logically infer that defendant was indeed the perpetrator of the crimes against victim four. Evidence must be viewed in the light most favorable to the jury's verdict, and all reasonable inferences must be allowed in support thereof. *State v. Tovar,* 98 N.M. 655, 651 P.2d 1299 (1982). Viewing the record as a whole, we conclude there was substantial evidence introduced to allow the jury to find defendant guilty of the crimes relating to victim four.

7. Sentence

Since we affirm defendant's convictions on all counts, defendant's issue regarding the unspecified suspension of part of his sentence is moot.

We have considered defendant's other arguments under this and other issues and find them to be without merit.

The convictions and sentences are affirmed.

IT IS SO ORDERED.

MINZER and FRUMAN, JJ., concur.

729 P.2d 1379

Elizabeth SMITH, Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE, a Self-Insured Employer, Defendant-Appellant.

No. 9179.

Court of Appeals of New Mexico.

Nov. 6, 1986.

Jeffrey L. Baker, Tryon, Pompei & Baker, P.A., Albuquerque, for plaintiff-appellee.

Terry R. Guebert, Paul L. Civerolo, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendant-appellant.

OPINION

DONNELLY, Chief Judge.

The City of Albuquerque appeals from a decision of the district court awarding appellee, Elizabeth Smith, temporary total disability and permanent partial disability in a worker's compensation case. We (1) answer two issues summarily and discuss (2) whether the injury arose out of and in the course of her employment, (3) whether the trial court erred in determining the period appellee was totally temporarily disabled and in finding permanent partial disability, (4) whether the City is entitled to reduction of benefit payments, (5) and whether there was error in failing to find that appellee suffered a separate work-related injury. We affirm, except for that portion of the award which involves overlapping compensation payments for both a prior disability adjudicated under Colorado law and the payments under New Mexico law involving the present claim.

This case involves a worker's injury incurred off the employer's premises during lunchtime. Smith was employed by the City as a risk management coordinator. On January 24, 1984, she had lunch with an assistant city attorney, Barbara Stephenson, at a restaurant in downtown Albuquerque. As Smith and Stephenson left the restaurant, Smith tripped over a carpet strip and injured her back. As a result of this injury, Smith underwent treatment for nerve root compression at St. Joseph's Hospital. Smith was hospitalized a second time, during the month of June, 1984, for psychological and emotional problems, including depression. Thereafter, Smith was again hospitalized at St. Joseph's Hospital from December 10, 1984 until January 14, 1985, for injuries connected with her January 1984 accident.

Prior to sustaining the injury in question, Smith had been employed by Mountain Bell and had suffered an injury to her back in March 1982. Smith was operated upon in March, 1982. Treatment of Smith's prior injury involved a lumbar laminectomy at two levels.

The trial court adopted findings of fact and conclusions of law which recited in part that Smith was required to communicate with attorneys as part of her duties as a risk management coordinator; Stephenson had received prior verbal permission from the city attorney to discuss City business with Smith; the City had a written policy recognizing business lunches as a proper forum for legal department employees to discuss matters affecting the City; the primary purpose of Smith's lunch with Stephenson was to discuss cases on which they had been working; and that seventy-five percent of the lunch meeting between Smith and Stephenson was devoted to the discussion of City business.

Smith's job responsibilities encompassed directing the Risk Management Division, evaluating, negotiating and securing insurance coverage for the City, and assisting in the handling of liability claims against the City. During lunch, Smith discussed both business and personal matters with Stephenson. Smith testified that she treated Stephenson to lunch because the attorney was leaving her job. According to Smith, she and Stephenson discussed City busi-

ness matters throughout most of their meeting; Smith had reviewed several of her office files preparatory to the luncheon meeting. She also testified that she had been working with Stephenson on several matters, including a water resource and treatment project and a number of claims that the City was attempting to collect. Stephenson confirmed that the central purpose of the lunch was to discuss matters on which they were jointly working.

Smith testified that it was not uncommon for her to attend business lunches on behalf of the City, but that not every lunch she had with a city attorney was a business lunch. Generally, the lunch period from 12:00 noon to 1:00 p.m. was excluded from Smith's normal work hours. The City, however, had adopted a written policy authorizing business lunches and providing that an employee could receive compensatory time for lunch periods involving the transaction of City business. Smith testified that she did not request compensatory time for the January luncheon meeting with Stephenson. The city attorney, Gary O'Dowd, testified that he had instructed Smith not to discuss problems involving City contracts or legal matters with city attorneys without first clearing the matters with him; however, he conceded that Stephenson had prior permission to discuss City business with Smith. Shortly after Smith's injuries and while she was recuperating, the City abolished the position held by her.

1. ISSUES ANSWERED SUMMARILY

(a) The trial court awarded Smith costs of transportation for plane fare in the sum of $613.50 from Hawaii to Albuquerque for trial. The City claims error in awarding costs. The evidence indicates that Smith's husband sought and later obtained employment in Hawaii and she moved there with him during the pendency of proceedings herein. We agree it was error to award air travel to plaintiff as a cost. Costs are recoverable only when they come within the ambit of a statute. *Swallows v. Laney,* 102 N.M. 81, 691 P.2d 874 (1984). As a general rule, a party is not entitled to per diem or mileage expenses for appearing as a witness in his own case. *Id.* NMSA 1978, Section 52–1–35(B) (Cum.Supp.1985) of the Workmen's Compensation Act, in effect at time of trial, expressly restricted any award of costs except in the case of a witness who testifies under subpoena. *See Sedillo v. Levi-Strauss Corp.,* 98 N.M. 52, 644 P.2d 1041 (Ct.App.1982); *see also Lujan v. Circle K Corp.,* 94 N.M. 719, 616 P.2d 432 (Ct.App. 1980).

(b) The trial court adopted a conclusion of law that Smith was "entitled to pre-judgment interest as provided by law." Our review of the judgment entered herein indicates that the language of the judgment failed to contain any provision providing for an award of prejudgment interest. In the absence of an express provision contained in the court's final judgment providing for an award of prejudgment interest, no such provision will be implied. Findings of fact or conclusions of law of the trial court contained in its decision and not carried forward in its judgment have no effect. *See Johnson v. C & H Construction Co.,* 78 N.M. 423, 432 P.2d 267 (Ct.App. 1967).

2. COMPENSABILITY OF INJURY

The City argues that the trial court erred in applying the law to undisputed facts in determining that the accident arose out of and occurred within the scope of employment. Because we do not consider the evidence undisputed and susceptible to only one logical inference, the issue is more appropriately whether the court's conclusion was supported by substantial evidence. *Cf. Trembath v. Riggs,* 100 N.M. 615, 673 P.2d 1348 (Ct.App.1983).

Lunchtime injuries may be compensable, provided the worker's accident

occurred in the course and scope of the worker's employment. *Hudson v. Thurston Motor Lines, Inc.,* 583 S.W.2d 597 (Tenn.1979). An injury occurs in the course of employment depending on the time, place and circumstances under which the accident happened. *See Velkovitz v. Penasco Independent School District,* 96 N.M. 577, 633 P.2d 685 (1981); *Sena v. Continental Casualty Co.,* 97 N.M. 753, 643 P.2d 622 (Ct.App.1982). Similarly, the injury must arise out of the employment. *Velkovitz v. Penasco Independent School District.* "Out of" refers to the cause or source of the accident. *Martinez v. Fidel,* 61 N.M. 6, 293 P.2d 654 (1956). The injury must have been caused by a risk to which the injured person was subjected in his employment. The fact that an employee is off the premises of the employer, and is engaged in an activity having a duality of purpose involving both business and personal matters, does not render the accident noncompensable. *Titus v. Fox Chemical Co.,* 254 N.W.2d 74 (Minn.1977); *Lauer v. Citizens Lumber & Supply Co.,* 170 Pa.Super. 352, 85 A.2d 609 (1952).

The general rule applicable to claims for workmen's compensation for injuries sustained off the premises of an employer during the lunch hour of an employee is discussed in 7 *Schneider's Workmen's Compensation,* § 1634 (1950):

> Ordinarily, where the lunch period is not subject to the employer's control or restricted in any way, and the employee is free to go where he will at that time, if he is injured on the public street, off the premises of the employer, the authorities hold that the injury does not arise out of the employment.

See also Trembath v. Riggs; Berry v. School District of Omaha, 154 Neb. 787, 49 N.W.2d 617 (1951); *J.R. Hess, Inc. v. Workmen's Compensation Appeal Bd.,* 17 Pa.Cmwlth. 87, 329 A.2d 923 (1975); *Hudson & Thurston Motor Lines, Inc.*

The "going and coming" rule generally precludes compensation for injuries incurred while on the way to assume duties of employment or after leaving such duties. *Mountain States Telephone & Telegraph Co. v. Montoya,* 91 N.M. 788, 581 P.2d 1283 (1978); *Beckham v. Estate of Brown,* 100 N.M. 1, 664 P.2d 1014 (Ct.App.1983). *See also* § 52–1–19 (Cum.Supp.1986).

Where, however, the employee is engaged in an off-premise activity during the lunch or meal period in furtherance of his employer's interests, and at the direction of or with the consent of his employer, an injury sustained by the employee may be compensable under the Workmen's Compensation Act. *See Tingey v. Industrial Accident Commission,* 22 Cal.2d 636, 140 P.2d 410 (1943); *Titus v. Fox Chemical Co.; Kahn Bros. Co. v. Industrial Comm'n,* 75 Utah 145, 283 P. 1054 (1929) (in bank) (sic); *see also* 1 A. Larson, *The Law of Workmen's Compensation,* §§ 20.-20, 21.23 (1985).

As observed in *Tingley v. Industrial Accident Comm'n,* an "injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do." *See also Sullivan v. Rainbo Baking Co.,* 71 N.M. 9, 375 P.2d 326 (1962). Similarly, as stated in *Hudson v. Thurston Motor Lines, Inc.,* 583 S.W.2d 597 (Tenn.1979), "Injuries that occur while an employee is furthering or facilitating his employer's business are incurred in the course of his employment." *See* 1 A. Larson, *The Law of Workmen's Compensation,* §§ 14, 15.50 (1985); *see also Edens v. New Mexico Health & Social Services Dep't,* 89 N.M. 60, 547 P.2d 65 (1976).

Here, the evidence indicated a sufficient nexus between Smith's employment and the injury. The trial court accordingly found that seventy-five percent of the lunch meeting between Smith and Stephenson was devoted to City business; that the primary purpose of Smith's luncheon was to discuss the case upon which they had

been working; that prior to the meeting, Stephenson had received verbal permission to discuss business matters with Smith; and that Smith's duties required her to communicate with attorneys in the legal department regarding matters of mutual concern.

The City contends that at the time of the accident, no substantive benefit incurred to the City from the business conference, that the employment did not contribute something to the hazard here involved, and that Smith did not have permission to discuss matters with Stephenson without first clearing the matter with the city attorney. This argument ignores the testimony of Stephenson that she had received permission to discuss City business with Smith and that the City had adopted a policy recognizing business lunches. On appeal, we view the evidence in a light most favorable to support the findings of the trial court, together with all inferences reasonably deducible from the evidence. *Marez v. Kerr-McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct.App.1978).

Plaintiff did not request a finding that O'Dowd had instructed Smith not to discuss certain problems with Stephenson. The trial court implicitly rejected a requested finding that Smith "was not authorized to conduct a business luncheon with Stephenson."

Smith held an administrative position which necessitated conferring with others concerning City business. Had Smith tripped, fallen and suffered an accident at her office while acting in the scope and course of her employment, the injury would have been compensable. The fact that the injury occurred in the building where the restaurant was located, away from the employer's premises, does not render the resulting disability noncompensable. *See Sullivan v. Rainbo Baking Co.* There is substantial evidence that the injury arose out of and within the course of Smith's employment and that it resulted from a risk incidental to the employment. The trial court's findings that Smith sustained a compensable injury are supported by substantial evidence.

3. TOTAL AND PARTIAL DISABILITY

The City asserts that the trial court erred in finding that Smith was temporarily, totally disabled from January 24, 1984, when she tripped and was injured, until September 1, 1984, and from December 10, 1984 to January 14, 1985. The trial court also found that Smith was "20% disabled from September 1, 1984 to December 10, 1984, and 20% disabled from January 14, 1985 through the present time." The City additionally asserts that because Smith's post-injury employment disqualifies her from receiving disability benefits, it was error to find that she was permanently, partially disabled from January 14, 1985 through the present time.

The testimony reflects that following her injury on January 24, 1984, Smith was hospitalized. She was discharged from the hospital in early February, and was released to return to work by her attending physician, Dr. Sonstein, on March 8, 1984. She accordingly sought and obtained several jobs subsequent to her employment with the City. In late March and early April of 1984, she worked as a finance director for Amethyst Hall treatment center in Santa Fe. She subsequently experienced severe emotional problems culminating in a suicide attempt in May, 1984. She was hospitalized for the emotional problems, treated, and released to return to work. In September 1984, she was employed by Cottonwood alcoholic clinic as a program coordinator. On December 10, 1984, she experienced a popping sensation in her back and severe pain while at work. She was again hospitalized for several weeks and she returned to work for Cottonwood in January 1985, and worked until April 30, 1985, when she moved to Hawaii with her husband. In July, 1985, Smith secured employment in

Hawaii as director of risk management for a hotel chain.

In *Anaya v. New Mexico Steel Erectors, Inc.*, 94 N.M. 370, 610 P.2d 1199 (1980), the supreme court rejected the argument that a worker should be denied disability benefits because of a demonstrated ability to perform some post-injury employment. NMSA 1978, Sections 52–1–24 and –25 have been interpreted to embody a two-pronged test for determining disability. First, the worker must be totally or partially unable to perform the work he was doing at the time of the injury. Secondly, the worker must be wholly or partially unable to perform any work for which he is fitted and qualified. *Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct. App.1974).

A claimant may be able to perform some work and still be disabled. *Id.; Adams v. Loffland Brothers Drilling Co.*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970). Under this test, if the worker is unable to perform some of the work for which he is fitted, a finding of partial disability has been upheld. *Anaya; Schober v. Mountain Bell Telephone*, 96 N.M. 376, 630 P.2d 1231 (Ct.App.1980). The evidence indicates that Smith was unable to continue working at Amethyst Hall in Santa Fe or at Cottonwood in Los Lunas because of residual problems attributed to her January, 1984 injury.

Dr. Sonstein, a neurosurgeon, testified that even though he felt Smith could attempt to work as of March 8, 1984, that she would be the best judge of her ability to return to work and perform the usual functions. Dr. Sonstein also testified that he examined Smith in March 1985, and that she had persistent back and left leg pain and some weakness and numbness in her left leg. He testified that this pain and numbness interferred with Smith's normal physical activity. He determined during that examination that she had a twenty-eight percent impairment to her body as a whole. Additionally, Dr. Sonstein testified Smith had restrictions placed on her physical activities, including limiting lifting weights to twenty to twenty-five pounds, limited bending, stooping or squatting, avoiding prolonged sitting, no climbing and limiting her activities to sendentary work.

Dr. Barry Maron, an orthopedic surgeon, testified that Smith's accident at the restaurant, within a reasonable medical probability, necessitated the back operation on January 31, 1984, contributed to her hospitalization in December, 1984, and the injuries sustained were a cause of her continued disability. Dr. Maron also testified that Smith had a medical impairment rating of twenty-two to twenty-four percent of the body as a whole. Further, he advised Smith that due to her weakened back condition and persistent pain, she might need a spinal fusion in the future.

Dr. William Foote, a clinical psychologist and vocational specialist, treated Smith at the request of Dr. Maron. Dr. Foote testified that he clinically tested Smith and that her brief employment with Amethyst Hall in March, 1984, was a failed attempt to return to work. Dr. Foote testified that as a reasonable psychological probability, the chronic pain Smith suffered following her January, 1984 accident contributed to her emotional vulnerability and emotional breakdown. He testified that she was 100 percent disabled from the time of her injury in January, 1984 to September 1, 1984, which precluded her from working during this period. Dr. Foote also testified that in his opinion, considering Smith's physical and emotional problems stemming from her January accident, she currently had a twenty to thirty-five percent vocational disability rating.

Once the causal connection between a workman's injury and disability has been established by expert medical testimony, the extent of plaintiff's disability may be established by non-medical witnesses. *Garcia v. Genuine Parts Co.*, 90 N.M.

124, 560 P.2d 545 (Ct.App.1977). *See also Lucero v. Los Alamos Constructors, Inc.*, 79 N.M. 789, 450 P.2d 198 (Ct.App.1969). Plaintiff may offer evidence concerning the extent of the disability by his own testimony. *Garcia v. Genuine Parts Co.* Drs. Maron, Sonstein, and Foote testified that the extent of Smith's impairment was causally increased as a result of the January 24, 1984 injury.

Smith testified that she has daily pain and discomfort; at times the pain is severe; at times the pain interferes with her ability to concentrate; she has difficulty bending, lifting or sitting for extended periods of time; and she experienced a decrease in her ability to perform job functions.

Determination of the degree of disability in a workman's compensation action is a factual issue to be determined by the trial court. *Smith v. Trailways Bus System,* 96 N.M. 79, 628 P.2d 324 (Ct.App. 1981). Absent misapplication of the law or a lack of substantial evidence, an appellate court will not substitute its judgment for that of the district court. *Id. See also Schober v. Mountain Bell Telephone; Trujillo v. Tanuz,* 85 N.M. 35, 508 P.2d 1332 (Ct.App.1973). The degree of disability is a question of fact for the trial court. The trial court may determine the percentage of disability based upon both medical and lay testimony. *Chapman v. Jesco, Inc.*, 98 N.M. 707, 652 P.2d 257 (Ct.App. 1982); *Romo v. Raton Coca Cola Co.*, 96 N.M. 765, 635 P.2d 320 (Ct.App.1981). The trial court's finding of temporary total disability and permanent partial disability is supported by substantial evidence.

4. REDUCTION OF BENEFITS

The City contends that if the trial court's findings that Smith was permanently partially disabled are affirmed on appeal, then the City is entitled to a reduction of benefits due to payments previously made to Smith by Mountain Bell for a prior disability. The City asserts that under NMSA 1978, Section 52–1–47(D), Smith is precluded from receiving workmen's compensation benefits for duplicate disabilities. Specifically, the City contends the disability benefits awarded to Smith by the court should be reduced by the compensation benefits paid on account of her prior injury to her back while employed by Mountain Bell. *Id.*

At the time of her injury in January 1984, Smith was receiving workmen's compensation benefits from Mountain Bell for an injury to her back. Smith testified that as a result of this work-related disability, she was awarded a five percent permanent partial disability from the Colorado Industrial Commission. Smith acknowledged receiving approximately $364 per month as payment on this award through April, 1984.

In *Gurule v. Albuquerque-Bernalillo County Economic Opportunity Bd.*, 84 N.M. 196, 500 P.2d 1319 (Ct.App.1972), this court considered a claim similar to that advocated by appellants. In *Gurule,* a truck driver had injured his back in 1961, and underwent three separate operations involving laminectomies and spinal fusions. The court held: "Although the subsequent injury in this case was to the same member or function, this does not automatically require a reduction of benefits payable for the subsequent injury. * * *" *Id.* at 203, 500 P.2d at 1326.

The compensation benefits paid to Smith for the injury she sustained while employed by Mountain Bell did not entirely duplicate the benefits she received from the City. Smith had recovered from her prior injury to the extent that she was able to work again, despite continued discomfort.

Both *Gurule* and a subsequent case, *Smith v. Trailways Bus System,* hold, however, that the Section 52–1–47(D) reduction applies when there is an overlap in compensation benefits resulting from two injuries to the same member or function or different parts of the same member or function, and if the compensation benefits would, in whole or in part, duplicate

benefits paid or payable as a result of the prior injury. *Id. See also* § 52–1–47. The reduction applies notwithstanding the fact that the worker has recovered from the prior injuries and there is no offset for the total amount paid on the first injury. Here, as shown by the record, a payment overlap occurred for the period of January, February, March, and a portion of April, 1984.

In the instant case, it was error to deny the City's claim for reduction of workman's compensation benefits to the extent the City did not receive credit for that portion of the award involving overlapping compensation payments resulting from the prior award by the Colorado Industrial Commission for a partial disability involving the same part of the body. The case must be remanded for a calculation of the appropriate reduction. *See Paternoster v. La Cuesta Cabinets, Inc.*, 101 N.M. 773, 689 P.2d 289 (Ct.App.1984).

5. WORK-RELATED INJURY

The City asserts that causation between the January 1984 accident and Smith's resulting disability was not supported by expert medical testimony.

A worker is entitled to compensation where an injury was incurred and disability resulted therefrom, even though the worker was suffering from a pre-existing injury, without which there would not have been a disability. *Reynolds v. Ruidoso Racing Ass'n*, 69 N.M. 248, 365 P.2d 671 (1961). *See also Herndon v. Albuquerque Public Schools*, 92 N.M. 635, 593 P.2d 470 (Ct.App.1978). The question of whether a workman's continued employment resulted in aggravation of a prior injury, is one of fact generally to be determined by expert medical witnesses. *Pena v. New Mexico Highway Dept.*, 100 N.M. 408, 671 P.2d 656 (Ct.App.1983).

The expert medical testimony of Dr. Maron and Dr. Sonstein constituted substantial evidence to support the trial court's finding that Smith suffered a work-related injury and disability. Similarly, Dr. Foote, a clinical psychologist, testified that Smith had sustained a fifteen to twenty percent disability as a result of her accident "related to the physical aspects of her injury and the pain embodied therein, and 5 to 10 [percent] additional disability based upon the emotional vulnerabilities caused by this accident." Dr. Foote also testified that plaintiff had chronic pain problems that reduced her capacity for coping with stress.

The trial court's findings of plaintiff's disability is supported by substantial evidence.

The judgment of the trial court is affirmed except for those portions of the award which allowed plaintiff travel costs and which involved overlapping compensation benefits from an award of compensation under Colorado law and benefits arising from the present claim. As to those issues, the matter is remanded for entry of an amended judgment consistent with this opinion.

Plaintiff is awarded $2,000 for services of her attorney on appeal.

IT IS SO ORDERED.

MINZNER and FRUMAN, JJ., concur.

729 P.2d 1387

In the Matter of ANGELA R., a child.

STATE of New Mexico, ex rel. DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellant,

v.

PATRICK R., Respondent-Appellee.

No. 9304.

Court of Appeals of New Mexico.

Nov. 13, 1986.

John Petoskey, Asst. Gen. Counsel, Human Services Dept., Santa Fe, for petitioner-appellant.

Gary R. Fernandez, Grants, for respondent-appellee.

OPINION

MINZNER, Judge.

The Human Services Department (HSD) appeals from a judgment entered by the children's court in an abuse and neglect proceeding. The children's court found that HSD had not proved, as alleged in the petition, that Angela R. had been sexually abused by her father. The court also found that the child was in need of therapy, ordered HSD to provide it, and made interim arrangements for custody. The appeal raises two issues: (1) whether the court erred in refusing to admit evidence of the child's statements made to two social workers concerning the alleged sexual abuse; and (2) whether the court exceeded its jurisdiction by ordering therapy, although it found that the child was neither abused nor neglected. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Romero,* 103 N.M. 532, 710 P.2d 99 (Ct.App.1985). We affirm.

BACKGROUND.

The three and one-half-year-old girl's parents were divorced. The father had custody, and the mother had liberal visitation. When the father's business took him out of town for a month, he arranged for the mother to care for the child. At the end of the month, the mother told the child that her father would be coming to pick her up. At this point, the child began crying. She initially said that she did not want to go back with her father because he spanked her, and her mother explained that spankings were necessary sometimes. The child then told her mother that the father "made her play with his wee-wee."

Because of this allegation, the child was not returned to the father. The child was taken to a social worker, Pat Dancer, who interviewed the child using anatomically correct dolls. Next, the child was taken to a medical doctor; he found no physical evidence of sexual abuse. The child then was taken to a psychologist, who had no opinion as to whether the alleged abuse had occurred. Finally, the child was taken to another social worker, Georgia Sanchez. The mother was present during Ms. Sanchez's interview with the child. The mother testified that the child told Ms. Sanchez

that her father would sit the child on his lap and make her jump and jump. The child also demonstrated to Ms. Sanchez, with anatomically correct dolls, that her father would put his penis between the child's legs.

The child also saw Dr. Sosa, Dr. Rodriguez, and Dr. Salazar, all clinical psychologists. They related what the child told them her father had done. Drs. Sosa and Rodriguez could not definitely say whether the child had been sexually abused. However, they indicated that a child would be very unlikely to make up a story with so much detail. Dr. Salazar was of the opinion that the father had not abused the child, because the child did not demonstrate any signs of being abused, such as disturbed sleeping or eating patterns, and because the father did not have pedophilic attributes. However, Dr. Salazar agreed with the other doctors that it would be unlikely for a child to have made up such a story.

All doctors testified that the child was in need of therapy because of what had happened to her between the time of the mother's first report of the alleged abuse and the time of trial. The record supports an inference that the investigation itself had caused severe emotional distress.

First, as one doctor put it, the child had been interviewed "to death." This doctor recommends that a child suspected of being sexually abused be interviewed with anatomically correct dolls only once, while being videotaped. Angela R. had been exposed to the dolls and had been requested to explain what happened in excess of three times. By the time the second psychologist gave her the dolls, she pushed them away, expressing that she knew all about these dolls and was not interested in talking about it anymore.

Second, the doctors were concerned that the child felt she was being forced to choose between her parents during the investigation. The child exhibited signs of insecurity. She seemed afraid of losing her parents and felt conflict about what she should say.

In addition to the evidence of the child's statements that the children's court admitted, there was other testimony. The mother testified that the father had played with a daughter of hers by a previous marriage in a manner similar to that related by Angela; he had bounced the older daughter on his lap until he became sexually aroused. At that time, the mother told him to stop and he did stop. The mother also testified that he apologized to her for doing the same thing to Angela. The father denied any abuse. His sister, who ordinarily provided child care for Angela, testified that the child told her nothing had happened.

CHILD HEARSAY.

The children's court allowed the mother and the psychologists to relate what the child told them. The court exercised its discretion in allowing this testimony in reliance on *State v. Taylor,* 103 N.M. 189, 704 P.2d 443 (Ct.App.1985). The court would not allow the social workers to testify as to what the child told them. HSD claims error in this ruling.

At different points in the transcript, the children's court appeared to give different reasons for its ruling on why the social workers would not be allowed to testify. Sometimes the court appeared to be of the opinion that only parents and medical or psychological experts would be competent to relate the child's statements. At other times, the court appeared to be of the opinion that, because the mother and the psychologists were testifying, any testimony by the social workers would be cumulative.

We wish to emphasize that *State v. Taylor* is not limited to parents or medical experts; in appropriate cases, others may be allowed to repeat children's allegations of sexual abuse. We agree with HSD that a social worker's testimony might be particularly significant, because he or she might be the first one to whom an allega-

tion is made. Nevertheless, the children's court had discretion to exclude cumulative testimony. *See State v. Lovato,* 91 N.M. 712, 580 P.2d 138 (Ct.App.1978). The admission or exclusion of evidence rests in the sound discretion of the trial court, and absent a showing of an abuse of discretion, the ruling of the trial court will not be set aside on appeal. *State v. McGhee,* 103 N.M. 100, 703 P.2d 877 (1985); *State v. Worley,* 100 N.M. 720, 676 P.2d 247 (1984).

On appeal, HSD concentrates on the court's refusal to allow Ms. Dancer to relate the child's statements and actions when she first played with the dolls. HSD asserts that Ms. Dancer would have testified as to the details of what the child did with the dolls; they argue that details concerning the movements of the dolls and the movements of the dolls' intimate parts were not otherwise in evidence. We must reject HSD's appellate claim for two reasons.

First, HSD never tendered to the court the actual testimony proffered. In the absence of an actual tender, the children's court was not in a position to intelligently rule, and this court is not in a position to know whether the proffered testimony was cumulative or not. *See State v. Shaw,* 90 N.M. 540, 565 P.2d 1057 (Ct.App.1977); NMSA 1978, Evid.R. 103(a)(2) (Repl.Pamp. 1983). The substance of the evidence must be made known or must be apparent from the context. *Id. See also State ex rel. Conley Lott Nichols Machinery Co. v. Safeco Insurance Co. of America,* 100 N.M. 440, 671 P.2d 1151 (Ct.App.1983) (an offer to prove facts which state conclusions is too general).

Second, there were sufficient details otherwise in evidence. The mother graphically described what the child told her and what the child told Ms. Sanchez. The psychologists were aware of what the child had been told previously and specifically what she told Ms. Dancer. The psychologists indicated that the child's knowledge of and relation of such detail was evidence that the events related actually happened. In the absence of the testimony Ms. Dancer would have offered, we do not know what further details there were or how they could have made HSD's case more persuasive.

■ Accordingly, we hold that the children's court could properly exclude the testimony of the social workers on grounds of repetitiveness. HSD has not preserved any claim that Ms. Dancer's testimony would not have been repetitive. *See Nichols Corp. v. Bill Stuckman Construction, Inc.,* 105 N.M. 37, 728 P.2d 447 (1986). Under the circumstances of this case, there was no abuse of discretion in excluding the testimony. Because a trial court will be affirmed if it is correct for any reason, *State v. Beachum,* 83 N.M. 526, 494 P.2d 188 (Ct.App.1972), we affirm on this issue.

ORDER OF THERAPY IN THE ABSENCE OF ADJUDICATION OF NEGLECT OR ABUSE.

■ Without finding that the child had been abused by her father, the children's court found that the child was in need of therapy and ordered that HSD provide such therapy. This order followed a colloquy at the conclusion of the hearing during which the court expressed the opinion that the child had been treated like a football in this matter and was emotionally disturbed. When the court expressed its concern over the child's mental health and its desire to have the child evaluated and counselled, HSD stated that it could provide counselors; it never objected to the court's announced intention to order HSD to provide those counselors. HSD proposed a form of judgment that included an order for treatment; the father proposed a conclusion of law that the child required counselling. Notwithstanding the lack of objection, we consider HSD's argument since it raises a jurisdictional question. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp.1983).

For the first time on appeal, HSD contends that the children's court exceeded its jurisdiction under the Children's Code. We disagree.

Our prior cases have held that, because the children's court is a court of limited jurisdiction, *In re Doe, III,* 87 N.M. 170, 531 P.2d 218 (Ct.App.1975), it is only permitted to do what is specifically authorized by the statute. *See id.; Health & Social Services Department v. Doe,* 91 N.M. 675, 579 P.2d 801 (Ct.App.1978). Nevertheless, the Children's Code must be read in its entirety, and sections must be interpreted to correlate as faultlessly as possible. *State v. Doe,* 95 N.M. 88, 619 P.2d 192 (Ct.App.1980).

HSD argues that the applicable statutory authority is NMSA 1978, Section 32–1–31(D) (Repl.1986) on dispositional matters. Prior to 1983, this statute read, in pertinent part:

> The court, after hearing all of the evidence bearing on the *allegations of neglect, abuse, delinquency or need of supervision* shall make and record its findings * * *. If the court finds that the *allegations on the foregoing issues* have not been established, it shall dismiss the petition and order the child released from any detention or legal custody imposed in connection with the proceedings.

See 1981 N.M.Laws, ch. 36, § 24 (emphasis added). In 1983, the statute was amended so that the last sentence quoted now reads:

> If the court finds that the *allegations of delinquency* have not been established, it shall dismiss the petition and order the child released from any detention or legal custody imposed in connection with the proceedings. If the finding is that the child is an abused child, the procedural safeguards of Section 32–1–38 NMSA 1978 shall apply with respect to the return of the child to the respondents.

See 1983 N.M.Laws, ch. 243, § 1 (emphasis added). Thus, under the old law, if any allegations under the Children's Code were not established, the children's court was required to dismiss the petition and release the child. Under the current law, this is only required for delinquency petitions. The statute is silent as to the power of the court when it finds that the allegations of neglect, abuse, or need of supervision are not established.

We need not decide in this case whether rules of statutory construction, including rules concerning repeal by implication, would allow us to construe the statute to allow the children's court to make dispositions generally concerning children found not to be neglected, abused, or in need of supervision. That is because we consider another provision in the Children's Code and the facts of this case to give the children's court authority to make the disposition it did.

NMSA 1978, Section 32–1–40(A) (Repl. 1986) states:

> When it appears during the course of any proceeding under the Children's Code that some finding or remedy other than or in addition to those indicated by the petition or motion appears from the facts to be appropriate, the court may, either on motion by the children's court attorney or that of counsel for the child, amend the petition or motion, and, provided all necessary parties consent, proceed to hear and determine the additional or other issues, findings or remedies as though originally properly sought.

The facts of this case indicate that the case itself has caused a need for the child to require counselling. No one disputes this. At the conclusion of the hearing, the father asked that the petition against him be dismissed. However, he invited the court to order treatment for the child if the court felt that was necessary. The guardian ad litem appointed for the child agreed that some sort of intervention was required for the child's benefit. We view the record as evidencing HSD's agreement to provide treatment.

On appeal, respondent states:

> The Doctors and Trial Court felt that the child was having problems from the months of testing and inquiring into this case. The Appellee agreed and has gotten help for his daughter. * * *
>
> The Trial Court probably has the inherient [sic] power to make findings regarding the child's mental condition as a result of the long investigation and testing in this case and order such treatment.

In *In re Doe,* 99 N.M. 517, 660 P.2d 607 (Ct.App.1983), we said that the children's court has broad and inherent powers to accomplish the results contemplated by the Children's Code and to attain a correct resolution of the issues presented. Considering the broad and inherent powers of the children's court, and under the facts herein, we find the court did not act in excess of its statutory authority. *Cf. State v. Julia S.,* 104 N.M. 222, 719 P.2d 449 (Ct.App. 1986) (children's court's inherent power to punish for contempt limited by Children's Code). Because Section 32–1–40 allows the children's court to alter the remedies when the facts warrant such relief and when all parties consent, and because that happened in this case, we hold that the children's court had statutory authority to enter the order it did. *See also* NMSA 1978, § 32–1–31(H) (Repl.1986).

The judgment below expressly stated that the children's court "will retain jurisdiction in this matter." Under the Code, the court's jurisdiction is retained until terminated by court order. NMSA 1978, § 32–1–12 (Repl.1986). Because the court had statutory authority to enter its order, and because its jurisdiction under the Code had not terminated, we affirm as to this issue also.

CONCLUSION.

Finding no error, the children's court is affirmed as to both issues.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

730 P.2d 1

Maria PACHECO, aka Maria Quintana, Petitioner-Appellee, and Cross-Appellant,

v.

Eloy QUINTANA, Respondent-Appellant, and Cross-Appellee.

No. 8181.

Court of Appeals of New Mexico.

Dec. 23, 1985.

Certiorari Quashed Dec. 2, 1986.

Sandra Morgan Little, Atkinson & Kelsey, P.A., Albuquerque, for petitioner-appellee and cross-appellant.

David J. Berardinelli, David J. Berardinelli, P.C., Santa Fe, for respondent-appellant and cross-appellee.

OPINION

GARCIA, Judge.

Respondent appeals from the trial court's finding that military retirement benefits had not previously been divided, and that petitioner was entitled to her communal share of benefits from the date her Petition to Divide undivided community property was filed. Petitioner cross-appeals from the court's refusal to award retirement benefits prior to the date her petition was filed.

FACTS

Prior to the parties' marriage, respondent spent four years in the armed services. The parties married in 1959, and in 1962 respondent decided to make the military his career and re-enlisted in the United States Marine Corps. The parties remained married until 1973 when petitioner initiated an action for dissolution of marriage. Petitioner was living in New Mexico and retained her own attorney to prosecute her action. Respondent was stationed in Nam Phon, Thailand, and did not have counsel of record, but did have legal advice and assistance from an attorney assigned to the Judge Advocate General's Office. The parties, with the assistance of their attorneys, negotiated an amicable settlement which was memorialized in an agreement drafted by petitioner's attorney. The agreement was to be submitted to the trial court for approval and incorporated into the final decree of dissolution of marriage.

The property settlement agreement divided items of personal property, including household goods, furnishings and automobiles. The settlement also disposed of real estate. The agreement indicated that it was the parties' intent to fully and completely settle their rights or claims in all respects. The agreement further recited that the parties had fully cooperated in making available information concerning their property and financial affairs and that the agreement had been freely and voluntarily made without undue influence. Each party waived further claims against the other. In particular, the agreement provided in pertinent part:

1. Except as hereinafter specifically set forth, each party is released from any obligations for the future acts of the other party, and each party hereby releases and agrees to indemnify the other party from any obligations of any kind previously incurred by or through the other party, and from any claim of the other party, including claims of either party for support or maintenance as husband and wife or property claims, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects except insofar as any provision herein may be changed by order of the Court.

2. That any and all property acquired by either of the parties hereto from this date henceforth shall be the sole and separate property of the party acquiring the same.

* * * * * *

4. That Plaintiff shall receive in full settlement and satisfaction of her community property the following assets: her separate property and such other miscellaneous property and cooking utensils as is mutually agreed to.

5. The Defendant shall retain the balance of the community property as his sole and separate estate, with the exception of the following items which will be disposed of as follows: [Specific disposition made of the parties' home, furnishings, automobile and other real estate.]

* * * * * *

8. It is understood and agreed that this Property Settlement Agreement constitutes full and complete settlement between the parties hereto; that it has been made freely and voluntarily between the parties without the undue influence of any person whatsoever; that the parties have cooperated fully in making available to each other requested information with respect to the properties and financial affairs of the parties; that the parties understand the terms of this Agreement; that neither of the parties shall assert any further claims against

the other; and that both parties agree that this Property Settlement Agreement shall be submitted to the District Judge who has jurisdiction over this cause for approval by said District Judge.

In accordance with the parties' agreement, the stipulation was approved by the district court and incorporated into the final decree. At the time of divorce, several years of military retirement credits had been earned, but retirement benefits had not matured. Had respondent left the service in 1973, he would not have been entitled to any military retirement benefits.

After the parties' divorce, they remained in contact with one another and continued to have social and business relationships. In 1977 the parties remarried. Respondent was still in the military service. In September of 1978, respondent retired from the military, and one year later, a second action for dissolution of marriage was filed. In this instance, respondent retained counsel and filed his petition to dissolve the matrimonial relationship. The petition recited that there was no community property nor community indebtedness. Petitioner entered her appearance in the divorce action by way of a written general appearance, affidavit, and acceptance of service. She waived further notice of the proceedings. On September 5, 1979, the district court approved a proposed final decree dissolving the parties' second marriage and finding that there was no community property nor community indebtedness.

In the spring of 1981, petitioner heard a news program concerning military retirement benefits and learned that as a former spouse of a serviceman, she may have been entitled to retirement benefits. In June of 1983, petitioner filed the present action to divide "undivided community property." No appeal from the court's prior final decrees had ever been taken, nor had petitioner ever filed a motion seeking relief from judgment or order pursuant to NMSA 1978, Civ.P.Rule 60 (Repl.Pamp.1980). At the hearing on her petition, petitioner did not claim that there was any fraud, misrepresentation, duress or coercion in the negotiation or execution of the 1973 agreement. Nor did petitioner assert any ambiguity or inconsistencies in the agreement and decree. Rather, petitioner claimed that she was entitled to a proportionate share of retirement benefits which had not been discussed nor divided by the 1973 agreement and decree. Following a hearing on petitioner's claim, the trial court found that neither divorce decree had divided respondent's retirement pay. Further, the court determined that it would be unfair to allow petitioner to receive any portion of the retirement pay which had previously been received by respondent from the time of his retirement until the time that she had filed her motion for division of property.

While the parties frame the issues in various manners, the significant questions are whether military retirement benefits were divided in the 1973 settlement agreement, and whether the court properly considered military benefits in the 1979 decree. In determining the first issue, the trial court took evidence concerning the parties' discussion or lack of discussion concerning retirement benefits and the parties' intent concerning the benefits. The court concluded that it was more probable than not that the parties had not considered the retirement benefits during the 1973 proceedings. Further, the court noted that a valuable property right, not in contemplation of the parties, could not be passed by the "catch-all residuary clause," contained in paragraph 5 of the agreement.

■ We first determine whether the court could consider matters outside of the stipulation in construing the document. In *Parks v. Parks*, 91 N.M. 369, 574 P.2d 588 (1978) the court stated:

> The stipulation involved herein and the judgment adopting it are not ambiguous. The rules to be followed in arriving at the meaning of such judgments and decrees are not dissimilar to those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings, nor matters dehors the record may be used to change its

> meaning or even to construe it. It must stand and be enforced as it speaks.

91 N.M. at 372, 574 P.2d at 591 (citations omitted).

When a writing is ambiguous, extrinsic evidence may be received to explain its meaning. If the writing is clear and unambiguous, extrinsic evidence to explain its meaning may not be considered by the court. *See Farmers and Stockmens Bank of Clayton v. Layton,* 92 N.M. 246, 586 P.2d 717 (Ct.App.1978).

The trial court recognized that in the absence of ambiguity, fraud or misrepresentation, the stipulation should be upheld. Yet, the court believed the stipulation to be unfair to petitioner, and sought to find an equitable remedy to avoid a potentially harsh result. The court noted:

> [I] believe this is an extremely close case between what I think is the right thing to do and what the laws relating to contract require a judge to do. It's an extremely close case * * * but I'm coming down on the side of what I feel ought to have been done.

The court's desire to achieve an equitable result is laudable. That result, however, is not sustainable under the laws relating to interpretation of stipulations and judgments. *Parks v. Parks.* We conclude that the trial court erred in its determination that retirement benefits were not included in the 1973 agreement. Because respondent took all of the community property not specifically described in the agreement, and because the military retirement benefits were not specifically described, he is entitled to receive as his sole and separate property the military retirement benefits attributed to all military service, up to the time of the 1973 divorce.

1979 DECREE; RES JUDICATA AND COLLATERAL ESTOPPEL

Our determination that the 1973 decree apportions certain retirement benefits does not resolve the entire dispute between the parties. The 1973 divorce decree brought an end to the marital community. The parties, however, remarried on March 31, 1977 and created a new community. All property which was acquired by either petitioner or respondent, or both of them during the existence of this second marital relationship, which was not the separate property of the parties, was community property. NMSA 1978, § 40-3-8 (Cum. Supp.1985). The parties were divorced on December 5, 1979. The military benefits earned during the parties' second marriage come within the purview of Section 40-3-8(B) and are community property. *LeClert v. LeClert,* 80 N.M. 235, 453 P.2d 755 (1969).

Respondent argues that petitioner's claim for benefits earned during the second marriage is barred by application of the doctrines of collateral estoppel and *res judicata.* Collateral estoppel would bar the relitigation of issues and facts which were actually litigated and which were necessary to support the judgment in prior litigation with a different cause of action. *Poorbaugh v. Mullen,* 96 N.M. 598, 633 P.2d 706 (Ct.App.1981). Collateral estoppel would bar the subsequent litigation of issues when those issues were actually and necessarily litigated in the previous action. *Thompson v. Barngrover,* 101 N.M. 216, 680 P.2d 356 (Ct.App.1984). Such is not the case before the court. The issue of community property was not actually litigated in the 1979 divorce action. In fact, the petition alleged that there was no community property and the court's finding tracked the petition's allegation. Had the issue of military retirement benefits been litigated and ruled upon by the trial court, respondent's argument would be convincing. Here, however, the trial court did not rule on the issue because the trial court had been told there was no property to divide.

Similarly, respondent argues that petitioner is barred from litigating the claim under the doctrine of *res judicata.* This doctrine is applicable when four elements are met: (1) identity of parties or privies; (2) identity of capacity or character of persons for or against whom the claim is made; (3) the same cause of action; and,

(4) the same subject matter. *Three Rivers Land Co., Inc. v. Maddoux,* 98 N.M. 690, 652 P.2d 240 (1982).

Res judicata ordinarily applies to claims which could have been brought in the first proceeding. There is no dispute that the property issue could have, and in fact, should have been brought in the 1979 proceeding. Nevertheless, NMSA 1978, Section 40-4-20 (Repl.Pamp.1983), allows parties to bring a subsequent suit for division of property when the property was not divided in the original decree. This statutory provision specifically authorizes the type of litigation initiated by petitioner in this case. A petition to divide a previously undivided asset involves a new cause of action not barred by *res judicata. See Smith v. Walcott,* 85 N.M. 351, 512 P.2d 679 (1973) (new cause of action not barred by *res judicata*); *Zarges v. Zarges,* 79 N.M. 494, 445 P.2d 97 (1968) (when property rights are not considered or disposed of in a divorce action, a suit seeking division and distribution of the property is not barred).

UNIFORM SERVICES FORMER SPOUSES' PROTECTION ACT

Respondent argues that petitioner's claim for benefits is barred by provisions of the Uniform Services Former Spouses' Protection Act, 10 U.S.C. 1408(d)(2) (West 1983). Respondent contends this provision precludes the division of military retirement benefits unless the parties were married for ten years. In support of his position, respondent relies upon *In re Marriage of Smith,* 100 Wash.2d 319, 669 P.2d 448 (1983), and *In re Marriage of Wood,* 34 Wash.App. 892, 664 P.2d 1297 (1983). Neither of these cases address the issue raised by respondent. Rather, both cases simply refer to, without discussing, the ten-year requirement.

In *Oxelgren v. Oxelgren,* 670 S.W.2d 411 (Tex.Ct.App.1984), the court addressed the issue and noted that Section 1408(d)(2) dealt only with a ten-year marriage requirement for direct payments by the Secretary of Defense to the non-member spouse. The court concluded, "[T]he language in subsection (d)(2) regarding payments 'to be made under this section' refers to payments which are direct payments made by the Secretary". *Oxelgren* at 412. In *Wood and Wood,* 66 Or.App. 941, 676 P.2d 338 (1984), the court rejected the identical argument being advanced by respondent. In *Wood,* the court concluded, as in *Oxelgren,* that the language in (d)(2) applied only to direct payments by the Secretary. Finally, in *Konzen v. Konzen,* 103 Wash.2d 470, 693 P.2d 97 (1985) the court found the statutory language involved to be ambiguous and looked to the legislative history to resolve the ambiguity. The court concluded that "Congress did not intend to limit the application of the USFSPA to marriages lasting over ten years during the service member's military career." *Konzen,* 693 P.2d at 99. We similarly reject respondent's argument.

The Uniform Services Former Spouses' Protection Act permits courts to classify military retirement allowances according to state law. 10 U.S.C. § 1408. The Act was passed in response to the United States Supreme Court's decision in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), which held that federal law barred the States from applying their own law to divide military retirement pay. With the congressional action in adopting the Uniform Services Former Spouses' Protection Act, retirement funds could again be divided in accordance with the States' community property laws. Section 40-3-8(B) has no ten-year requirement before the property can be considered as community property. We determine that the ten-year requirement referred to in Section 1408(d)(2) is simply a requirement for direct payments by the Secretary.

BENEFITS RECEIVED BY RESPONDENT PRIOR TO FILING OF THE PETITION

The court determined that while petitioner was entitled to her portion of the communal share of retirement benefits, she could not collect the portion of benefits which were received by respondent for the

period prior to the filing of the petition. The court found that under the circumstances of the case, it would be unfair and would shock the conscience of the court to allow petitioner to receive any portion of the retired pay which was received by her husband from the time he retired until petitioner filed her motion. This equitable approach was impliedly approved by the court in *Plaatje v. Plaatje,* 95 N.M. 789, 626 P.2d 1286 (1981). Under the circumstances that existed at the time of the trial, the trial judge's resolution was appropriate. Those circumstances, however, have changed by our determination that petitioner is not entitled to retirement benefits that accrued prior to her second marriage to respondent.

LACHES AND WAIVER

While respondent raises laches or waiver as a defense to petitioner's claim, the trial court found to the contrary and respondent does not attempt to demonstrate a lack of evidence to support the finding.

CONCLUSION

We conclude that the trial court's division of the benefits earned during the first marriage be reversed; the trial court's determination that petitioner is entitled to benefits earned during the second marriage be affirmed, with the exception that a new percentage of entitlement be calculated. The trial court found petitioner was entitled to 30.5% of the retirement benefits based upon 151 months of marriage compared to respondent's 247 months of military service. There are now only thirty-two months of marriage that can be considered in relation to respondent's 247 months of military credits. We remand this matter to the trial court to calculate the percentage of petitioner's entitlement to respondent's military benefits and to determine whether petitioner should receive any portion of the benefits attributable to the second marriage for the time prior to the filing of her petition for division of property.

Respondent is awarded his appellate costs; the parties shall bear their own attorney fees.

IT IS SO ORDERED.

WOOD and ALARID, JJ., concur.

730 P.2d 448

In re Adoption of Railroad Rules and Regulations: SOUTHERN PACIFIC TRANSPORTATION COMPANY, the Atchison, Topeka and Santa Fe Railway Company, Appellants,

v.

CORPORATION COMMISSION of the State of New Mexico, Appellee,

United Transportation Union, Intervenor-Appellee.

No. 16135.

Supreme Court of New Mexico.

Dec. 11, 1986.

Rehearing Denied Dec. 31, 1986.

White, Koch, Kelly & McCarthy, Benjamin Phillips, Sumner S. Koch, Santa Fe, for appellant Southern Pacific.

Campbell & Black, Jack M. Campbell, Santa Fe, for appellant AT & SF.

Christopher Carlsen, Gen. Counsel, Corp. Com'n, Carol Baca, Asst. Atty. Gen., Santa Fe, for appellee Corporation Com'n.

Jones, Gallegos, Snead & Wertheim, James G. Whitley, Santa Fe, for intervenor appellee.

OPINION

WALTERS, Justice.

In this removal proceeding Petitioners, the Railroads, challenge Respondent Commission's Rules 2 and 3. Rule 2 requires the use of a manned caboose on certain trains, including "through" freights exceeding 2000 feet in length, and the challenged portions of Rule 3 require certain methods of reporting railroad accidents. In support of the rules, which followed two public hearings before the Commission regarding train accidents and derailments in New Mexico and elsewhere, the United Transportation Union (UTU) has intervened.

Although the parties raised ten issues in their briefs, we are convinced after thorough research and analysis of the questions presented and the considerations applicable to this matter, that only one procedural matter and one constitutional issue need be discussed with regard to the Commission's Rule 2. We discuss, additionally, Railroads' attacks upon Rule 3 made solely upon the ground of federal preemption. We conclude that Railroads' challenge to Rule 2 must be upheld; that its attack on Rule 3 is sustained in part and overruled in part.

I. Jurisdiction to Review Rules & Regulations on Removal

At the outset, the Commission urges that its adoption of rules of general application and prospective effect is a purely legislative function and that, under N.M. Const. art. XI, Section 7, only the Commission may petition for removal, and then, only for the purpose of enforcing its rules. Other parties, it says, may seek removal only if the Commission has entered an order arising out of its quasi-judicial function which determine the rights of individual parties. It refers to *State Corporation Commission v. Mountain States Tel. & Tel. Co.*, 58 N.M. 260, 270 P.2d 685 (1954).

The latter proposition was disposed of by our earlier order denying Commission's Motion to Dismiss for lack of jurisdiction. At that time we decided, in effect, that whether the Commission regulates by rule or by order, the validity of its exercise of regulating power is reviewable by this Court. On the issue of removability, the Commission did file, concurrently with Railroads' petition, its own separate petition for removal for purposes of enforcement. If the contention of the Commission on this portion of its initial argument had any merit, it was waived. We therefore consider those issues raised on removal which we think dispositive of the proceeding.

II. Authority of the Commission to Promulgate Rules 2 and 3

The Commission, opposing Railroads' contention that the Commission is without authority to promulgate Rules 2 and 3, urges us to recognize its "broad and plenary power," at the same time prefacing its argument with the acknowledgement that "the Commission is a constitutionally created institution that derives its powers from the New Mexico Constitution itself." (Respondent's Answer Brief.)

Within the latter phrase, we believe, lies the key to the entire matter. We are supplied by the parties and intervenor with an almost overwhelming number of state and federal case citations, and an abundance of scholarly argument regarding the police

power of a state to enact safety legislation even though it impinges to some degree on interstate commerce.[1] Against that authority, we are urged to evaluate and balance, with the great deference due to state safety measures, any burden such exercise of local police power would place upon interstate commerce, *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968), and to determine whether the regulations overcome the fatal weaknesses, if interstate commerce is affected, of slight, problematical, or illusory safety interests. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959).

We have no quarrel with the principles advanced by both the proponents and opponents of the rules in question, but the crucial distinction between state rules and regulations upheld as non-invasive of the protections to interstate commerce is obscured in the arguments. In all of the cases cited, the exercise of regulatory power has been through statutes enacted by state legislatures, or by rule or regulation of a commission to which the state legislative power to regulate has been delegated by the legislature. In that sense have the decisions of the Supreme Court discussed the validity or invalidity of "state legislation" or "state regulation." Although none of the cited cases recite the language of the state document or statute which granted the regulation-making power to the body which exercised that authority, it is clear either that none of them were constrained by such language as appears in our constitution, or if they were, the basic scope of the regulating body's authority was never raised. That question is squarely before us here.

Article XI, Section 7 of the New Mexico Constitution grants, in abbreviated and pertinent part, the following authority to the State Corporation Commission:

> The commission shall * * * have power and be charged with the duty to make and enforce reasonable and just rules requiring the supplying of cars and equipment for the use of shippers and passengers, and to require all intrastate railways * * * to provide such reasonable safety appliances * * * as may be necessary and proper for the safety of its employees and the public, and as are now or may be required by the federal laws, rules and regulations governing interstate commerce.

Thus the empowering language itself limits the application of any safety appliance requirements of the Commission to *intrastate* railways. The Commission was not granted the broad powers which state legislatures might exercise, as affects interstate commerce, if the balancing analysis were to permit the conclusion that the local regulation only incidentally burdens interstate commerce.

The Commission's argument, although proclaiming its interest in mandating sufficient cars and equipment (to include cabooses), focuses principally and primarily upon the safety features of its requirement for cabooses. This is probably so because the Constitution has made the "cars and equipment" oversight applicable when necessary "for the use of shippers and passengers" and not otherwise. The Commission

1. *E.g., Sporhase v. Nebraska,* 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981); *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); *Southern Pac. Co. v. Arizona,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943); *South Carolina State Highway Department v. Barnwell Bros. Inc.,* 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938); *Electrolert Corporation v. Barry,* 737 F.2d 110 (D.C.Cir.1984); *American Trucking Associations, Inc. v. Larson,* 683 F.2d 787 (3rd Cir.1982); *Norfolk and Western Ry. Co. v. Pennsylvania Public Utility Commission,* 489 Pa. 109, 413 A.2d 1037 (1980); *San Juan Coal & Coke Co. v. Santa Fe, S.J. & N. Ry. Co.,* 35 N.M. 512, 2 P.2d 305 (1931); *State Corporation Commission v. Atchison, T & SF Ry. Co.,* 32 N.M. 304, 255 P. 394 (1927); *Seward v. Denver & RG Ry. Co.,* 17 N.M. 557, 131 P. 980 (1913).

must, therefore, rest its justification for the rule upon the "safety appliance" clause. But only one paragraph of Commission's 45-page answer brief addresses the decisive words: "intrastate railways." In a single sentence it asserts, without reference to any authority, that "[t]he Commission interprets the word to mean 'railroad operations within New Mexico.'" That it would rely upon such an interpretation makes patent its awareness that its regulatory power is not as pervasive as the legislature's might be if we were here dealing with a statute—to which the precedents cited would surely apply—rather than with a regulation formulated by a body whose powers have been strictly limited by the provisions of the constitutional grant.

The Commission's "interpretation" is not acceptable. It may be conceded that railroads operating in interstate commerce, for a part of their interstate journeys, do travel within the borders of each state through which they pass. But they do not then become individual and separate intrastate operations during those portions of a longer journey between several states. An intrastate operation has the long-recognized meaning of being "that operation which during its whole course of * * * transportation is within the jurisdiction and confines of a single State." *American Airlines v. Battle*, 181 Va. 1, 7, 23 S.E.2d 796, 799 (1943). "Intrastate commerce is that commerce which is during its *whole* course of transportation within the jurisdiction of a *single* state." *Yohn v. United States*, 280 F. 511, 512 (2d Cir.1922) (our emphasis).

The Commission may only require "all *intrastate* railways" to furnish reasonable, necessary and proper safety appliances. It has no power to impose such requirements on interstate railways. Indeed, it has no constitutional authority whatever to even attempt to impose its requirements for a safety appliance upon an interstate train, because its jurisdiction in that area is specifically limited to "intrastate" railways, unless the safety appliance is "required by the federal laws, rules and regulations governing interstate commerce." N.M. Const. art. XI, § 7. Consequently, we are not called upon to determine whether, when such a requirement has been ordered, it can be sustained as a reasonable local safety measure that does not excessively burden interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Commission acted beyond its powers in the first instance; we cannot gloss over that excess of power by analyzing how a safety order that might otherwise be presumptively valid if promulgated by another body with broader powers might withstand attack as having only a minimal impact on interstate commerce. *Cf. Pike v. Bruce Church, Inc.*

We hold, therefore, that Rule 2 is invalid as beyond the jurisdictional authority of the Commission to promulgate or enforce.

III. Validity of Rule 3

Both parties agree that Rule 3A requiring Railroads to submit copies of their federal accident reports to the Commission pertains only to accidents in New Mexico, and that portion of the rule is not challenged. *See* 49 C.F.R. § 225.1 (1985). Railroads insist, however, that subsections B and C, which require immediate telephonic reporting of certain accidents to the Commission, are preempted by federal law (*see id.*) because the Commission is not a certified participant in the Federal Railroad Administration program of cooperative oversight, and because the rules require reporting under circumstances not delineated in the federal regulations.

The procedure for participating in the organization that enforces federal regulations is set forth in 45 U.S.C. Section 435 (1982). It requires the state agency to submit to the Secretary of Transportation an annual certification which includes a report of all railroad accidents or incidents reported to the state agency during the preceding year. § 435(b). Thus, even if the Commission is not now a certified participant (a fact not clearly established by the record), it must exact certain reporting

requirements from Railroads in order to become a certified participant. We are not persuaded that mere non-participant status alone destroys the Commission's rule-making power.

Congress has expressed a total preemptive intent, however, with respect to accident reporting requirements, in 49 C.F.R. Section 225.1 (1985). That regulation provides, in part, that "[i]ssuance of these regulations under the Federal Railroad Safety Act preempts States from prescribing accident/incident reporting requirements." In construing 45 U.S.C. Sections 434 and 435(b) and the corresponding 49 C.F.R. Section 225.1, the Third Circuit Court of Appeals concluded that "[Section 225.1] does not prevent [states] from requiring rail carriers to provide immediate notification of accidents in order to enable the states to launch promptly their own investigations. Nor does it forbid the states from requiring the railroads to furnish them copies of the monthly reports filed with the F[ederal] R[egulatory] A[dministration]." *National Association of Regulatory Utility Commissioners v. Coleman,* 542 F.2d 11, 15 (3d Cir.1976). Rule 3B, however, requires telephonic reporting of some accidents that are not required to be reported under 49 C.F.R. Section 225.9 (1985). To the extent that subsection B is thus inconsistent with the federal regulation, that portion is preempted, but the remaining requirements of B and C are not vulnerable to that objection.

Railroads object also to subsection D which requires telephonic reporting to the state police of train accidents involving hazardous cargo "pursuant to 49 C.F.R. 172." Railroads protest on grounds that: (1) subsection D is impermissibly vague; (2) it conflicts with and is preempted by federal requirements for reporting accidents involving hazardous materials in transit; (3) it conflicts with New Mexico's Emergency Management Act, NMSA 1978, Sections 74-4B-1 to 74-4B-11 (Repl.Pamp.1986); and (4) the Commission lacks authority to require reporting to the state police.

The purpose of the Emergency Management Act is to enable state employees and officials to respond quickly and effectively to accidents involving hazardous materials, NMSA 1978, Section 74-4B-2 (Repl.Pamp. 1986), and the chief of the state police is charged with authority to administer its provisions. NMSA 1978, § 74-4B-4. Rule 3D facilitates the purpose behind the Act, *i.e.,* rapid and effective response to emergencies. Consequently, subsection D of Rule 3 and the Emergency Management Act are not in conflict.

The Commission's authority to require accident reports in a manner consistent with federal law has already been discussed, and Railroads' reliance on the preemptive language of the Hazardous Materials Transportation Act, 49 U.S.C.App. Section 1811 (1982), is misplaced. That statute specifically recognizes that local requirements for transporting hazardous materials are preempted *only* if they are inconsistent with requirements and regulations promulgated under the Act. Rule 3D requires reporting to the state police of all accidents involving hazardous materials listed in 49 C.F.R. Part 172. Section 171.15 of that regulation requires notification to the Transportation Department only when those accidents result in injury or property damage. Compliance with subsection D in no way precludes or prevents compliances with 49 C.F.R. Section 171.15 (1985); therefore, it cannot be said to be inconsistent with the federal regulations.

Railroads next contend that Rule 3D is impermissibly vague because it does not define the term "accident/incident," and that the federal definition of "accident" includes events unrelated to the transportation of hazardous materials. *See* 49 C.F.R. § 225.5(B) (1985). Because Rule 3D was intended to facilitate compliance with and to promote the purposes of the Emergency Management Act, the definition of the challenged term can be related directly to the definition found in the Act at NMSA 1978, Section 74-4B-3(A) (Repl. Pamp.1986). When so correlated, Rule 3D is not impermissibly vague. Subsection D

thus withstands the attacks upon its validity.

We state, in passing, that we do not consider Railroads' half-hearted challenge in its opening statement that "Railroads doubt the Commission's authority to promulgate Rules 4, 6, and 7, but will wait the Commission's identification of their constitutional or statutory source of authority before addressing that issue." The attempted follow-up in their Reply Brief, to the effect that, because the Commission did not respond to their baited doubt, "it must be presumed that the Commission cannot locate any authority," is ineffective to present an issue for determination. This appears to us to be a ploy to shift to Respondent the initial burden of briefing issues Petitioner might wish to argue. That is not the rule governing the right to appellate review; consequently, we do not consider whether Rules 4, 6 and 7 are valid or not.

IV. Cost of Appeal

The Commission ordered Railroads to bear the cost of preparing the appellate record ($1,589.00). Railroads offer five reasons for reversing that order: the New Mexico Constitution requires the Commission to bear the cost because removal is the "obligatory final step in any contested Art. XI, Section 7 proceeding"; it has been the Commission's consistent practice to bear the cost of removal; the Commission may not impose costs on petitioners when it has instituted a separate removal of the same matter on its own motion; the costs are unwarranted and excessive because the Commission is statutorily required to keep three copies of each transcript of proceedings (NMSA 1978, §§ 63–7–13, –14); and, lastly, Railroads should not pay costs if they prevail. *See* NMSA 1978, Civ.App. Rule 27 (Repl.Pamp.1984). Our response:

1. Judicial review is the "obligatory final step" in many kinds of contested proceedings. That fact alone does not entitle the party seeking review to recover the cost of review. What Railroads term as the Commission's "nondiscretionary duty" to remove its proceedings exists only where there has been refusal to comply with its orders or rules. Railroads could have avoided removal and its costs simply by complying with the rules.

2. We are not persuaded, either, by Railroads' estoppel argument. They cite no authority for the proposition that the Commission is bound by its prior administrative practice and there is no evidence of what, in fact, that practice has been.

3. NMSA 1978, Section 63–7–13 imposes upon the Commission a duty to keep a file of each proceeding, which is to include the evidence and testimony, transcribed, in triplicate. Section 63–7–14 requires the clerk of the commission to transfer the file to this court upon removal. By its terms, the Commission's "Order Relating to Record Cost" (which imposed on Railroads the cost of preparing the record on removal) is based on "Rule 90 of the Commission's Rules of Procedure * * *." In its brief, however, the Commission bases its authority to assess costs on "Rule 64 and its predecessors."

We cannot decide whether the Commission may, by its procedural rules, pass on to regulated entities the cost of records that the Commission is required by statute to keep, especially when it has not included the pertinent regulations in the record. We are not persuaded by the Commission's argument that Section 63–7–13 imposes a duty on the stenographer to make a triplicate transcription, but imposes no duty on the Commission to pay for or keep the triplicate record. If the Commission is in fact failing to keep three copies of the transcript in the case file, it is in violation of the statute. Nor are we convinced that NMSA 1978, Section 63–7–11 authorizing the clerk to charge for copies of the complete record applies to the record on removal, especially since Section 63–7–13 requires the Commission to obtain and keep three copies on file, and requires the clerk to send the complete file to us when a matter is removed. We doubt that there was any intention on the part of the legislature to encourage, by application of Section 63–7–11, the "chilling effect" of discouraging removal procedures by pre-assessing the petitioners for transcript costs already paid by the Commission. In any event, we think

it more appropriate in such cases, since a transcribed record is already available, that this Court determine who shall bear the costs on removal.

4. Although each party has prevailed on certain issues and thus there is no single "prevailing party," *see* NMSA 1978, Civ. App.R. 27(a) (Repl.Pamp.1984), it nevertheless would be unfair and unreasonable to shift the cost of an already prepared record to the party which has enjoyed the greater success on removal. Since Railroads first petitioned for removal, the docket fee paid by it shall not be assessed against the Commission.

The case is remanded to the Commission with directions to vacate its Rule 2, to modify Rule 3, to withdraw its order relating to record costs, and for such other proceedings as may be necessary, in conformance with this Opinion.

IT IS SO ORDERED.

FEDERICI, J., concurs.

RIORDAN, J. (concurs in the result only).

730 P.2d 454

Jean BOUDAR, Plaintiff-Appellee,

v.

E G & G, INC., a foreign corporation, Defendant-Appellant,

v.

John GUENETTE, individually, Donald Wright, individually, William Anderson, individually, Peter Zavattaro, individually, and Ken Jones, individually, Defendants-Appellees.

No. 16167.

Supreme Court of New Mexico.

Dec. 12, 1986.

Rehearing Denied Dec. 31, 1986.

Opinion Withdrawn; New opinion issued.*

* The new opinion filed August 27, 1987 will be published.

Sutin, Thayer & Browne, Randy S. Bartell, Ron Segel, Santa Fe, for defendant-appellant.

Ortega & Snead, Michael Bustamante, Paskind, Lynch & Printz, Myra C. Lynch, Albuquerque, for plaintiff-appellee Boudar.

OPINION

FEDERICI, Justice.

Plaintiff filed this action on March 11, 1982, setting out four counts against E G & G, Inc. (E G & G), his former employer, and several of its supervisory level employees. Plaintiff alleged that he had been terminated by E G & G in retaliation for reporting certain conduct of his immediate supervisor. Plaintiff alleged that he discovered four mounted color slides in his immediate supervisor's desk which plaintiff considered to be pornographic and which he alleged had been processed in the E G & G photo lab using federal government contract funds. Defendants filed a motion to dismiss, seeking dismissal of the first count of the complaint (wrongful discharge from employment), and the fourth count (conspiracy to cause emotional distress). The trial court granted the motion in part, dismissing the first count against the individual defendants and dismissing the fourth count (conspiracy to cause emotional distress).

Thereafter, plaintiff filed an amended complaint alleging three counts: retaliatory discharge from employment, intentional infliction of emotional distress, and tortious interference with contract. Defendants moved for partial summary judgment on various grounds and argued the motions on the day before the trial began. The court entered an order granting the motion in part and denying the motion in part.

Defendants moved for directed verdict on the three counts at the close of plaintiff's case. The court granted the motion in part, dismissing plaintiff's second count (intentional infliction of emotional distress), and dismissing certain of the defendants from the third count (tortious interference with contract). At the close of all the evidence, E G & G again moved for directed verdict on the claim of retaliatory discharge. Defendants William Anderson and John Guenette moved for directed verdict on the claim of tortious interference with contract. Those motions were denied.

Upon instructing the jury, the trial court submitted to the jury the first count of the amended complaint on a mixed theory of retaliatory discharge and breach of contract of employment. The third count of the amended complaint was submitted to the jury on a theory of interference with contractual relations. The jury found in favor of plaintiff on the first count, awarding compensatory and punitive damages against E G & G. The jury found in favor of defendants Guenette and Anderson on the third count. Judgment was entered on the jury verdicts.

E G & G moved the court for judgment notwithstanding the verdict, for new trial, and for remittitur. Plaintiff then moved to amend the pleadings to conform to the evidence because the contract theory of liability and recovery had been erroneously submitted to the jury. The court entered its order denying E G & G's motions and also denying plaintiff's motion to amend. E G & G appeals. We reverse.

Two relevant and dispositive issues are presented on appeal:

1. Did the trial court err in submitting to the jury plaintiff's first count which alleged a tort claim for wrongful discharge?

2. Did the trial court err in submitting to the jury plaintiff's claim based upon breach of contract of employment?

Issue 1. Claim for Wrongful Discharge.

Until 1983, the rule in New Mexico was that an employee who did not have a

contract of employment for a definite term could be discharged by his employer at will, with or without cause, and such a discharge, even without cause, did not give rise to a claim for damages against the employer. *Gonzales v. United Southwest National Bank of Santa Fe,* 93 N.M. 522, 602 P.2d 619 (1979); *Bottijliso v. Hutchison Fruit Co.,* 96 N.M. 789, 635 P.2d 992 (Ct.App.), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1981); *Garza v. United Child Care, Inc.,* 88 N.M. 30, 536 P.2d 1086 (Ct. App.1975).

In 1983, the Court of Appeals of New Mexico decided the case of *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct.App.1983). *Vigil* recognized for the first time in New Mexico a cause of action in tort based upon discharge of an employee in contravention of a clear mandate of public policy. The *Vigil* case modified the long-standing rule that an employee who did not have a contract for a definite term could be discharged at will. *See Bottijliso v. Hutchison Fruit Co.*

Although *Vigil* gave birth to a cause of action for retaliatory discharge, *Vigil's* holding was given prospective application only:

> Because this new cause of action imposes significant new duties, and because of reliance on the long-standing terminable-at-will rule, we hold that the new law should be given modified prospective application. [Citation omitted.] Thus, we apply the law announced to the case before us, except as to punitive damages, and to prospective cases filed after the date this decision becomes final.

Id. at 690–91, 699 P.2d at 621–22.

The court's description of the prospective application of *Vigil* is clear and unambiguous. The date on which *Vigil* became final was clearly some time after the July 5, 1983 opinion of the Court of Appeals. The present action was filed on March 11, 1982, approximately sixteen months before the date of the *Vigil* decision. Plaintiff's amended complaint was filed on February 9, 1983, approximately five months before *Vigil.* Under the Court of Appeals' holding concerning prospectivity, the rule of *Vigil* is not applicable to this case. The rule which is applicable to this case is the terminable-at-will rule which was reaffirmed by the Court of Appeals as little as six months before this case was filed, when the court in *Bottijliso* refused to recognize a cause action for retaliatory discharge.

E G & G timely and properly preserved its objections concerning plaintiff's claim of retaliatory discharge by motion for judgment notwithstanding the verdict. The trial court erred in denying E G & G's motion.

Issue 2. Breach of Employment Contract.

The first count of plaintiff's amended complaint did not plead a claim of breach of contract of employment and E G & G never consented to trial of a claim for breach of contract. On the contrary, at trial, counsel for defendant brought the matter to the court's attention thus:

> I believe there is a difference of opinion between the plaintiff and the defendants as to whether there is a claim against E G & G in this case for breach of contract, and, as I read the complaint, there is not. There is a claim in the third cause of action against the individual defendants for tortious interference with contractual relations. For whatever good it does, I want the record to be clear that all of the issues that may come into evidence pertaining to the existence or nonexistence of a contract of employment, as far as the defense is concerned, are relevant only to the question of the third claim of tortious interference with contractual relations. I do not want to be understood as expressly or impliedly consenting to the trial of a claim of breach of contract against E G & G.

Nevertheless, in submitting plaintiff's first count to the jury, the court instructed the jury on a variety of contract matters that were not within the issues raised by the pleadings. The giving of certain of plaintiff's tendered instructions, which permitted the jury to find that E G & G breached a contract of employment between itself

and plaintiff, constituted reversible error. A party is entitled to have the jury instructed on his theory of the case only if he has both pleaded that theory and offered evidence in support of it. *Mac Tyres, Inc. v. Vigil,* 92 N.M. 446, 589 P.2d 1037 (1979); *Falkner v. Martin,* 74 N.M. 159, 391 P.2d 660 (1964); *Garcia v. Barber's Super Markets, Inc.,* 81 N.M. 92, 463 P.2d 516 (Ct. App.1969). Instructions which present false issues should not be given. *Kirk Co. v. Ashcraft,* 101 N.M. 462, 684 P.2d 1127 (1984); *Simon Neustadt Family Center, Inc. v. Bludworth,* 97 N.M. 500, 641 P.2d 531 (Ct.App.1982).

Instructions given by the trial court improperly inserted contract issues for the jury's consideration. Plaintiff's tendered instruction 14, given over objection as the court's instruction 16, referred to balancing the employer's, the employee's and the public's interest in employment contracts, and allowed the jury to determine, in violation of the prospectivity ruling of *Vigil,* whether plaintiff was discharged for acting in accord with public policy. Plaintiff's tendered instruction 15, given over objection as the court's instruction 17, allowed the jury to find that bad faith or unfair dealing by E G & G would constitute a breach of employment contract. Plaintiff's tendered instruction 17, given over objection as the court's instruction 18, defined a contract. Plaintiff's tendered instruction 18, given over objection as the court's instruction 19, allowed the jury to imply a contract of employment. And plaintiff's tendered instruction 21, given over objection as the court's instruction 20, allowed the jury to find that deviation by E G & G from its employment policies would constitute a breach of an implied contract of employment.

After the verdict was returned, the trial court denied plaintiff's motion to amend the pleadings to conform to the evidence based upon the contract theory of liability. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." NMSA 1978, Civ.P.R. 15(b) (Repl.Pamp.1980); *see also Rice v. Gideon,* 86 N.M. 560, 525 P.2d 920 (Ct.App.1974), *cert. quashed,* 87 N.M. 299, 532 P.2d 888 (1975). Since plaintiff did not plead a claim for breach of contract of employment, and since E G & G never consented to trial of a claim for breach of contract, the trial court did not err in denying plaintiff's Rule 15(b) motion. The trial court's denial of plaintiff's Rule 15(b) motion supports our conclusion that it was reversible error to instruct the jury on a breach of contract theory.

The trial court erred in submitting plaintiff's claim of retaliatory discharge to the jury. The trial court also erred in submitting the first count to the jury on a breach of contract theory. Our holdings on these two issues necessarily dipose of E G & G's contentions that the trial court erred in submitting the issue of punitive damages to the jury. Since we reverse the award of compensatory damages, the punitive damages award cannot stand. *Grandi v. LeSage,* 74 N.M. 799, 399 P.2d 285 (1965); *Wilson v. Galt,* 100 N.M. 227, 668 P.2d 1104 (Ct.App.), *cert. quashed,* 100 N.M. 192, 668 P.2d 308 (1983).

The judgment of the trial court is reversed and the cause remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

STOWERS, C.J., and RIORDAN and WALTERS, JJ., concur.

SOSA, Senior J., not participating.

730 P.2d 458

Jim J. OWENS, Don M. Fedric, and Ronald Peters, Plaintiffs-Appellants,

v.

The SUPERIOR OIL COMPANY, Defendant-Appellee.

No. 16517.

Supreme Court of New Mexico.

Dec. 12, 1986.

A.J. Losee, Losee & Carson, Artesia, K. Douglas Perrin, Shamas & Perrin, Roswell, for plaintiffs-appellants.

Harold L. Hensley, Jr., Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, for defendant-appellee.

OPINION

WALTERS, Justice.

Plaintiff Owens and others sued Superior to obtain release of an oil and gas lease held by Superior. Both parties moved for summary judgment; the trial judge denied Owens's motion and granted Superior's. Owens appeals, posing the following issue:

> Does pooling leased land with other land, on which lessee began drilling operations within the sixty-day grace period allowed under a continuous operations clause, effectuate a valid extension of an oil and gas lease so long as production is maintained?

To answer this question, we review the facts. On April 8, 1974, Donna G. Roberts, Owens's predecessor in interest, executed a ten-year primary term oil and gas lease in favor of Superior. Before the primary term expired, Superior began drilling operations at its No. 2 Mescalero Ridge Well located on the leased lands. That drilling resulted in a dry hole and, on April 25,

1984, Superior ceased operations at the No. 2 well. Since the primary term had expired, and the continuous operations clause of the lease provided for termination sixty days after the cessation of operations unless the lessee commenced "additional drilling or reworking operations," Superior began drilling operations at its No. 11 Mescalero Ridge Well on April 28, 1984. No. 11 was not located on the leased land. On May 9, 1984, Superior filed its "Designation of Mescalero Ridge Com. No. 11 Unit" purporting to pool forty acres of the leased land with forty acres on which the No. 11 well was located, to form an eighty-acre unit. First production from No. 11 well was obtained on June 26, 1984.

On June 7, 1984, Owens acquired a one-half mineral interest in the land covered by the lease. On July 11, 1984, Fedric and Peters (co-plaintiffs) acquired certain undivided interests in the minerals and leasehold estate of Owens, two days after Owens had made a demand for release. Superior refused to execute the release and, on August 1, 1984, plaintiffs filed this suit.

New Mexico has not previously decided the issue presented. Two other jurisdictions reached opposite results in similar cases. *Compare Humble Oil & Refining Co. v. Kunkel,* 366 S.W.2d 236 (Tex.Civ. App.1963) *with Harper v. Hudson Gas & Oil Corp.,* 189 F.Supp. 781 (W.D.La.1960), *aff'd,* 299 F.2d 238 (5th Cir.1962). In both, drilling operations in progress following expiration of the primary term resulted in dry holes. Both leases provided that the lessees had sixty days after completion of the dry hole to commence additional operations. In *Harper,* within the sixty days, the Louisiana Commissioner of Conservation issued an order pooling the leased lands with other lands on which there was a preexisting well. The *Harper* court granted summary judgment in favor of lessee Hudson Oil. In *Kunkel,* within the sixty days, Humble Oil pooled its leased lands with other land on which there was a preexisting well. The trial judge granted a summary judgment in favor of termination, and the appellate court affirmed.

As with other leases, the primary consideration when construing an oil and gas lease is to give effect to the intention of the parties. *Acquisto v. Joe R. Hahn Enterprises, Inc.,* 95 N.M. 193, 619 P.2d 1237 (1980). Neither party argues that the provisions in question are ambiguous; therefore, the lease must be given the legal effect resulting from a construction of the language contained within the four corners of the instrument. *L.R. Property Management, Inc. v. Grebe,* 96 N.M. 22, 627 P.2d 864 (1981); *see also Newman Brothers Drilling Co. v. Stanolind Oil & Gas Co.,* 296 S.W.2d 567 (Tex.Civ.App.1956), *rev'd on other grounds,* 157 Tex. 489, 305 S.W.2d 169 (1957).

Superior began drilling operations during the primary term which resulted in a dry hole. The continuous operations clause provides, in part:

> 6. a) If * * * lessee should drill and abandon a dry hole or holes thereon * * this *lease* shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter * * * (emphasis added).

Owens argues that only this clause remained in force after the primary term expired and Superior, therefore, could only extend the lease by engaging in additional drilling, mining, or reworking on the lands leased from Owens. Since Superior did not comply with this requirement, plaintiff argues, the lease expired by its own terms.

Superior urges us to adopt the federal district court's interpretation of the similar provision in *Harper.* The *Harper* court, noting that the primary purpose of a continuous operations clause "is to give a lessee who has incurred the expense of drilling a well an opportunity to save his lease in the event the well is a dry hole," held that the clause kept the entire lease, including the pooling clause, in full force and effect for a sixty-day period after the cessation of operations. *Harper v. Hudson Gas & Oil Corp.,* 189 F.Supp. at 787 (quoting *Stanolind Oil and Gas Co. v. Newman Brothers Drilling Co.,* 157 Tex. 489, 497, 305 S.W.2d 169, 174 (1957)). We

are persuaded by this reasoning, and hold that a continuous operations clause in an oil and gas lease keeps the entire lease in full force and effect if, within a period of sixty days after the cessation of drilling or production, drilling or reworking occurs on the leased land or any land with which it is pooled when pooling is permitted by the lease.

To hold otherwise necessitates construing the continuous operations clause as terminating all other provisions of the lease as soon as operations or production cease. To do so is contrary to the express language of that clause. Accordingly, since Superior began drilling operations during the primary term of the lease, and even though they resulted in a dry hole after the term ended, the continuous operations clause maintained the lease in full force and effect for sixty days after April 25, 1984.

Oil and gas leases must be construed to give effect to all of their provisions so far as possible. *Cf. Gallup Gamerco Coal Co. v. Irwin,* 85 N.M. 673, 515 P.2d 1277 (1973) (meaning and significance must be given to each part of a real estate lease in context of entire agreement); *Waxler v. Humble Oil & Refining Co.,* 82 N.M. 8, 474 P.2d 494 (1970) (same). Here, the pooling provision gave Superior the "right to pool or unitize this lease." By exercising that right within sixty days of drilling the dry hole on the leased premises, Superior saved the lease for as long as production is maintained. *Harper v. Hudson Gas & Oil Corp.*

Owens insists that, unlike the *Harper* court, we must strictly construe the lease against the lessee. There is New Mexico authority to support his position. *See Greer v. Salmon,* 82 N.M. 245, 479 P.2d 294 (1970) (recognizes cautious application of rule that oil and gas leases are to be construed most strongly against lessees). In *Kunkel,* the court's critical inquiry was not "whether Humble declared its unit while the lease was still in force; it is, instead, did Humble do that thing permitted by the lease to save it?" *Humble Oil & Refining Co. v. Kunkel,* 366 S.W.2d at 239. The court there focused solely on the language of the continuous operations provision, and held that the mere pooling of the leased land with land on which there was an already producing well did not satisfy the specific requirements of the continuous operations clause. It held the lease terminated. Here, however, not even a strict construction of the provision in question defeats Superior's claims.

Both parties urge that success under the *Kunkel* analysis depends on interpretation of the final section of the continuous operations clause which provides:

> If, at the expiration of the primary term, oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is not being produced on said land *or land pooled therewith* but lessee is then engaged in operations for drilling, mining, or reworking of any well or wells thereon, this lease shall remain in force so long as such operations or said additional operations are commenced and prosecuted * * * with no cessation of more than sixty (60) consecutive days, and, if they result in production, so long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced from said land *or land pooled therewith* (emphasis added).

Owens insists that the crucial language is "said land or land pooled therewith," and argues that the second appearance of the phrase "or land pooled therewith" relates back to the first time it appears in the section, thereby requiring that any land covered by this provision be pooled before the expiration of the primary term.

We construe the paragraph to the contrary, believing that the clause ending with the first "or land pooled therewith" simply introduces the particular situation that must exist to cause this section to become operative. The rest of the paragraph then instructs the lessee what may be done to save the lease. The final "or land pooled therewith," read in conjunction with the phrase "such operations or said additional

operations ... commenced and prosecuted," establishes that one option for the lessee is to begin additional operations resulting in production on "said land or land pooled therewith" during that subsequent sixty-day period. Therefore, even though under *Kunkel,* pooling alone is insufficient to save a lease under the continuous operations clause after the expiration of the primary term, "additional operations ... commenced and prosecuted" on either the leased land or land with which it has been pooled during the sixty-day grace period covered by the clause, continues the lease in force. Superior, unlike Humble Oil, did "that thing" which saved the lease—it engaged in further drilling (that resulted in production) on land that had been "pooled therewith [the leased land]" prior to production, and before the sixty days had run.

Summary judgment in favor of Superior is AFFIRMED.

SOSA, Senior Justice, and RIORDAN, J., concur.

730 P.2d 461

RUIDOSO STATE BANK, Plaintiff-Appellant,

v.

Michael M. CASTLE, et al., Defendants-Appellees.

No. 16259.

Supreme Court of New Mexico.

Dec. 23, 1986.

Ronald G. Harris, Parsons, Harris & Bryant, P.C., Ruidoso, for plaintiff-appellant.

Mel B. O'Reilly, Ruidoso, S. Thomas Overstreet, Alamogordo, for defendants-appellees.

OPINION

WALTERS, Justice.

The question on this appeal is whether a mortgage containing a "dragnet clause" covers preexisting debts to the lender in all cases, whether or not those debts are related to the purpose of the loan for which the mortgage is obtained, to give the lender in a foreclosure proceeding a priority position as to those debts over judgments obtained by other creditors before foreclosure. In the circumstances of this case, we hold it does not and we affirm the trial court.

FACTS

Appellant Ruidoso State Bank (Bank) brought a foreclosure suit against Michael Castle and Ruth Castle (Castles); Allied Stores, Inc., d/b/a T-Bird Home Centers (Allied); Otero County Electric Cooperative, Inc. (Otero) and other judgment creditors of Castles. Allied and Otero filed counter- and cross-claims alleging superior rights in the property sought to be fore-

closed. Bank obtained, before trial, a default judgment against Castles; the other creditors failed to appear and, consequently, their relative priorities were determined to follow those of the litigating parties. The district court established a priority in favor of the Bank for the amount of a renewal note and in favor of appellees Allied and Otero on their respective judgment claims.

The record discloses that on March 30, 1982, Castles executed and delivered to the Bank a $10,100 commercial promissory note ("Note 1"), secured by a Loraine 20-ton crane. On June 28, 1982, Michael Castle executed a second promissory note ("Note 2") for $4,334.64, secured by a 1979 Chevrolet El Camino. Thereafter, Castles signed a real estate mortgage note for $12,000 ("Note 3") and a mortgage, both dated July 30, 1982, covering Lots 1, 3 and 5 of Thunderbird Hills Subdivision. A second mortgage dated September 8, 1982, but acknowledged on July 30, 1982 was given by Castles to Bank covering Lot 6 of Thunderbird Hills Subdivision. Both mortgages secured the July 30, 1982 "Note 3." Each mortgage contained a dragnet clause securing "all loans, advances, indebtedness, or liabilities, whether now existing or which hereafter come into existence * * * including any extensions and renewals thereof * * * *"

On December 15, 1982, Allied obtained a money judgment against Michael Castle in the sum of $12,978.27, plus interest, and recorded its judgment the next day. On February 8, 1983, Otero obtained and recorded a money judgment against the Castles in the sum of $666.60, plus interest.

On August 24, 1983, Castles executed in favor of Bank a $6,000 promissory note ("Note 4"), renewing or extending Note 3. Before its execution, however, Bank had released Lots 1 and 5 from the mortgage securing Note 3, and Note 4 reflects that Castles gave a security interest in Lots 3 and 6, and that the note was secured by the July 30 and September 30, 1982 mortgages.

On November 28, 1983, the Bank obtained a default deficiency judgment against Michael Castle in the amount of $6,032.12, plus interest, after he had defaulted on Notes 1 and 2. That judgment was recorded on December 1, 1983.

Castles thereafter defaulted on Note 4, and this action resulted to foreclose on Lots 3 and 6 and to establish the priorities of creditors to the proceeds. The court allowed the Bank to amend its complaint at trial, to assert that the dragnet clauses contained in the mortgages should be construed to secure Bank's deficiency judgment.

Finding that the Bank's 1982 mortgages constituted valid first liens against Lots 3 and 6, the court awarded the Bank $6,378 plus interest, and $600 in attorney's fees. The court denied any priority to Bank under the dragnet clause of the mortgages with respect to the deficiency judgment, and directed that the other claims against Castles be paid from any excess sale proceeds in the following order:

1. To Allied on its judicial lien;
2. To Otero on its judicial lien;
3. To the Bank on its judicial lien;
4. To non-participating creditors.

DISCUSSION

A provision in a mortgage in which the mortgagor gives security for past and future advances as well as present indebtedness has been called a "dragnet clause." *Uransky v. First Federal Savings & Loan Association,* 684 F.2d 750, 756 n. 5 (11th Cir.1982). In *Clovis National Bank v. Harmon,* 102 N.M. 166, 692 P.2d 1315 (1984), this Court found that a dragnet clause in a real estate mortgage effectively secured all preexisting and future debts incurred by the maker of the note. In the present case, both of the 1982 real estate mortgages to the Bank from the Castles provided, in part:

> This mortgage secures the performance of the following obligations:
>
> * * * * * *
>
> (b) Payment of all loans, advances, indebtedness, or liabilities, whether now existing or which hereafter come into

existence, whether matured or unmatured, whether direct or indirect, whether obligatory or discretionary, absolute or contingent, primary or secondary, including any extensions and renewals thereof, due mortgagee from mortgagor regardless of how acquired by mortgagee, not to exceed at any one time the maximum sum of $24,000.00, the advancement of which sum is discretionary but not obligatory upon mortgagee.

We think the trial court was correct, however, in declining to read *Harmon* as establishing as a matter of law that any holder of a mortgage having a dragnet provision has, automatically, with respect to all preexisting and future obligations, a priority date as of the date of the mortgage.

We based our decision in *Harmon* on the substantial evidence to support the trial court's ruling. As we noted there, substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 168, 692 P.2d at 1317, quoting *Toltec International, Inc. v. Village of Ruidoso,* 95 N.M. 82, 84, 619 P.2d 186, 188 (1980). An appellate court does not weigh the evidence; rather, it resolves "all disputed facts in favor of the successful party, indulge[s] all reasonable inferences in support of a verdict, and disregard[s] all evidence and inferences to the contrary." *Id.* at 168–69, 692 P.2d at 1317–18. In *Harmon,* then, this Court, in its appellate role, simply concluded that based on the record before it the trial judge had not erred in deciding that the dragnet clause contained in the real estate mortgage secured other notes involved in that particular case. Having said here, however, that dragnet clauses do not, as a matter of law, secure all debts between parties, we must then determine if substantial evidence supports the trial court's decision.

Dragnet clauses which purport to secure all debts, past, present, and future, between parties to a security agreement generally are disfavored and thus strictly construed. *Uransky v. First Federal Savings & Loan Association.* Aside from the actual language of the provision, construction should focus on the intent of the parties as evidenced by the circumstances surrounding the mortgage and the nexus between the mortgage and the notes involved. *In re Bass,* 44 B.R. 113 (Bkrtcy.N.M.1984). It is apparent that this is what the trial judge did. For instance, in his Finding 22, the judge determined:

> The course of conduct between Plaintiff and Defendant Castle indicates that the real property was security for the August 24, 1983 note only and not as collateral security for any other note of Castle to Plaintiff.

That finding was no doubt influenced by Bank's actions in the deficiency proceedings. Bank had already filed suit on Notes 1 and 2 when on August 24, 1983 it renewed Castles' June 30, 1982 Note 3, and it had released two of the lots secured by the mortgages. Additionally, the complaint on Notes 1 and 2 sought (and Bank obtained) foreclosure on the personal property collateral securing those notes. In fact, when Bank sued on Notes 1 and 2 in January 1983, both mortgages already had been recorded, but it was not contended by Bank at the time of suit that the mortgages also secured Notes 1 and 2.

Nevertheless, if the connection between the first two notes and the later mortgages is sufficiently related, the court could give effect to the dragnet clause despite the lack of evidence of actual expressed intent. *In re Bass,* 44 B.R. at 116. On that question, the trial judge found:

> 24. The general purpose of the August 24, 1983 promissory note is inconsistent with any interpretation other than that the real property described as Lots 3 and 6, Thunderbird Hills, was being held as collateral for payment of said August 24, 1983 promissory note.

Note 1 (March 30, 1982), secured by a Loraine 20–ton crane, shows that it was executed for a business purpose. Note 2 (June 28, 1982), secured by a 1979 Chevrolet El Camino, does not indicate its purpose. The July 30, 1982 Note 3 was executed by Castles in their personal capacity but, again,

does not disclose the purpose for which the loan was made. The purpose of the August 24, 1983 Note 4 was "Lots for resale/Renewal decrease conforming." From the record, then, we are unable to determine that any of the loans are sufficiently related to each other to satisfy the nexus requirement. *Cf. New Mexico Bank and Trust Co. v. Lucas Brothers,* 92 N.M. 2, 4, 582 P.2d 379, 381 (1978) (sufficient relationship existed between mortgage with a dragnet clause and subsequent notes to give bank's lien first priority, against second mortgagee with notice, for an amount equal to the face value of bank's mortgage).

We are satisfied that adequate and substantial evidence supports the trial court's findings that the Bank never intended for the mortgages to secure preexisting notes and security agreements, and that there was an insufficient nexus to relate Notes 1 and 2 to the mortgages. Accordingly, we affirm the order of priority declared by the court below.

IT IS SO ORDERED.

FEDERICI, J., concurs.

STOWERS, C.J., concurs in result.

730 P.2d 464

Marie EAVENSON, Plaintiff-Appellant,

v.

LEWIS MEANS, INC., Defendant-Appellee.

No. 16198.

Supreme Court of New Mexico.

Dec. 30, 1986.

Klipstine & Hanratty, James W. Klipstine, Jr., Carlsbad, for plaintiff-appellant.

W.T. Martin, Jr., Carlsbad, for defendant-appellee.

OPINION

RIORDAN, Justice.

Marie Eavenson (Eavenson) brought this action against Lewis Means, Inc. (Means)

for the breach of an oral promise for employment. The trial court granted summary judgment for Means. We reverse and remand for trial.

Eavenson was employed by Titan Services, Inc., when Lewis Means, contract operator of a trucking terminal for Whitfield Tank Lines, Inc., approached her and offered her employment at Louis Means, Inc. He offered a salary that was higher than the salary she was making at Titan, plus he offered to provide health insurance for her family and her. He also gave her a prospective starting date for employment. Eavenson accepted the offer of employment and Means acknowledged her acceptance. Subsequently, Eavenson quit her job, but was refused employment by Means. Eavenson brought this action.

The issues on appeal are:

I. Whether granting summary judgment in this case was proper, and

II. Whether the statute of frauds applies.

I. SUMMARY JUDGMENT

Summary judgment is a drastic remedy which should be used with great caution, *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977). *See Cunningham v. Gross,* 102 N.M. 723, 699 P.2d 1075 (1985). The sole purpose of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. *Cebolleta Land Grant v. Romero,* 98 N.M. 1, 644 P.2d 515 (1982).

This Court frequently has reiterated the standard to be applied in deciding whether a summary judgment should be granted. We have stated that where an appeal is taken from a summary judgment, we will review the testimony in light most favorable to support a trial on the merits. *North v. Public Service Co.,* 97 N.M. 406, 640 P.2d 512 (Ct.App.1982).

It was error for the trial court to grant a summary judgment in light of the facts of this case. Eavenson stated during the summary judgment motion that she was not arguing about an employment contract, but rather an "agreement to employ". The issue to be decided at trial is one of promissory estoppel. Promissory estoppel has been defined as: "a promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of a promisee and which does not induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. Restatement (Second) of Contracts § 90 (1981). The limits of promissory estoppel are: (1) the detriment suffered in reliance must be substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; (3) the promisee must have acted reasonably in justifiable reliance on the promise as made." Laurence P. Simpson, *Contracts* (1965). Implementation of this doctrine "requires reliance upon a promise." J. Calamari and J. Perillo, *Contracts,* 202 (2d ed. 1977).

Upon reading the pleadings, the transcript of the proceedings, and depositions of the parties, it appears there are genuine issues of fact to be decided in this case, i.e., did Eavenson rely on Means' promise; if so, did Eavenson suffer economic loss as in reliance on Means' promise; were Eavenson's acts in reliance foreseeable by Means; and did Eavenson act reasonably in justifiable reliance on Means' promise to hire her? These are all issues of fact for the trier of fact to decide. Therefore, granting the summary judgment was improper in this case where a genuine issue of fact exists.

II. STATUTE OF FRAUDS

The general purpose of the statute of frauds is to "protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or imposed upon them." *Pattison Trust v. Bostian,* 90 N.M. 54, 56, 559 P.2d 842, 844 (Ct.App.1976), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977), (quoting *Keirsey v. Hirsch,* 58 N.M. 18, 265 P.2d 346 (1953)).

In *Westerman v. City of Carlsbad,* 55 N.M. 550, 237 P.2d 356 (1951), this Court addressed the issue of whether recovery could be had in an action for reasonable value of service actually rendered under an alleged oral contract of employment for minimum term of two years, notwithstanding the statute of frauds. We held that such recovery may be had. We stated that the party claiming equitable estoppel must lack knowledge of the true facts; rely on the conduct of the party estopped and act on the promise to her detriment. Under the facts of the case at bar, Eavenson lacked knowledge of the true fact that Means would not hire her. She relied on the conduct of Means, the party estopped. Further, she acted on Means' promise to her detriment. She quit her job and lost money and her job as a result of her actions in reliance on Means.

The Tenth Circuit Court of Appeals affirmed that the doctrine of promissory estoppel can apply to an otherwise unenforceable employment contract in *Glasscock v. Wilson Constructors, Inc.,* 627 F.2d 1065 (10th Cir.1980). The trial court denied a motion for summary judgment on the grounds that the doctrine of promissory estoppel could be available to avoid the application of the statute of frauds.

This same query was addressed in *Oxley v. Ralston Purina Co.,* 349 F.2d 328 (6th Cir.1965). The court affirmed the application of the doctrine of equitable estoppel to deny invoking the statute of frauds as an affirmative defense under the facts of the case. Oxley brought the action against Ralston Purina for breach of oral contract dealing with a hog-leasing program. The court held that the oral agreement, which was not to be performed within a year, should be enforced against Ralston Purina because the farmer relied upon the agreement and had made extensive investments upon such reliance.

We distinguish *Gonzales v. United Southwest National Bank of Santa Fe,* 93 N.M. 522, 602 P.2d 619 (1979). In that case the court dealt with the issue of an employee with a written contract for a three-year period of performance. Gonzales, the employee, argued that the employment agreement provided for lifetime or permanent employment if he competently handled his job and that he could only be discharged for good cause. In the alternative, Gonzales argued that if the contract was not a lifetime contract, the contract was automatically renewed. We held that a contract for permanent employment must be supported by additional consideration other than performance of duties and payment of wages or it is a contract for an indefinite period. *Id.* at 524, 602 P.2d at 621. Additionally, the contract in question contained an option for renewal clause which specifically implied that the parties must affirmatively exercise the option. *Id.*

Gonzales further argued that if the Statute of Frauds were applicable, the bank should be estopped from asserting it. But unlike the Eavenson case, the *Gonzales* case presented no facts to substantiate the claim of estoppel. Therefore, the *Gonzales* case is clearly distinguishable.

In the present case, if the elements of promissory estoppel are proven in court, then the application of the statute of frauds is not available for Means.[1]

We reverse the summary judgment and remand this case back to the trial court for a trial on the merits.

IT IS SO ORDERED.

WALTERS, J., and SOSA, Senior Justice, concur.

1. Although the issue of damages is not before the court on this appeal, should it become a question for the trial court, we commend the trial court to the following cases: *Griffin v. Burns,* 431 F.Supp. 1361 (D.R.I.1977) (appropriate remedy under all circumstance was specific performance); *Kinzlie v. City of Santa Cruz,* 539 F.Supp. 887 (N.D.Cal.1982) (Court of equity has broad powers to tailor remedies); *Swinerton & Walberg Co. v. City of Inglewood Los Angeles Co. Civic Center Authority,* 40 Cal.App.3d 98, 114 Cal.Rptr. 834 (court limited damages to plaintiffs losses sustained in reliance, rather than his expected profit). *See also Corbin on Contracts,* §§ 193–200 (Kaufman Supp., 1984).

730 P.2d 467

In re WHAT D'YA CALL IT, INC., a New Mexico corporation, d/b/a Ned's Marina, Debtor.

WHAT D'YA CALL IT, INC., d/b/a Ned's Marina, Plaintiff,

v.

SUNWEST BANK OF ALBUQUERQUE, Ned Gattas, Adele Gattas, State of New Mexico Bureau of Revenue and the State of New Mexico Employment Security Commission, United States of America Department of the Treasury, New Mexico Federal Savings & Loan Association and Uptown Square Venture, Defendants.

No. 16529.

Supreme Court of New Mexico.

Dec. 30, 1986.

Louis Puccini, Jr., Albuquerque, for plaintiff.

Paul Bardacke, Atty. Gen., Bridget Jacober, Sp. Asst. Atty. Gen., Santa Fe, for Bureau of Revenue.

Donald Becker, Albuquerque, for Bacchus.

OPINION

FEDERICI, Justice.

The United States District Court for the District of New Mexico, upon recommenda-

tion of the United States Bankruptcy Court, certified to this Court the following question of law:

> Whether NMSA 1978, Sections 7-1-82 and 60-6B-3(E) create conditions precedent to the transfer of a liquor license and therefore the claims of the tax department and liquor wholesalers have superpriority status over security interests, mortgages and other liens or whether the requirements of NMSA 1978, Section 7-1-37 and general lien law must be met in order to effectuate a claim under Sections 7-1-82 and 60-6B-3(E).

Section 7-1-82 creates conditions precedent to obtaining approval for the transfer of a liquor license. This section assures the New Mexico Taxation and Revenue Department of payment in full for all taxes due from engaging in business authorized by the liquor license by prohibiting the transfer, assignment, lease or sale of a liquor license unless the conditions as to the payment of taxes have been met. *See* NMSA 1978, § 7-1-82(A) (Repl.Pamp.1986).

The tax liability referred to in Section 7-1-82 may become a lien in favor of the State in the amount of taxes due if the procedures set forth in NMSA 1978, Sections 7-1-37 and -38 (Repl.Pamp.1986) are followed. Subsection 7-1-37(C) provides: "As against any mortgagee, pledgee, purchaser, judgment creditor, lienor or other encumbrancer for value, the lien imposed by Subsection A of this section shall not be considered to have arisen or have any effect whatever until notice of the lien has been filed as provided in Section 7-1-38 NMSA 1978."

Section 7-1-38 provides: "A notice of the lien provided for in Section 7-1-37 NMSA 1978 may be recorded in any county in the state in the tax lien index established by Sections 48-1-1 through 48-1-7 NMSA 1978, and a copy thereof shall be sent to the taxpayer affected." The lien is effective as of the date the notice is filed. A superpriority status in bankruptcy is not created by Section 7-1-37 and the priority of Taxation and Revenue Department claims is determined as of the date of recording notice of the lien as provided in Section 7-1-38. The requirements of Section 7-1-38 must be met in order to effectuate a lien under Section 7-1-37.

The sections of the Tax Administration Act discussed above are completely independent of NMSA 1978, Section 60-6B-3(E) (Cum.Supp.1986). This section provides that debts of the liquor licensee owed to wholesaler creditors "shall constitute a lien on the license, and the lien shall be deemed to have arisen on the date when the debt was originally incurred." *See generally Chronis v. State ex rel. Rodriguez,* 100 N.M. 342, 345, 670 P.2d 953, 956 (1983) (as against creditors of the licensee the license shall be considered property subject to execution, attachment and liens). Section 60-6B-3(E), in contrast to Section 7-1-38, does not require that notice of the lien be recorded to effectuate the liquor wholesaler's lien.

The requirements of Section 7-1-38 and general lien law do not apply to claims made under Section 60-6B-3(E). A lien pursuant to Section 60-6B-3(E) has a superpriority status over other lienholders, including the tax lien in favor of the State, unless the latter liens were perfected under Section 7-1-38 or under applicable general law prior to the date the licensee incurred debts owed to wholesaler creditors.

IT IS SO ORDERED.

STOWERS, C.J., SOSA, Senior Justice, and WALTERS, J., concur.

RIORDAN, J., not participating.

730 P.2d 470

Robert Lee CANDELARIA,
Plaintiff-Appellee,

v.

GENERAL ELECTRIC COMPANY, a corporation, Employer, and Electric Mutual Insurance Company, Insurer, Defendants-Appellants.

No. 7841.

Court of Appeals of New Mexico.

Feb. 13, 1986.

Certiorari Quashed Dec. 17, 1986.

Pedro G. Rael, Rael & Jarner, Los Lunas, Thomas A. Tabet, Albuquerque, for plaintiff-appellee.

Kathryn Levy, Paul L. Civerolo, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendants-appellants.

OPINION

ALARID, Judge.

Defendants appeal from the judgment of the district court in favor of Robert Lee Candelaria (plaintiff). This appeal raises issues of first impression: whether and under what circumstances psychological disability predicated upon psychological injury that arises from work-related stress is compensable under the New Mexico Workmen's Compensation Act (Act), NMSA 1978, Sections 52-1-1 to -69 (Orig.Pamp. and Cum.Supp.1985). Defendants also appeal the trial court's failure to grant post-judgment relief, the amount of attorneys' fees awarded, and the award of interest on the judgment. We affirm.

FACTS

Plaintiff is forty-three years old and has been married for seven years. He has a high school education and was in the service for three years. He testified that he had no problems in the service and was honorably discharged. He then began to work as a "plater." Eventually, he became a foreman supervising platers and later became a plant manager overseeing a substantial number of employees. He held this position for thirteen or fourteen years until, in 1977, the owner sold the plant, leaving plaintiff without a job. Plaintiff came to New Mexico to look for work and had to settle for a janitor job. Subsequently, plaintiff worked as a laborer and for a company making roof trusses. He testified that he had no problems with these jobs and had no clashes with his supervisors. Plaintiff then went to work for General Electric (G.E.), as a janitor, hoping that he could advance to a plating job.

Plaintiff first worked as a janitor at G.E., but soon became a forklift operator. Thereafter, he began to work as a "process varied" preparing jet engine parts for plating. According to plaintiff, he had no emotional difficulties with his supervisors during this period of time. At first, plaintiff worked during the night shift under Gianini for a period of between six months and a year. Plaintiff testified that except for one instance where he had refused to take a shortcut requested by Gianini, he had no problems while he worked the night shift.

Plaintiff described the process of his work. Basically, he prepared various components of jet engines for plating. The parts would be cleaned and then placed in acid, cleanser chemical or plating baths for various periods of time. A timer would go off when the part was to be removed from the bath. More than one part would be going through this process at any given time. Plaintiff testified that this was a full-time job.

Plaintiff's problems began when he was transferred to the day shift and began working under the supervision of Jewett. At first, plaintiff had basically the same job. After a few weeks, however, Jewett began to assign more duties to plaintiff. An employee with a different job classification quit, and plaintiff was required to perform this employee's job in addition to his own. Plaintiff testified that he received no help from other employees in performing these additional tasks. The performance of these additional tasks was complicated by the fact that parts were being timed while plaintiff was doing these tasks and by the fact that Jewett would tell plaintiff to drop everything in order to work on the "hot" (priority) items.

Plaintiff complained to Jewett, but was told that he had to do the work assigned to him. Plaintiff then went to the union and various plant officials, but nothing was done. Plaintiff then went to the Labor Board, but was told to talk to the plant manager. Plaintiff did talk to the plant manager and was told a new worker would be hired in three weeks. Three weeks passed, and no new worker was hired.

On or about May 13, 1981, plaintiff again went to see the plant manager. The manager said he had been too busy and needed additional time. Plaintiff returned to his work station and was told to go outside to steam clean some parts. Plaintiff felt nervous. Jewett came outside and started giving plaintiff more orders. Plaintiff started shaking and felt like killing Jewett. Plaintiff formed an intent to kill Jewett but changed his mind. Plaintiff ran inside the building; he was crying, sweating and had chest pains. Plaintiff went home where he was later found by his wife still crying and shaking. His wife called the family doctor.

A series of hospitalizations began for psychological problems. First, plaintiff was hospitalized for three months at Vista Sandia on a voluntary basis. He then returned to G.E., was again placed under Jewett and asked to perform the same tasks. Soon, plaintiff was suffering from nervousness, sweating and chest pain. He was again hospitalized at Vista Sandia for three months. Plaintiff returned to work at G.E., again was placed under Jewett and asked to perform the same tasks. Accord-

ing to plaintiff, "Jewett didn't slack off one bit." Plaintiff had a nervous breakdown and was again hospitalized at Vista Sandia. This happened again and again for a total of four times. Plaintiff told officials at G.E. that he would work as a janitor, if necessary, if they would not place him under Jewett again. After the fourth hospitalization, plaintiff was finally placed under another supervisor. However, after attending a deposition, plaintiff saw Jewett, got chest pains and began to hyperventilate. He was then hospitalized for the fifth time in January 1983.

Dr. Gerard S. Fredman, a psychiatrist, testified that plaintiff was suffering from anxiety and depression disorders, and from paranoid ideations. The symptoms of anxiety and depression were severe. Dr. Fredman concluded that events at work had triggered the symptom formation. Dr. Fredman believed that plaintiff's problems arose from the fact that he could not cope with work. The doctor testified that to a reasonable degree of medical probability, plaintiff's disability was stimulated by the conflict with Jewett and by plaintiff's interpretation of that conflict. Dr. Fredman stated that there were things in plaintiff's history that could have predisposed him to the breakdown.

Dr. Fredman attached critical significance to the conflict with Jewett because plaintiff had done well in other settings. Dr. Fredman also evaluated the possibility that plaintiff was malingering. He concluded that plaintiff was not malingering because the physical symptoms were too sophisticated to fake, because plaintiff had made a genuine (as opposed to an attention-getting) suicide attempt, and because plaintiff had made diligent attempts to return to work.

More medical testimony was provided by Dr. Stephen I. Sacks, another psychiatrist. Dr. Sacks' deposition was read into the record. Dr. Sacks diagnosed plaintiff as suffering from affective or mood disorders involving anxiety and depression. He believed that these disorders were a reaction to the stress at work. Dr. Sacks stated that he was unable to identify any source of plaintiff's disability other than the stress at work.

Dr. Paul Rodriguez, a clinical psychologist, testified for defendants. After administering psychological tests to plaintiff, Dr. Rodriguez concluded that plaintiff had a "schizotypical" personality. Dr. Rodriguez found it difficult to believe that plaintiff's problems were caused by the particular job situation at G.E. because a schizotypical personality is a long-standing problem. However, Dr. Rodriguez refused to say whether the work situation at G.E. aggravated any pre-existing problems because he had insufficient information as to plaintiff's history.

On cross-examination, Dr. Rodriguez was asked a long, hypothetical question in which he was asked to assume, among other things, that plaintiff had no prior difficulties in other settings, was under stress at work and had a nervous breakdown after a confrontation with his foreman. Dr. Rodriguez admitted that, if all the facts in the hypothetical were true, the work situation may have aggravated plaintiff's problems.

After trial, the court found plaintiff to be temporarily totally disabled from May 13, 1981 to January 28, 1983, and permanently partially (25%) disabled thereafter. The trial court found that an accidental injury took place on May 13, 1981, and before each subsequent hospitalization.

DISCUSSION

I. COMPENSABILITY OF PSYCHOLOGICAL INJURY CAUSED BY EMOTIONAL STRESS

A. Recognition of the Cause of Action

Defendants' arguments on appeal are related to the issue of whether a workman may recover compensation benefits where he has sustained disability predicated upon a psychological injury, caused by emotional stress, which is unrelated to any accompanying physical injury. Although this question has been raised previously in this jurisdiction, recovery has been denied based upon the facts of each particular case. *See*

Kern v. Ideal Basic Industries, 101 N.M. 801, 689 P.2d 1272 (Ct.App.1984) (a mental breakdown suffered as a result of termination was not an injury "arising out of" employment because it was not related to the performance of the employee's employment duties). No case has held or suggested that a psychological injury caused by stress arising out of and in the course of employment would not be compensable.

There is a divergence of opinion as to whether workmen's compensation benefits are payable due to the disability or death of a workman caused by shock, excitement or emotional disturbance unaccompanied by physical impact or violence on the workman's body. *See e.g. State Compensation Fund v. Industrial Commission,* 24 Ariz. App. 31, 535 P.2d 623 (1975) (mental or emotional shock resulting in disability is compensable without physical injury); *Burlington Mills Corp. v. Hagood,* 177 Va. 204, 13 S.E.2d 291 (1941) (recognizing recovery without physical impact). *Contra In re Loague,* 450 P.2d 492 (Okla.1969); *In re Korsun's Case,* 354 Mass. 124, 235 N.E.2d 814 (1968); *Samolin v. Trans World Airlines, Inc.,* 20 App.Div.2d 160, 245 N.Y.S.2d 628 (1963); *Liscio v. S. Makransky & Sons,* 147 Pa.Super. 483, 24 A.2d 136 (1942).

A "distinct majority" of out-of-state courts have held that an emotional or mental stimulus can produce a compensable "nervous" injury. 1B A. Larson, *Workmen's Compensation Law,* § 42.23 (1985). *See e.g. American National Red Cross v. Hagen,* 327 F.2d 559 (7th Cir.1964); *Carter v. General Motors Corp.,* 361 Mich. 577, 106 N.W.2d 105 (1960); *Wolfe v. Sibley, Lindsay & Curr Co.,* 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975); *Bailey v. American General Insurance Co.,* 154 Tex. 430, 279 S.W.2d 315 (1955). *See also* Annot., 97 A.L.R.3d 161 (1980 & Supp. 1985). A substantial number of courts, however, still deny recovery in these cases. *Id. See e.g. Jacobs v. Goodyear Tire & Rubber Co.,* 196 Kan. 613, 412 P.2d 986 (1966); *Johnson v. Hartford Accident & Indemnity Co.,* 196 So.2d 635 (La.App. 1967); *Vernon v. Seven-Eleven Stores,* 547 P.2d 1300 (Okla.1976). The majority of courts that have dealt with the question have held that this emotional or mental stimulus may be gradual. Larson, *supra,* § 42.23(b). *See e.g. American National Red Cross; Carter.*

New Mexico law points us in the direction toward recognizing that an emotional or mental stimulus can produce a compensable psychological injury. In a series of cases involving physical injuries at the workplace, the supreme court has held that a resulting psychological disability is compensable. *Webb v. Hamilton,* 78 N.M. 647, 436 P.2d 507 (1968), *overruled on other grounds, American Tank & Steel Corp. v. Thompson,* 90 N.M. 513, 565 P.2d 1030 (1977); *Ross v. Sayers Well Servicing Co.,* 76 N.M. 321, 414 P.2d 679 (1966); *Jensen v. United Perlite Corp.,* 76 N.M. 384, 415 P.2d 356 (1966), *overruled on other grounds, American Tank & Steel Corp.; Gonzales v. Gackle Drilling Co.,* 70 N.M. 131, 371 P.2d 605 (1962). In a series of cases involving physical disabilities, both the supreme court and this court have held that an injury caused by emotional stress at work is compensable. *Salazar v. County of Bernalillo,* 69 N.M. 464, 368 P.2d 141 (1962) (cerebral hemorrhage caused by stressful events at work); *Little v. J. Korber & Co.,* 71 N.M. 294, 378 P.2d 119 (1963) (emotional upset at work caused heart attack); *Crane v. San Juan County, New Mexico,* 100 N.M. 600, 673 P.2d 1333 (Ct.App.1983) (work stress caused high blood pressure which caused hemorrhage in eye). Thus, existing case law has established that a psychological disability is a "disability" within the meaning of the Act, and that physical disabilities resulting from work-related emotional stress are compensable. If both physical trauma leading to psychological disability, and emotional stress, leading to physical disability are compensable, it follows that emotional stress leading to psychological disability comes within the Act. We hold that a psychological disability caused by stress arising out of and in the course of employment is compensable. *See Townsend v.*

Maine Bureau of Public Safety, 404 A.2d 1014 (Me.1979).

Implicit in our holding is the recognition that a gradual, non-traumatic emotional condition arising from stress may be an accidental injury under Section 52–1–28 of the Act. This section makes "an accidental injury arising out of, and in the course of * * * employment" a pre-condition to coverage. *Id.* The language makes no distinction between physical and mental injuries. An accidental injury is merely an unlooked-for mishap, or untoward event, that is not expected or designed. *Bufalino v. Safeway Stores, Inc.,* 98 N.M. 560, 650 P.2d 844 (Ct.App.1982). An accident is not limited to a sudden injury, nor is it limited to any time test. *Gilbert v. E.B. Law & Son, Inc.,* 60 N.M. 101, 287 P.2d 992 (1955). Such injury, moreover, may be produced gradually and progressively. *Webb v. New Mexico Publishing Co.,* 47 N.M. 279, 141 P.2d 333 (1943). The statutory language does not operate to bar an emotional condition arising from stress.

The language serves as a reflection of the basic purpose of the Act, which is to ensure that industry carry the burden of personal injuries suffered by workmen in the course of their employment. *Gonzales v. Chino Copper Co.,* 29 N.M. 228, 222 P. 903 (1924); *Casillas v. S.W.I.G.,* 96 N.M. 84, 628 P.2d 329 (Ct.App.1981). Our inclusion of a gradual, non-traumatic emotional injury does no more than track that purpose. In *Royal State National Insurance Co. v. Labor and Industrial Relations Appeal Board,* 53 Haw. 32, 487 P.2d 278 (1971), the Hawaii Supreme Court eloquently articulated why this is so. That court interpreted "accidental injury" in a statutory provision similar to Section 52–1–28, and concluded:

> HRS [Hawaii Revised Statutes] § 386–3 makes no differentiation between organic and psychic injuries arising out of the employment relationship and we do not believe this court should impose such a distinction. The legislature has chosen to treat work-related injuries as a cost of production to be borne by industry and, ultimately, through the consumption process, by the community in general. (Citation omitted). In today's highly competitive world it cannot be doubted that people often succumb to mental pressures resulting from their employment. These disabilities are as much a cost of the production process as physical injuries. The humanitarian purposes of the Workmen's Compensation Law require that indemnification be predicated not upon the label assigned to the injury received, but upon the employee's inability to work because of impairments flowing from the conditions of his employment.

Id. at 38, 487 P.2d at 282 (citation omitted). *See also* Annot., 97 A.L.R.3d at 168–69.

Defendants are in error, therefore, when they assert that plaintiff suffered no accidental injury. Substantial evidence supported the trial court in finding that an accidental injury took place on May 13, 1981 (the first hospitalization), and before each subsequent hospitalization.

B. "Arising Out of" Employment

Our holding, however, raises other issues argued on appeal. We must, in recognizing a new basis for recovery, determine what is required for the psychological injury to "arise out of" the particular employment. Section 52–1–28. We first discuss the "arising out of" component in New Mexico and its relationship to the present case. We next discuss the approach of other jurisdictions, and the approach we will adopt.

It is unnecessary that a workman be subjected to an unusual or extraordinary condition for an injury to be compensable. *See, e.g., Lyon v. Catron County Commissioners,* 81 N.M. 120, 464 P.2d 410 (Ct.App.1969); *Webb v. New Mexico Publishing Co.; Alspaugh v. Mountain States Mutual Casualty Co.,* 66 N.M. 126, 343 P.2d 697 (1959). In order to arise out of employment, an injury need only be causally related to the performance of the job duties. *See Wilson v. Richardson Ford Sales, Inc.,* 97 N.M. 226, 638 P.2d 1071

(1981). In New Mexico, however, it is not sufficient that the injury occurs at work; the disability must have resulted from a "risk incident to work itself" or "increased by the circumstances of the employment." *Kern,* 101 N.M. at 802, 684 P.2d at 1273.

To the extent, therefore, that plaintiff's disability was due to stress associated with the performance of his work duties, it "arose out of" his employment. *Salazar v. County of Bernalillo; Little v. J. Korber & Co.; Crane v. San Juan County.* Whether plaintiff's stress, resulting from the conflicts with Jewett, arose out of the employment depends upon whether the conflicts were related to work. *Cf. Perez v. Fred Harvey, Inc.,* 54 N.M. 339, 224 P.2d 524 (1950) (jury question whether shooting by fellow employee was personally motivated or motivated by work-related quarrel). Jewett denied any conflict with plaintiff. Plaintiff's testimony, set forth above, was that the conflict arose from Jewett's assignment of work duties. Plaintiff's testimony was substantial evidence that the stresses identified by Drs. Fredman and Sacks as the cause of the disability did arise from plaintiff's employment.

Certain jurisdictions have expressed concern over applying the normal interpretation of "arising out of" to cases involving gradual psychological injury. This concern grows out of the traditional reluctance of courts to allow recovery for any mental suffering unaccompanied by physical impact or injury. The reluctance is based on a fear of fraudulent claims and the lack of judicial expertise for evaluating injury unaccompanied by observable physical manifestations. *See Townsend.* Where a psychological injury "occurs rapidly and can be readily traced to a specific event * * * there is a sufficient badge of reliability to assuage [any] Court's apprehension. Where, however, a mental injury develops gradually and is linked to no particular incident, the risk of groundless claims looms large indeed." *Id.,* 404 A.2d at 1018.

As a response to the difficulties inherent in the evaluation of psychological injury, the Supreme Court of Wisconsin, in *School District #1 v. Department of Industry, Labor & Human Relations,* 62 Wis.2d 370, 377, 215 N.W.2d 373, 377 (1974), enunciated the following interpretation of "arise out of" employment:

> [I]t is the opinion of this court that mental injury non-traumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability * * * be found.

The plaintiff in *School District* was employed as a school guidance counselor. She received a list of recommendations from high school students that asked for the removal of several staff members, including herself. The Department of Industry found that receipt of this list, and conversations with students concerning the list, constituted the accident "arising out of" plaintiff's employment which caused subsequent "acute anxiety reaction" and resulting disability. *Id.* at 372–373, 215 N.W.2d at 374–375. The court, however, after formulating its interpretation of "arise out of", concluded that the receipt of the list "could not be deemed to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury." 60 Wis.2d at 378, 215 N.W.2d at 377. Her application for compensation was dismissed.

Arkansas, Rhode Island and Wyoming have adopted the *School District* interpretation of "arising out of". *See Owens v. National Health Laboratories,* 8 Ark.App. 92, 648 S.W.2d 829 (1983); *Seitz v. L & R Industries, Inc., etc.,* 437 A.2d 1345 (R.I. 1981); *Consolidated Freightways v. Drake,* 678 P.2d 874 (Wyo.1984). Defendants ask this court to adopt *School District* and overrule the trial court on that basis.

In *Townsend,* the Supreme Court of Maine modified *School District* because it perceived a problem with its application.

The *Townsend* court announced the following standard:

> While this rule [in *School District*] would be appropriate in the vast majority of gradual mental injury cases, it would not compensate an individual who, for example, developed a psychological disability resulting from the simple day-to-day stresses of an assembly line * * *. Our Act, however, is not merely objective covering the average person; it is also subjective and protects even the eggshell. With adequate safeguards to shield the employer, even those predisposed to mental injury should be able to recover for ordinary work-related stress to which others would not succumb. We conclude that ordinary work-related stress and strain could be compensable if it were shown by clear and convincing evidence that the trauma generated by the employment predominated in producing the resulting injury. [Footnote omitted.] Any less showing, however, would be insufficient adequately to protect an employer.

404 A.2d at 1019–20.

Townsend recognized the higher level of stress required under *School District* for most cases but, at the same time, permitted a subjective standard for the measurement of stress designed to protect those workers predisposed to mental injury.

Another group of jurisdictions allow compensation based on a gradual mental injury resulting from day-to-day work-related stress without the higher standard of proof imposed in *Townsend*. *Baker v. Workmen's Compensation Appeals Board*, 18 Cal.App.3d 852, 96 Cal.Rptr. 279 (1971); *Royal State; Carter*. This approach is premised on the view that the basic purpose of a worker's compensation system mandates that a worker disabled as a result of work-related stress receive treatment identical to a worker disabled by a work-related physical injury. *Carter*.

We realize the competing interests involved with any approach. On the one hand, there is the goal of maintaining a progressive worker's compensation system. *Carter*. On the other, there is the goal of reducing fraudulent claims in order to financially preserve the system. *Townsend*. It is, however, the province of the legislature to make changes in the provisions of coverage under the Act. *Varos v. Union Oil Co. of California*, 101 N.M. 713, 688 P.2d 31 (Ct.App.1984).

Section 52–1–28 does not distinguish between a physical and mental injury, nor does any provision of the Act condition compensation on an injury resulting from unusual or extraordinary working conditions. *Webb; Lyon*. The application of the *School District* rule would mean that a mental injury, to be compensable, must result from an extraordinary working condition, whereas a physical injury, to be compensable, need only result from the usual conditions of employment. Application of the higher standard of proof in *Townsend* would also differentiate between physical and mental injury. To establish disability, a worker with a pre-existing physical condition that makes him more susceptible to physical injury is not subjected to a higher standard of proof than a worker not so disposed. *Salazar v. County of Bernalillo*. However, a worker predisposed to mental injury from day-to-day stress would have to establish, by clear and convincing evidence, the causal connection between the trauma generated by the employment and the resulting disability. The basis for such differentiation is not present in our Act. We must defer to the legislature. *Varos; see McGarrah v. State Accident Insurance Fund Corp.*, 296 Or. 145, 675 P.2d 159 (1983).

We conclude that a psychological injury resulting from a sudden or gradual emotional stimulus "arises out of" employment when it is causally related to the performance of job duties. This standard is in keeping with the letter, and purpose, of the Act. This standard also makes no distinction between those workers predisposed to mental injury and those not so disposed. Plaintiff, through the recited testimony, has met this standard.

Our conclusion presupposes the existence of an actual job condition which causes the stress (actual stress), rather than a perceived condition that does not exist (imagined stress). Actual stress is that stress traceable to real working conditions; imagined stress exists when a worker honestly perceives that some event, or events, occurred during the course of his employment to cause injury when, in fact, no such event or events occurred. *See McGarrah.* In this case, defendants contend that plaintiff testified about occurrences existing only in his mind. They base their contention on testimony that plaintiff's disorders could cause him to distort reality. They challenge the trial court's finding of actual stress.

Substantial evidence supports this finding. *Garcia v. Genuine Parts Co.,* 90 N.M. 124, 560 P.2d 545 (Ct.App.1977). First, there was no evidence that plaintiff had trouble coping with other situations. Logically, this supports an inference of actual stress at work. Second, there was a flare-up in plaintiff's symptoms each time he returned to work. Third, Jewett had a reputation as the type of foreman who would "ride on a person." Fourth, Dr. Fredman testified that even paranoid ideations have some basis in reality. Fifth, Dr. Sacks testified that there was no condition suffered by plaintiff that would cause him to misperceive reality. The trial court's finding of actual stress will not be overturned.

We do not, at this time, address the complex issue of whether the effect of the *perceived* work environment on the worker, i.e., imaginary stress, is sufficient to establish an injury "arising out of" the employment. Such a discussion is not necessary in the present case because there is evidence of the effect of the *actual* work environment. *See McGarrah* and *Williams v. Western Electric Co.,* 178 N.J. Super. 571, 429 A.2d 1063 (1981), for a discussion of actual versus imaginary stress.

Any plaintiff must still demonstrate that, as a medical probability, any disability is a natural and direct result of the accidental injury. Section 52–1–28. Expert medical testimony is required to establish this causal connection. *Id.* The testimony of Drs. Fredman and Sacks provided substantial evidence on causation for plaintiff in this case.

II. POST-JUDGMENT RELIEF

At trial, plaintiff testified that he had been unsuccessful in finding new employment. After trial, defendants discovered that plaintiff had been working at the time of trial. Defendants moved for a new trial and deposed the bookkeeper of the business for which plaintiff worked. A hearing was held. Defendants argued that plaintiff had lied under oath. Plaintiff's attorney argued that the context of the testimony was simply that plaintiff had been unsuccessful in finding similar employment. The trial court ordered that plaintiff's doctors be re-deposed to determine if knowledge of plaintiff's employment would cause them to change their opinions.

The doctors' depositions were taken. Dr. Fredman testified that the opinions he expressed at trial had not changed because plaintiff still had symptoms, but they were less severe because the current job had less stress and less interpersonal contacts. Dr. Fredman thought that it was especially significant that plaintiff's stepson was the foreman and understood plaintiff's problems. Dr. Sacks stated that assuming plaintiff's new job involved simple tasks as a laborer, few interpersonal contacts, and supervision by a sympathetic stepson, he would not change the opinion expressed in the original deposition.

The trial court entered supplemental findings and conclusions, and an order denying post-judgment relief. The court found that the new employment did not affect the doctors' opinions. The court also found that the job involved the performance of simple tasks, subjected plaintiff to minimum stress and interpersonal contact, and provided supervision by his stepson, who understood his emotional problems. Finally, the court found in its supplemental

findings and conclusions that objective evidence of plaintiff's psychological disability overcame any taint which plaintiff's testimony might have cast upon his testimony in other areas.

The granting or denial of a new trial rests within the sound discretion of the trial court. *Martinez v. Schmick,* 90 N.M. 529, 565 P.2d 1046 (Ct.App.1977). The same is true for Rule 60(b) motions. *Click v. Litho Supply Co.,* 95 N.M. 419, 622 P.2d 1039 (1981). In this case, the trial court took new evidence, and the findings indicate that the trial judge carefully considered the impact of plaintiff's new employment. The trial court did not abuse its discretion in failing to grant post-judgment relief.

III. ATTORNEY FEES

Defendants argue that the trial court's award of $15,000.00 in attorney fees was excessive. An award of fees must have evidentiary support. *See Woodson v. Phillips Petroleum Co.,* 102 N.M. 333, 695 P.2d 483 (1985); *Johnsen v. Fryar,* 96 N.M. 323, 630 P.2d 275 (Ct.App. 1980). The record discloses that both the statutory factors for attorney fees contained in Section 52-1-54, and the factors enumerated in *Fryar v. Johnsen,* 93 N.M. 485, 601 P.2d 718 (1979), were considered by the trial court. The determination of the present value of the award at approximately $63,000.00, the amount of time expended by plaintiff's attorneys, and the extent to which causation and the meaning of accidental injury were contested are critical factors which support the trial court's award. *Fryar.* We note, moreover, that an award is not to be set at a specific percentage of the recovery. *Woodson.* The percentage in this case, about 23%, is consistent with the principles articulated in *Woodson.* The award is affirmed.

IV. INTEREST ON JUDGMENT

Defendants challenge the following part of the alias judgment:

> Interest at the rate of 15% per annum on all sums due pursuant to this judgment, except for medical, doctor, hospital and drug bills, from and after the date of entry of this judgment, until paid.

Defendants argue that the award of interest is discretionary and that the trial court abused its discretion in awarding interest. It is true that an award of prejudgment interest is discretionary. *Waksman v. City of Albuquerque,* 102 N.M. 41, 690 P.2d 1035 (1984); *Trujillo v. Beaty Electric Co.,* 91 N.M. 533, 577 P.2d 431 (Ct.App.1978). However, post-judgment interest is mandatory according to NMSA 1978, Section 56-8-4(A) (Cum.Supp.1985):

> Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of fifteen percent per year, unless the judgment is rendered on a written instrument having a different rate of interest * * *.

There is nothing which indicates that Section 56-8-4(A) should not apply in workmen's compensation cases. This section was enacted in 1983 and there are no workmen's compensation cases construing the section. Logic dictates that interest should not accrue on installments until they become due. This is especially true when one considers that the employer, after six months, may attempt to reduce benefits because of decreasing disability.

The district court's judgment is proper because, in accordance with Section 56-8-4(A), it awards interest on sums due pursuant to the judgment, from and after the entry of the judgment. Thus, the judgment does not award interest on any amount until that amount becomes due. The trial court is affirmed.

The court determines that plaintiff's counsel is entitled to an award of attorney fees for services on appeal in the amount of $2,500.00. Section 52-1-54(D).

The judgment of the district court is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and MINZNER, J., concur.

730 P.2d 480

Lloyd C. SCOTT and Annette Scott, individually and as shareholders of the Ladron Corporation, a New Mexico corporation, Plaintiffs-Appellees,

v.

James R. WOODS and Patricia V. Woods, Defendants-Appellants.

No. 8149.

Court of Appeals of New Mexico.

Aug. 7, 1986.

Certiorari quashed Nov. 25, 1986.

Keith S. Burn, Norman E. Todd, Keith S. Burn, P.A., Linda S. Bloom, Las Cruces, for plaintiffs-appellee.

Quincy D. Adams, Adams & Foley, P.C., Kenneth S. McDaniel, Albuquerque, for defendants-appellants.

OPINION

MINZNER, Judge.

Defendants James R. and Patricia V. Woods, husband and wife, appeal jury verdicts of $250,000 in favor of plaintiff Ladron Corporation and $200,000 in favor of plaintiffs Lloyd C. and Annette Scott, husband and wife. Their appeal raises the question of whether, under the New Mexico Constitution, a party may demand a jury trial on legal issues arising in a stockholder's derivative suit, and, if so, whether plaintiffs' derivative suit included issues to which the right of jury trial attached. We conclude that the trial judge erred in denying the Woods' motion to sever or, in the alternative, for separate trial because plaintiffs' claim on behalf of the corporation asked the court for equitable relief on equitable grounds; we hold, further, that the judgments must be set aside, and the cause remanded for a new trial.

Background

In 1981, the Scotts and the Woods decided to purchase and operate a liquor package store and lounge known as the Roadrunner Lounge, in Socorro, New Mexico. They also decided to use Ladron Corporation, which had been created by the Woods but never funded, to acquire title. Each of

the individuals received equal shares of stock in Ladron, assumed a corporate office, and became a member of the board of directors. The Roadrunner Lounge was located next to the Scotts' auto parts store.

Ladron borrowed $200,000 from the First National Bank of Belen and $130,000 from the First National Bank of Socorro. The Scotts and the Woods personally guaranteed the indebtedness. Ladron then purchased the property on which the Roadrunner was located, paying $60,000 for the buyer's interest and assuming a balance of $60,000 due the seller, S.E. Gutierrez, and acquired an initial inventory for $140,000.

From late 1981 to the end of 1982, the record indicates the parties participated in an informal management arrangement. The board of directors never met, and Mr. Woods and Mr. Scott discussed and resolved problems as they arose. During this period, responsibility for the books, a central issue at trial, shifted several times. The package store opened on November 17, 1981, and the lounge opened on December 11, 1981 under a full-time manager and an assistant manager.

Mrs. Scott, who kept the auto parts store books, set up the first books and initially did the bookkeeping. In January 1982, she relinquished the books to the Woods' adult son, Peter. He may have delivered them to Mrs. Woods. In March 1982, the full-time manager was replaced by his assistant, Jon Jaramillo; there was evidence at trial of friction between Jaramillo and Mrs. Woods, and in April, Mr. Woods advised her to stay away from the Roadrunner. After Peter returned to school in the fall of 1982, Mr. Scott agreed to pick up the daily cash register tapes, Mr. Woods said he would pay the bills, and they hired a bookkeeper to do tax reports and payroll. It is clear that Mrs. Woods also did some bookkeeping; an accountant, who was interested in selling computer equipment, sold her a small computer and allowed Ladron to use his larger one. Mr. Scott testified that he and Mr. Woods discussed selling the Roadrunner in November. Nothing was decided.

In mid-January 1983, Mr. Scott learned from Jaramillo that suppliers had placed the Roadrunner Lounge on a cash basis. On further inquiry, Jaramillo determined that the corporation owed eighty or ninety thousand dollars to different suppliers, and the debts were six months old. When approached, Mr. Woods said that the corporation had forty to sixty thousand dollars available; he also said he would pay the outstanding bills.

In addition to this financial emergency, other problems in operating the business soon surfaced. The informal management arrangement proved ineffective.

The record indicates that sometime in the spring of 1983, the Scotts told the Woods that they no longer wanted to participate in management, and there was further discussion of selling the business. In April 1983, Mr. Scott discontinued picking up the cash register tapes; Jaramillo took over this task. In May 1983, Mrs. Woods took over operation of the package store, and Jaramillo was restricted to operating the bar. He and Mrs. Woods continued to have difficulties working together; he quit in July 1983. Peter replaced him in the bar, and Mrs. Woods became manager. She did the bookkeeping with assistance from the accountant. In July or August 1983, the Roadrunner was listed for sale at approximately $450,000. The best offer received was $360,000. Mr. Scott testified that he rejected the offer on Mr. Woods' advice.

More financial and management difficulties surfaced after the business was listed for sale. The informal management arrangement now failed.

The First National Bank in Socorro brought suit against the Scotts and the Woods in October 1983 on their 1981 guaranty. The Scotts hired an attorney, who made a formal request for access to the corporate records, and the board of directors held its first formal meeting in November 1983. At that meeting, which the Woods secretly taped, the Scotts expressed satisfaction with Mrs. Woods' management, and she continued operating the business. There was evidence at trial, how-

ever, that the Scotts made their statements only because Mr. Woods privately begged Mr. Scott to do so. Peter became manager in December 1983. In January 1984, the Internal Revenue Service notified Ladron that taxes were due for the periods ending June 30, 1982 and December 31, 1982.

The Scotts and the Woods settled the bank suit in February 1984, but the Scotts themselves sued in March. The Scotts' complaint contained six counts. With respect to all counts but the first, plaintiffs claimed compensatory and punitive damages as provided in the ad damnum clause. In the first count, plaintiffs asked that a receiver be appointed and for various injunctions. The first count appears to be a claim brought primarily on behalf of the corporation, but it also alleges grounds for dissolution. *See generally* NMSA 1978, § 53–16–16(A) (Supp.1986) (authorizing the district court to liquidate corporate assets in an action by a shareholder). The sixth count is a claim brought only on behalf of the Scotts. The other counts appear to have been brought on behalf of Ladron, as well as the Scotts. Under the Scotts' theory of the case, the Woods had injured the corporation by various kinds of misconduct and, in injuring the corporation, had injured the Scotts individually.

The Woods answered. They also counterclaimed on behalf of themselves and Ladron. Under the Woods' theory of the case, the Scotts had abandoned management of the corporation, failed to participate in additional capitalization as agreed, and otherwise breached fiduciary duties. Additionally, the Woods claimed breach of a partnership agreement between Mr. Woods and Mr. Scott.

The trial court appointed a receiver on April 10. He found no books and records, only a few records of cash balances in 1982 and a bar inventory. There were several checkbooks, which were not current. By calling creditors, he determined that forty or fifty thousand dollars was due different distributors. On April 11, the accountant who had helped Mrs. Woods in 1982 and 1983 was appointed as co-receiver, and the court ordered an inventory.

The relationship among the parties and members of their family grew progressively worse. At one point, the Socorro police arrested Peter for interfering with the receivers, and he in turn sued the original receiver and the Scotts' lawyer. On May 14, the trial court relieved the accountant as receiver. The court also entered a preliminary injunction enjoining the parties from "contacting, threatening or harassing one another, or the agents and family members of the parties * * *." In May 1984, Peter purchased the seller's interest in the Gutierrez real estate contract. He also purchased the note owed the First National Bank of Belen, although the date is not certain. After the receivership ended, he sought to foreclose on the real estate contract. He also sued the Scotts on the Belen bank note. The present suit came to trial about the time Peter attempted to retake the underlying property under the real estate contract.

The Woods consistently objected to a jury trial of the issues relating to the claims made on behalf of Ladron. Prior to trial, they moved to sever, or try separately, the issues raised by the suit on behalf of Ladron; they argued that plaintiffs were not entitled to a jury trial of those issues because they raised equitable issues or because plaintiffs had asked for equitable relief. Plaintiffs argued that they were entitled to a jury trial on all issues because they had either raised legal claims, asked for damages, or raised factual issues. The trial court denied the motion.

The trial court permitted evidence that Mrs. Woods had made trust fund money available to Peter at the time he acquired the Gutierrez' interest and that his father assisted him in acquiring the Belen bank's interest. The trial court refused to permit Peter's counsel to testify about Peter's reasons for foreclosing on the real estate contract. The Woods objected to both rulings, claiming that they should have been permitted to establish their lack of involvement in Peter's activities. At this point,

plaintiffs' counsel argued to the court that the evidence admitted concerning Peter's conduct was relevant on the issue of his parent's fraud. The record does not indicate whether the evidence was admitted with respect to the corporate claim or claims, claims made on behalf of the Scotts individually, or both.

The Woods submitted requested findings of fact and conclusions of law. None were entered; rather, the trial court instructed the jury on issues related to the first, second, third and sixth counts. The trial court denied defendants' request for special interrogatories.

The jury returned a verdict in favor of Ladron, finding by special interrogatory that there were grounds for dissolution and liquidation. They also returned a verdict for the Scotts, which included $50,000 punitive damages. The Woods moved for remittitur or, in the alternative, for a new trial, claiming error in denying their pretrial motion, instructing the jury, and in admitting evidence.

Discussion

The Woods contend that all of the issues relating to the derivative action should have been decided by the court; because the equitable nature of a derivative action controls, there is no constitutional right to a jury trial. They also claim that the trial court erred in instructing the jury to determine whether Ladron should be dissolved.

Plaintiffs initially suggest that the New Mexico Business Corporation Act authorizes a jury trial in a shareholder's derivative action. *See* NMSA 1978, § 53-11-47 (Repl.Pamp.1983). This statute, however, does not answer the appellate issues, although it affects a shareholder's right to bring derivative suits on behalf of the corporation. *See generally* Wellborn and Barker, *1975 Amendments to the New Mexico Business Corporation Act,* 6 N.M. L.Rev. 57, 58, 69-70 (1975).

Relying on *Ross v. Bernhard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), plaintiffs also contend that the issues they raised on behalf of Ladron are legal rather than equitable and, because there are factual issues underlying the right to dissolution, the trial court properly submitted all the claims they raised on behalf of the corporation to the jury. In *Ross v. Bernhard,* the United States Supreme Court said:

> [W]here equitable and legal issues are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

396 U.S. at 537-38, 90 S.Ct. at 737-38. In that case, the Court held these principles were applicable to a shareholder's derivative action.

Ross v. Bernhard involved damages for injuries sustained by the corporation as a result of allegedly excessive brokerage commissions authorized by the directors. The Court further observed:

> [W]e have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, *but there are also allegations of ordinary breach of contract and gross negligence.* The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, *of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence.* Under these circumstances, it is unnecessary to decide whether the corporation's other claims are also properly triable to a jury.

396 U.S. at 542-43, 90 S.Ct. at 740. (emphasis added).

As the Woods contend, however, *Ross v. Bernhard* relies on the right to jury trial protected by the seventh amendment. In this case, the question is the scope of the right to jury trial protected by

the state constitution. *See* N.M. Const. art. II, § 12. Although the seventh amendment governs the right to trial by jury in federal courts, it does not control the right to jury trial in state courts. *Pelfrey v. Bank of Greer,* 270 S.C. 691, 244 S.E.2d 315 (1978). *See generally* D. Dobbs, *Remedies* § 2.6 (1973).

The Woods' contentions raise three appellate issues, which the parties have addressed somewhat differently. These issues are: (1) whether the right to jury trial in New Mexico attaches to legal issues arising in a derivative suit, (2) whether the derivative action on behalf of Ladron and the prayer for dissolution included issues triable to a jury, and (3) whether reversible error occurred at trial. We address each issue separately.

1. Right to Jury Trial in a Shareholder's Derivative Suit

The result in *Ross v. Bernhard* has not yet been adopted by many state courts. *See generally* 32 A.L.R.4th 1111 (1984). The result has been criticized as historically and analytically unsound. *See* Note, *Ross v. Bernhard; The Uncertain Future of the Seventh Amendment,* 81 Yale L.J. 112 (1971); Note, *Jury Trial in a Stockholders' Derivative Suit,* 65 Nw.U.L.Rev. 697 (1970). We recognize that the result rests on a legal fiction that is not consistent with the historical development of the derivative suit, *see generally* Prunty, *The Shareholders' Derivative Suit: Notes on its Derivation,* 32 N.Y.U.L.Rev. 980 (1957), and that it introduces a new complexity, illustrated by this appeal, which creates practical problems for the trial court.

Developed as a corrective for managerial abuse when minority shareholders had been wrongfully deprived of an effective voice, the derivative suit was recognized on the theory that a breach of trust had occurred, which the shareholders were entitled to remedy, and on the principle that the remedy was enforcement in equity of a corporate right of action. Once the shareholder was allowed to proceed on behalf of the corporation, the equity court entertained the entire proceeding; it was not necessary to identify and separate the claims made on behalf of the corporation. *Ross v. Bernhard* introduces a new complexity; under that decision, each claim asserted on behalf of the corporation must be evaluated separately. *See Camrex (Holdings) Ltd. v. Camrex Reliance Paint,* 90 F.R.D. 313 (E.D.N.Y.1981). Yet, prior to *Ross v. Bernhard,* the derivative action had been treated as a unitary suit. Consequently, prior case law provides uncertain guidance to the trial judge who must evaluate the individual claims made on behalf of the corporation.

Nevertheless, *Ross v. Bernhard* clearly extends the use of the jury trial on the principle that extension is desirable. That principle has been recognized by our supreme court. *See Evans Financial Corp. v. Strasser,* 99 N.M. 788, 664 P.2d 986 (1983).

In addition, the result gives the trial court useful flexibility in managing and resolving disputes by emphasizing substance rather than form. *Cf. Mogollon Gold and Copper Co. v. Stout,* 14 N.M. 245, 91 P. 724 (1907) (where right to damages is merely incidental and dependent upon plaintiff's right to an injunction, the court may assess damages already sustained; if the action is brought primarily for the recovery of a money judgment, it is triable by a jury). Under the three-part test approved in *Ross v. Bernhard,* the trial court identifies issues for jury determination by taking into account the nature of the underlying claim, as well as its historical origins, and the practical limitations of the jury or, as more commonly stated, the trial court considers a three-prong test: (1) premerger custom, (2) remedy sought, and (3) abilities and limitations of juries. *Cf. United States v. State of New Mexico,* 642 F.2d 397 (10th Cir.1981) (applying federal law in a diversity action and recognizing a right to jury trial in a suit for declaratory and injunctive relief and recovery of taxes). Thus, the nature of the issues to be tried and the trial court's contemporary capacity to grant relief become more signif-

icant than the terminology used in the complaint or past practice when courts of equity were separate from courts of law.

In fact, *Ross v. Bernhard* applied the earlier, flexible analysis expressed in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and extended in *Dairy Queen v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In the former case, the Court refused to allow the order in which issues arose to control a party's right to a jury trial. After that decision, "it is no longer enough to say that an action was conceived in equity and was always brought in that court; the 'nature of the issue' presented is the determinative factor. Yet, the nature of issue is almost always determined by surrounding circumstances and the manner in which they are presented." Note, 65 Nw.L.Rev. at 706–07. In the latter case, the Court noted that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." 369 U.S. at 477–78. The former case was cited with approval and applied in *Evans Financial Corp. v. Strasser.*

For these reasons, we adopt the rule of *Ross v. Bernhard.* Under New Mexico's constitutional provision for jury trials, if a shareholder's derivative suit raises legal claims or issues as to which the corporation is entitled to a jury trial, those claims or issues should be tried to a jury on demand. As to other issues, triable to the court, the trial court must make findings of fact and enter conclusions of law even if an advisory jury is used, *see Romrell v. Zions First Nat. Bank, N.A.,* 611 P.2d 392 (Utah, 1980), or otherwise place the appellate court in a position to pass upon the issues raised on appeal. *See Mallory v. Citizens Utilities Co.,* 342 F.2d 796 (2nd Cir.1965). Where legal and equitable issues have been joined, the trial court must determine the mode and order of trial consistent with the rules articulated in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen v. Wood. See Ford v. C.E. Wilson & Co.,* 30 F.Supp. 163 (D.Conn., 1939).

2. Whether the Scotts' Suit on Behalf of Ladron Raised Issues Triable by Jury

We have assumed that plaintiffs' claims on behalf of Ladron present, at least in part, a derivative action rather than an action seeking relief on the basis of a fiduciary duty owed the Scotts, as nonmanaging stockholders, by the managing stockholders. *Cf. Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 328 N.E.2d 505 (1975) (stockholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership). We based our assumption on the form of the complaint, the parties' theories at trial, and the arguments on appeal. *Id.* at 579–80, 328 N.E.2d at 508 n. 4. For the reasons that follow, our conclusion does not depend on the correctness of that assumption.

Plaintiffs argue that because they sought, on behalf of Ladron, money damages for breach of fiduciary duty, fraud, negligence and conversion, there was a right to a jury trial on all issues raised by their suit. That is not the meaning of *Ross v. Bernhard;* the right to a jury trial does not follow from the terminology employed in the complaint. Rather, the analysis articulated in *Beacon Theatres* and applied in *Ross v. Bernhard* shifted the question before the trial court "from the presence of a basis for equitable relief to the presence of a legal issue." 5 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 38.-16[2] (2d ed. 1985). The critical inquiry is whether a right to jury trial has been established by the party making the demand.

The question before the trial court in this case was whether plaintiffs had identified a legal issue with respect to claims made on behalf of the corporation. *See generally Gartenberg v. Merrill Lynch Asset Management, Inc.,* 487 F.Supp. 999 (S.D.N.Y.1980), *mandamus denied sub. nom., In re Gartenberg,* 636 F.2d 16 (2d Cir.1980), *cert. denied,* 451 U.S. 910, 101 S.Ct. 1979, 68 L.Ed.2d 298 (1981). A claim for money damages must be a valid one. *See Rowell v. Kaplan,* 103 R.I. 60, 235 A.2d 91 (1967).

The existence of common issues of fact does not mean that the entire lawsuit should be tried to a jury. Rather, joining a legal with an equitable claim gives the plaintiff a right to have common issues of fact decided by a jury and can provide a right to have the legal claims tried first. *In re Evangelist,* 760 F.2d 27 (1st Cir. 1985).

Plaintiffs claimed the existence of a deadlock, illegal, oppressive and fraudulent acts, misapplication and waste of assets and asked the court to order dissolution and liquidation. This claim seeks an equitable remedy on equitable grounds. *See generally* 19 Am.Jur.2d *Corporations* § 2782 (1986). The trial court, in its discretion, orders dissolution on a proper showing. *Id.* In a similar case, the supreme court referred to the court's power as that which "is necessary to do justice to all involved." *See Prager v. Prager,* 80 N.M. 773, 776, 461 P.2d 906, 909 (1969).

This claim should not have been submitted to the jury. The decision it requires is often made only after consideration of alternative forms of relief. These include purchase of plaintiffs' shares, partition and reorganization. *See generally McCauley v. McCauley,* 104 N.M. 523, 724 P.2d 232 (Ct.App.1986). In addition, the nature of a claim for dissolution is such that the trial court must determine the propriety of dissolution. *See Stefano v. Coppock,* 705 P.2d 443 (Alaska 1985).

Plaintiffs also sought damages for negligent and intentional mismanagement and for fraud. Because the substance of the facts alleged in this case are critical in analyzing the remedy sought, we have reviewed the allegations in light of the instructions. *Cf. Seneca v. Novaro,* 80 A.D.2d 909, 437 N.Y.S.2d 401 (1981), On these facts, we must separate plaintiffs' theories of liability from their damages claims. *Cf. Rodgers v. Eighty Four Lumber Co.,* 623 F.Supp. 889 (D.C.Pa.1985) (holding statutory damages provided for copyright infringement to be equitable in nature).

Plaintiffs' claim of negligence on behalf of Ladron was submitted on the basis of failure to keep a proper set of books and waste of assets; the claim of intentional mismanagement was submitted to the jury on the basis of refusing access to financial records, harassment of employees so that they quit, conversion or misappropriation, failure to keep proper books, and waste. These are claims that the directors breached fiduciary duties that arose from their status either as de facto managers or as controlling shareholders. *See Alaska Plastics, Inc. v. Coppock,* 621 P.2d 270 (Alaska 1980). *Cf. Camrex (Holding) Ltd. v. Camrex Reliance Paint* (claim against directors based on loss due to breach of corporate contract stated legal claim for jury trial). Thus, the standard against which the claimed misconduct must be measured arose from their relationship with the Scotts rather than from the terms of a contract or the standards appropriate in finding tortious conduct. *See Jaffe Commercial Finance Co. v. Harris,* 119 Ill. App.3d 136, 74 Ill.Dec. 722, 456 N.E.2d 224 (1983). This presented an equitable ground for relief. *See Seneca v. Novaro.*

Similarly, plaintiffs claimed that the Woods acted fraudulently toward Ladron. The jury was instructed that they should find fraud if they determined that:

(1) the Defendants failed to keep a proper set of books and records of LaDron Corporation;

(2) Defendants refused to allow Plaintiffs to have access to the financial records of LaDron Corporation;

(3) Defendants misapplied and wasted assets of LaDron Corporation;

(4) Defendants converted to their own use money and assets owned by LaDron Corporation;

(5) Defendants made secret unauthorized withdrawals of LaDron Corporation assets;

(6) Defendants, or either of them, provided funds to their son, Peter Woods, which enabled Peter Woods to purchase the owner's interest in the so-called S.E. Gutierrez real estate contract and which

allowed Peter Woods to attempt to foreclose Plaintiffs' and LaDron Corporation's interest in the Roadrunner Lounge property;

(7) Defendants, or one of them, provided funds to their son, Peter Woods, which enabled Peter Woods to purchase from the First National Bank of Belen the promissory note owed by LaDron Corporation and all collateral thereon, including the personal guarantees of the Plaintiffs, and which enabled Peter Woods to file suit against Plaintiffs on such guarantees.

These instructions, with the exception of the last two, are essentially the same ones asserted in support of the claim of intentional mismanagement.

These instructions are all generally based on the equitable theory of a breach of fiduciary duty and, since they do not identify legal claims separately, do not satisfy plaintiffs' obligation to identify claims or issues triable to the jury. *See In re Evangelist.* Plaintiffs sought to prove wrongful dealing with corporate property. To the extent a claim was stated on behalf of the corporation, it was a claim of misconduct by a fiduciary to be analyzed by the court. *See generally* IV J. Pomeroy, *Equity Jurisprudence* § 1095 (S. Symons 5th ed.1941) (the kinds, forms, and methods by which such wrongful acts may be committed and recognized in equity are practically unlimited in number and variety). Because judges are not business experts, courts have been reluctant to substitute their judgment for that of the board of directors. *Alaska Plastics v. Coppock.* In view of this principle, expressed in the business judgment rule, we cannot say plaintiffs identified a legal issue as to liability on behalf of Ladron.

This case arose from a close friendship between Mr. Scott and Mr. Woods, which deteriorated as the business relationship in which they had invested substantial money and energy proved unsuccessful. The record indicates that emotions at trial were high, and there was considerable mutual mistrust and bitterness. As the trial court noted, it was never clear whether Ladron was a corporation or a partnership. Plaintiffs contended that all of the Woods' acts were done with a view to gaining an unfair advantage over plaintiffs and to cause injury to plaintiffs and to Ladron Corporation itself. We have assumed, for purposes of this appeal, that a derivative suit was stated, rather than a claim as individual shareholders. Whether viewed as a derivative claim, or an individual one, having joined legal and equitable claims, plaintiffs failed to identify either common issues of fact or legal issues with respect to liability.

As to money damages, the trial court refused an instruction based on revenues lost as a result of Mrs. Woods' conduct toward or in front of customers. Thus, plaintiffs' claim for money damages was based on a claim that sums not shown to be legitimate corporate expenses, sums shown received but not deposited, and expenditures not supported by receipts should be repaid. We view this claim as a claim for restitution based on a proper accounting. It is a claim for equitable, rather than legal, relief. *Compare Fedoryszyn v. Weiss,* 62 Misc.2d 889, 310 N.Y.S.2d 55 (1970) (where sole relief requested was a money judgment, right to a jury trial was stated) and *Rizzo v. Saltmarsh, Cleaveland and Gund,* 341 So.2d 818 (Fla.App. 1977) (although plaintiff sought damages, the claim in effect sought to establish a fiduciary relationship, a partnership, and obtain an accounting, which involved extensive or complicated accounts).

We conclude that plaintiffs failed to demonstrate, either in their complaint or the instructions, an issue or claim, on behalf of the corporation, that was triable to the jury within the meaning of *Ross v. Bernhard.* The next question is the existence and extent of reversible error.

3. Whether Reversible Error Occurred

In this case, defendants challenged the judgment and verdict as to Ladron, the order of dissolution, and the judgment and verdict as to the Scotts. For the sake of clarity, we discuss separately the disposi-

tion as to Ladron and the disposition as to the Scotts.

a. The Judgment and Verdict as to Ladron and the Order of Dissolution

Defendants preserved error under NMSA 1978, Civ.P.Rules 21 and 42(b) (Repl.Pamp.1980), when they moved to sever or try separately, and under NMSA 1978, Civ.P.Rule 52(B) (Repl.Pamp.1980), when they requested findings of fact and conclusions of law and objected to the instructions on the corporation's claim. Under Rule 42(b), a separate trial is appropriate, if necessary to avoid prejudice. The decision to grant such a motion is a matter within the sound discretion of the trial court, not to be disturbed in the absence of an abuse of discretion. *Mendenhall v. Vandeventer*, 61 N.M. 277, 299 P.2d 457 (1956). In exercising this discretion, however, the trial court was required to analyze the issues presented by plaintiffs' derivative action, there being no claim at trial or on appeal that the Scotts lacked the right to sue as shareholders. *See Alaska Plastics v. Coppock.*

The trial court did not enter findings of fact and conclusions of law to sustain the judgment in favor of the corporation. In the absence of a legal issue, the jury was advisory. Under these circumstances, the judgment in favor of the corporation may not stand. *Mallory v. Citizens Utilities Co.; Romrell v. Zions First Nat. Bank, N.A.* The error is the equivalent of an abuse of discretion.

On remand, plaintiffs will have another opportunity to identify any legal issues for which a jury trial is required. If such issues are identified, the trial court will need to determine the appropriate sequence at trial. *See Evans Financial Corp. v. Strasser. See generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2338 (1971).

With respect to the order of dissolution, the jury was instructed to determine whether dissolution was appropriate, apparently on the theory that there were issues of fact common to the other claims. Instruction No. 2, based on NMSA 1978, UJI Civ. 3.3 (Repl.Pamp.1980), provided in part:

> The Plaintiffs, Lloyd C. Scott and Annette Scott ask to have LaDron Corporation dissolved and the assets of LaDron Corporation liquidated. In order for LaDron Corporation to be dissolved and its assets sold and liquidated, the plaintiffs have the burden of proving any of the following elements:
>
> (1) the directors of LaDron are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
>
> (2) the acts of the directors or those in control of the corporation are illegal, oppressive or fradulent; or
>
> (3) the corporate assets are being misapplied or wasted.
>
> The plaintiffs contend that all of these elements have occurred but the occurrence of any one of the above elements, if proved, establishes that LaDron Corporation should be dissolved and that its assets should be sold and liquidated at the future direction of the Judge.

This instruction does not use the jury as an advisory jury. The trial court did not enter findings of fact and conclusions of law to support the order dissolving the corporation pursuant to the jury finding. *See generally McCauley v. McCauley.* That order also must be reversed. *See Romrell v. Zions First Nat. Bank, N.A.; Romell v. Kaplan.*

b. The Judgment and Verdict as to the Scotts

The Woods contend that the verdict in favor of the Scotts individually is not supported by substantial evidence or, in the alternative, that it must be reversed as excessive. This issue was preserved by motion for directed verdict. The Scotts concede that the actual amount of damages was not proved but, relying on *Wirth v.*

Commercial Resources, Inc., 96 N.M. 340, 630 P.2d 292 (Ct.App.1981), argue no greater specificity was required. The Woods also contend that various instructions and evidentiary rulings to which they objected were erroneous, prejudiced the jury, and caused or contributed to an excessive award. For the following reasons, we hold that reversible error occurred with respect to the second judgment.

The jury was instructed on seven acts, as evidence to be considered in finding for either Ladron or the Scotts on the basis of fraud or deceit. That instruction is reproduced above in subsection 2. All of these acts occurred after Ladron was operating the Roadrunner and concerned the corporate management. The instruction on damages to the Scotts individually does not state elements associated with a claim of fraud.

We conclude that the claim of fraud was actually included in the claim made on behalf of Ladron. We have held that the claim made on behalf of Ladron should not have gone to the jury. Consequently, two theories of liability to the Scotts as individuals were submitted to the jury, although only one was appropriate. The jury returned a general verdict. The instructions on damages were not sufficient to clarify the jury's obligation. Under these circumstances, the judgment in favor of the Scotts must be reversed, and the cause remanded for a new trial. *See Gerety v. Demers*, 86 N.M. 141, 520 P.2d 869 (1974).

With respect to the sufficiency of the evidence of liability on the claim of emotional distress, the instructions advised the jury that plaintiffs might recover if they proved that defendants "intentionally or recklessly acted in an extreme or outrageous manner." Because the instructions on liability presented alternative theories, the jury was permitted to find liability on various kinds of misconduct, some of which did not present legal issues, rather than equitable claims. Under these circumstances, appellate review of the evidence would not be appropriate. We do not give advisory opinions, and the scope of this tort is still evolving. *See Trujillo v. Puro*, 101 N.M. 408, 683 P.2d 963 (Ct.App.1984).

Finally, with respect to damages, under the jury instructions, the Woods' liability to Ladron was hopelessly blended with their liability to the Scotts individually. Plaintiffs' counsel argued to the jury that he had proved misconduct toward Ladron, which in turn harmed the Scotts individually, but the instructions on damages failed to separate the elements of injury to Ladron from the elements of injury to the Scotts individually. This created a potential for double recovery. *Cf. Clappier v. Flynn*, 605 F.2d 519 (10th Cir.1979) (holding error occurred when judgment was awarded under common law claim for negligence as well as civil right claim; double recovery precluded when alternative theories seeking same relief are tried together). Although defendant did not specifically claim error on this basis at trial, we hold the issue was preserved by their motion for a new trial, as well as their objections to the instructions and their motion to sever. *See id.*

A verdict is excessive if the evidence, viewed in the light most favorable to the winning party, does not provide substantial support for the amount awarded or if there is an indication of passion, prejudice, partiality, undue influence, or a mistaken measure of damages on the part of the fact-finder. *Gonzales v. General Motors Corp.*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976). In this case, the instructions on liability and the instructions on damages not only created a potential for double recovery, they also provided a mistaken measure of damages.

The instructions on liability provided alternative theories for recovery on the same facts; instructions on damages insufficiently limited plaintiffs to a single recovery. In fact, the instructions on damages to the Scotts individually included a sum for obligations they incurred which Ladron could have paid if managed properly. The instruction on damages due the corporation

had, however, already stated separate claims for lost revenues and lost profits.

In closing argument, plaintiffs' counsel suggested that the jury could award Ladron as much as $350,000 in compensatory damages for the Woods' misconduct in managing the business and that they could award the Scotts as much as $100,000 in damages for the emotional distress they had suffered. The compensatory damages awarded to Ladron, together with the compensatory damages awarded the Scotts, were twenty times the amount of actual damages proved and argued to the jury. In addition, the sum awarded the Scotts approximated the sum awarded Ladron. Under these circumstances, even if the jury's decision as to liability could be sustained, the verdict could not. *See Gonzales v. General Motors Corp.*

Conclusion

Plaintiffs have asked for an award of damages for a frivolous appeal. They claimed that all but one issue was based on sufficiency of the evidence and abuse of discretion and that the remaining issue is based on an outmoded distinction between law and equity. In short, they claim the Woods' appeal is groundless and made in bad faith for purposes of delay. In view of our disposition, the request is denied.

While this case was pending, defendants moved to remand for an evidentiary hearing on a motion under NMSA 1978, Civ.P. Rule 60(b) to set aside the judgment. The motion was made after the case had been submitted to a panel and a decision on the merits had been reached but prior to the time the opinion had been filed. In view of the decision, the motion to remand is moot.

The verdict in favor of Ladron Corporation and the order for dissolution is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. The verdict as to liability in favor of the individual plaintiffs, including the award of compensatory and punitive damages, is reversed and the cause is remanded for a new trial. The Woods shall recover their appellate costs.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

730 P.2d 491

Larry F. LONG, as Personal Representative of the Estate of Erin Katherine Long, a minor, deceased, Plaintiff/Appellee,

v.

William WEAVER, M.D., Ann Kosloske, M.D., Jane Goldthorn, M.D., John Mangione, M.D., University of New Mexico/Bernalillo County Medical Center, and the Regents of the University of New Mexico, Defendants/Appellants.

No. 9302.

Court of Appeals of New Mexico.

Oct. 28, 1986.

Alfred M. Carvajal, Alfred M. Carvajal, P.A., Albuquerque, for plaintiff/appellee.

Douglas A. Baker, Jeffrey Twersky, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for defendants/appellants.

OPINION

FRUMAN, Judge.

This is an interlocutory appeal from a denial of defendants' motions for summary judgment in an action for wrongful death as a result of alleged medical negligence. The action was brought, in pertinent part, pursuant to the Tort Claims Act, NMSA 1978, Sections 41–4–1 through –29 (Repl. 1986). Generally stated, the certified question involves the issue of the fraudulent concealment of relevant information by the defendants, and the application of Section 41–4–15(A), which is the controlling statute of limitations. The facts pertinent to this appeal follow.

Plaintiff is the father and personal representative of the estate of Erin Katherine Long, a minor, deceased. The individual defendants are physicians who at all material times were employed by defendant University of New Mexico Hospital, a health care provider, which is operated by the defendant Regents.

Erin Long was admitted to the hospital on March 21, 1983. She was suffering from bleeding esophogeal varices. The next day, hospital physicians attempted to stop the bleeding by using a special tube. On March 30th, several days after the tube had been removed, hospital physicians diagnosed a perforation of Erin's esophagus. On April 6th and April 19th, operations were performed to repair the perforation. On July 14th, an open liver biopsy and cholangiogram were performed.

Erin Long remained hospitalized at the hospital until her death on August 2, 1983. The specific cause of death was not determined because an autopsy was not performed. However, both the Death Summary and the Uniform Death Note identify the esophageal perforation as one of several possible causes or contributing factors leading to Erin Long's death.

On or before October 11, 1983, plaintiff retained a lawyer to represent him and signed a medical release which gave the lawyer access to Erin Long's medical records. Plaintiff later retained a second lawyer, his present counsel. On September 28, 1984, this counsel wrote the hospital, informing it that he had been retained to represent plaintiff in a wrongful death action against the hospital. On August 2, 1985, the second anniversary of Erin Long's death, the complaint in this cause was filed.

As part of their defense and in support of their motions for summary judgment, defendants have claimed that Section 41-4-15(A) establishes a bar to this action. Specifically, defendants claim that the statutory period began to run no later than March 30, 1983, when the esophageal perforation was diagnosed. They further claim that Erin Long's mother was informed of this diagnosis on April 6, 1983. Thus, defendants assert, the filing of the complaint on August 2, 1985 was untimely.

The plaintiff's position is that, because of the fraudulent concealment of the malpractice alleged in his complaint, he did not learn of the cause of action until September 28, 1984. He further claims that Section 41-4-15(A) was tolled until that date, again because of the alleged fraudulent concealment of malpractice by defendants, and thus the complaint was timely filed. However, on the basis of the following, the question of fraudulent concealment need not be analyzed.

Section 41-4-15(A) provides, in pertinent part: "Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of *occurrence resulting in* loss, injury or *death....*" [Emphasis added.]

The supreme court interpreted this provision in *Aragon & McCoy v. Albuquerque National Bank,* 99 N.M. 420, 424, 659 P.2d 306, 310 (1983), as follows: "The plain language of the statute indicates that the period of limitations began to run when an 'occurrence resulting in loss' took place. *Until such a loss took place, the statute of limitations could not begin to run.*" [Emphasis added.] *See also Irvine v. St. Joseph Hospital, Inc.,* 102 N.M. 572, 698 P.2d 442 (Ct.App.1984).

The parties did not consider *Aragon & McCoy* in their initial briefs to this court, and we therefore requested supplemental briefs as to the effect of that case upon the issue of whether the complaint was timely filed. In plaintiff's supplemental brief, he continues to promote the idea of fraudulent concealment to bolster his timely filing argument, and offers no insight as to how *Aragon & McCoy* may provide an alternative, augmenting argument in his favor.

Defendants, in their supplemental brief, maintain that *Aragon & McCoy* provides several bases that support their position. The first is that the time for commencing this action began to run when there *clearly* was an occurrence and a resulting loss or injury, and that both of these elements were in existence by March 30, 1983.

Secondly, defendants assert the general principle of law that a cause of action accrues at the earliest time it arises. The cases cited by defendants to support this proposition are distinguishable. In *Gonzales v. Coe,* 59 N.M. 1, 277 P.2d 548 (1954), the decisive issue was whether the claimant knew or should have known of his disability as of the date of his accident. Since his injury was not latent and was apparent at the time of the accident, the court found that his suit for workmen's compensation was untimely filed. A similar rationale formed the basis for the decision reached in *Noland v. Young Drilling Co.,* 79 N.M. 444, 444 P.2d 771 (Ct.App.1968). In *Noland,* the court also explicitly excluded the discussion of a compensation claim arising

from the death of a workman from the parameters of its opinion. Additionally, neither of these cases involved the construction of a statute that contains alternatives, as is involved here.

Defendants have also cited *Hammons v. Muskogee Medical Center Authority,* 697 P.2d 539 (Okl.1985) as authority for their second proposition, but have not discussed it in their supplemental brief. The central issue in *Hammons* is whether a legislative amendment to a tort claims act should retroactively apply to bar a wrongful death action, and we do not find this case to be applicable to the issue at hand. Defendants' final authority, *Carter v. Cross,* 373 So.2d 81 (Fla.App.1979), reiterated the principle that a cause accrues from the time of the injury rather than when the full extent of the damages is ascertained. The primary focus of the court was on whether an exception to this principle was created by the enactment of an automobile no-fault law, and the court determined that it did not. This case and its reasoning do not persuade us regarding the merits of defendants' position.

Defendants recognize that the word "or" as used in a statute has a disjunctive meaning that indicates an alternative, such as "either one or another," unless this meaning is contrary to the context and main purpose of all of the statutory words. *See First National Bank v. Bernalillo County Valuation Protest Board,* 90 N.M. 110, 560 P.2d 174 (Ct.App.1977). Given this, they contend that a plain, simple reading of the statute requires our finding that the cause accrues upon the happening of either the loss, the injury, or the death, whichever occurs first. This requires reading something into the statute that is not there, and we will not do so. *Redding v. City of Truth or Consequences,* 102 N.M. 226, 693 P.2d 594 (Ct.App.1984).

The application of Section 41–4–15(A) in *Aragon & McCoy* is distinguishable from the situation in this case. In *Aragon & McCoy,* the specific time of the loss was ascertainable, and thus the trial court was able to determine as a matter of law when the limitation period commenced.

Defendants have maintained that the incident giving rise to a claim occurred no later than March 30, 1983, and that the limitations period commenced not later than that date, apparently in reliance on *Kern v. St. Joseph Hospital, Inc.,* 102 N.M. 452, 697 P.2d 135 (1985). In *Kern,* however, the cause of action arose under the Medical Malpractice Act. *See* NMSA 1978, Section 41–5–13 (Repl.1986); *see also* Horn, *The Statute of Limitations in Medical Malpractice Actions,* 6 N.M.L.Rev. 271 (1976). In this case, the cause of action arises under the Tort Claims Act. *See Emery v. University of New Mexico Medical Center,* 96 N.M. 144, 628 P.2d 1140 (Ct.App.1981). We have recognized that under the Tort Claims Act the limitation period commences when an injury manifests itself *and* is ascertainable, rather than when the wrongful or negligent act occurs. *See Tafoya v. Doe,* 100 N.M. 328, 670 P.2d 582 (Ct.App.1983); *Peralta v. Martinez,* 90 N.M. 391, 564 P.2d 194 (Ct. App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977). In applying *Emery,* an incident does not give rise to a claim until the resulting injury manifests itself in a physically objective manner and is ascertainable. Until these factors are established, the question of fraudulent concealment need not be addressed.

Summary judgment is not proper where material facts are in dispute, and when such a dispute does exist, the party against whom the judgment is sought will have all reasonable doubts resolved in his favor. *Garcia v. Presbyterian Hospital Center,* 92 N.M. 652, 593 P.2d 487 (Ct.App. 1979). While the trial court had serious concerns regarding the extent of plaintiff's knowledge of Erin's injury, it found that a genuine issue existed as to when the injury became ascertainable. For that reason, a genuine issue also existed as to when the applicable limitations period commenced.

The trial court relied on inferences arising from two documents: the notice letter of September 28, 1984 and the affidavit of Erin's mother. In her affidavit, the mother refers to her inquiry as to the need for Erin's further surgery and that "she was never informed by defendants that the esophageal perforation undiagnosed for eight days by defendants would render successful treatment impossible[.]" Additional factors that raise the possibility that the injury Erin suffered may not have been physically manifest and ascertainable until she died are an April 19, 1983 diagnosis refers to the esophogeal perforation as being "secondary to placement of a Sengstaken-Blakemore tube"; a June 28th medical summary did not link the perforation to the procedures used to control the bleeding; and Erin had suffered from various, serious medical problems since birth.

In our view, the record supports conflicting inferences on the question of whether the injury Erin suffered was physically manifest and ascertainable prior to her death. It is unclear from the record when the perforation became distinguishable from the problems she had suffered since birth or the condition for which she was admitted to the hospital.

Given these factors, the record supports the trial court's finding as to the existence of a genuine issue of material fact. That issue is: when did the injury manifest itself in a physically objective manner and when was it ascertainable? Accordingly, the denial of defendants' motion for summary judgment was proper. *See Garcia v. Presbyterian Hospital Center.* Even though the rationale that we have used to justify the denial of the motion may differ from the reasons recited in the order of the trial court, its decision is affirmed. *Cf. Scott v. Murphy Corp.*, 79 N.M. 697, 448 P.2d 803 (1968).

IT IS SO ORDERED.

HENDLEY, C.J., and MINZNER, J., concur.

730 P.2d 495

STATE of New Mexico, Plaintiff-Appellee,

v.

FELIPE V., a Child, Respondent-Appellant.

No. 9393.

Court of Appeals of New Mexico.

Nov. 13, 1986.

Paul G. Bardacke, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Deborah A. Moll, Asst. Appellate Defendant, Santa Fe, for respondent-appellant.

OPINION

GARCIA, Judge.

Respondent appeals a children's court order denying his motion to dismiss a delinquency petition with prejudice. The sole issue on this interlocutory appeal is whether a petition for a writ of superintending control is an "appeal" within NMSA 1978, Child.Ct. Rule 46(b)(4) (Cum.Supp.1984). Under the facts of this case, we believe that it is and affirm.

FACTS

Respondent, a juvenile, allegedly committed a second degree murder. On February 4, 1986, a petition alleging delinquency was served on him. Respondent was not held in detention pending adjudication of the charge against him. On February 20, 1986, he requested a jury trial. The request was denied as untimely and an adjudicatory hearing was set for April 28, 1986. Respondent requested an interlocutory appeal but the children's court judge refused to certify it. Respondent then petitioned the supreme court for a writ of superintending control requiring the children's court judge to set the matter for a jury trial. The supreme court granted the writ and ordered the April 28, 1986 adjudicatory hearing vacated and reset for trial by jury; the writ became permanent on April 14, 1986, fourteen days prior to the original April 28th hearing date. The judge then recused himself and the matter was reassigned and set for trial by jury on July 14, 1986. On June 11, 1986, respondent filed a motion to dismiss with prejudice, contending the children's court did not have jurisdiction because the July 14th hearing date was not within ninety days from the day the petition was served as required by Rule 46(b)(1). The court denied the motion and granted leave for this interlocutory appeal.

DISCUSSION

The trial court determined that the ninety-day period for commencing the adjudicatory hearing began to run anew when the writ of superintending control was issued. Rule 46(b) requires that if a respondent is not in detention, the adjudicatory hearing shall commence within ninety days of serving the petition on respondent or the later occurrence of certain listed events. One of those events is an appeal. With an appeal, the date the mandate or order is filed in children's court disposing of the appeal signals the commencement of the ninety-day period. Child.Ct.R. 46(b)(4). If the hearing is not held within the applicable time limitations, the children's court must dismiss the petition with prejudice. Child.Ct.R. 46(e).

Here, the children's court denied the motion to dismiss and ruled the action by the supreme court started a new ninety-day period for commencing the adjudicatory hearing. The court reasoned that "appeal" included all instances in which issues raised and pending in children's court are presented to an appellate court. Respondent would have us interpret Rule 46(b)(4) to mean that "appeal" is limited to appellate review of the entire case once disposed of by the trial court. We decline to follow such a narrow interpretation of the rule.

The supreme court case of *State v. Flores,* 99 N.M. 44, 653 P.2d 875 (1982) is analogous to the case at bar. There, at the time defendant was arraigned in August, he was already serving a sentence in the New Mexico State Penitentiary. After entering a plea of not guilty, the trial court ordered Flores to be returned to the penitentiary's custody and to be detained there until further order of the trial court. The trial court neither set bond nor ordered any specific "conditions of release." In October, defendant was discharged from the penitentiary without the trial court's permission. In November, the trial court issued a bench warrant for defendant's arrest because he did not appear at his pretrial conference. He was arrested pursuant to that warrant in January. He moved for dismissal of the charges because no extension of the six-month rule had been sought by the state as required by NMSA 1978, Crim.P. Rule 37(c) (Repl.1985). The court held that Rule 37 was adopted to ensure the prompt trial and disposition of criminal cases, not to effect dismissals by such a technical application. It is to be

read with common sense. *Flores* at N.M. 46, 653 P.2d at 877.

We believe the same common sense approach should be taken here. Child.Ct. Rule 46, like Crim.P.Rule 37, was adopted to ensure the prompt trial and disposition of children's court cases. *See id.* The term 'appeal,' as employed in Rule 46, includes a review of the decision of the children's court under a writ of superintending control. We do not apply a narrow technical meaning. We note that Rule 46 provides that the ninety-day period runs from the date a mandate or order is filed. The term "mandate" is associated with the disposition of an appeal, while the term "order" is an appropriate reference to the termination of an original proceeding. Moreover, while we appreciate the distinction between an appeal and a writ of superintending control delineated by respondent in his brief, in situations such as this, it is a distinction without a difference. Just as with an appeal, the writ interrupted the flow of proceedings. It was in the nature of the interlocutory appeal since it created the same scheduling and preparation problems and interrupted the proceedings. *See People v. Ferguson,* 653 P.2d 725 (Colo. 1982) (en banc).

If, on appeal, a higher court orders the children's court to vacate the setting for a bench trial and schedule it for trial by jury, the rule gives the children's court ninety days from the filing of that order to set the cause for trial by jury. Under respondent's interpretation of the rule, if the same order takes the form of a writ of superintending control, it has no effect on the ninety-day clock. No matter how impractical it is for the children's court to follow the supreme court's order within the time remaining, respondent would require the state to apply to the supreme court under Rule 46(d) for the means to carry out the supreme court order obtained by respondent, or suffer mandatory dismissal.

For the foregoing reasons, we hold that "appeal" for the purposes of Rule 46(b)(4) should be defined as a seeking of review by a higher court, including seeking supreme court review under a preemptory writ. The children's court, therefore, correctly interpreted Rule 46 and its denial of respondent's motion to dismiss is hereby affirmed.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

730 P.2d 497

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael C. GATTIS, Defendant-Appellant.

No. 9176.

Court of Appeals of New Mexico.

Nov. 26, 1986.

[redacted]

[redacted]

[redacted]

Thomas A. Harden, Dan B. Buzzard, Clovis, Winston Roberts-Hohl, Santa Fe, for defendant-appellant.

Paul G. Bardacke, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BIVINS, Judge.

Defendant appeals his conviction on three counts of use of telephone to harass, annoy or offend, contrary to NMSA 1978, Section 30-20-12 (Repl.Pamp.1984). After a jury trial, defendant was sentenced to eighteen months on each count, to run concurrently. The sentences were suspended and defendant was placed on probation for eighteen months on each count, to run concurrently.

Defendant lists four issues on appeal: (1) whether Section 30-20-12(A) is overbroad; (2) whether that subsection, reasonably interpreted, prohibits conduct which is constitutionally protected; (3) whether that subsection is too vague and indefinite; and (4) whether there was a failure of proof under the circumstances of this case. Issues one and two are the same and, thus, will be discussed together. One other issue listed in the docketing statement, but not briefed, is deemed abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We affirm.

BACKGROUND

Defendant was indicted on six counts—two counts of threatening a witness, contrary to NMSA 1978, Section 30-24-3

(Repl.Pamp.1984), and four counts of misuse of telephone, contrary to Section 30–20–12. A jury found him guilty of three counts of misuse of telephone and acquitted him of the other charges. The convictions resulted from a telephone call defendant made to Anita A. on March 23, 1985, and three telephone calls to Vickie L., two on April 12, 1985, and one on May 3, 1985.

Both of the victims had had intimate relationships with defendant. Anita testified that her affair with defendant ended in 1978. In 1984, she sent a certified letter to defendant asking him not to call her anymore. Vickie had lived with defendant at two different times. Testimony indicates this relationship ended in December 1984. The relevant telephone calls from defendant were traced and recorded. At the time the telephone calls were made, both women were married to other men.

1. Whether Section 30–20–12 is Unconstitutionally Overbroad or Vague, or Both

Section 30–20–12(A) states:

> *It shall be unlawful for any person,* with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd, criminal or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It shall also be unlawful for any person to attempt by telephone to extort money or other thing of value from any other person, or to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any other person at the place where the telephone call or calls were received, or *to maliciously make a telephone call, whether or not conversation ensues, with intent to annoy or disturb another,* or to disrupt the telecommunications of another. [Emphasis added.]

The jury was only instructed on the underscored alternative, and that is the only alternative applicable to this case.

Challenges of overbreadth and vagueness are frequently brought together and many of the cases dealing with the constitutionality of statutes similar to Section 30–20–12 address both issues. Nevertheless, they are distinct concepts.

A statute is unconstitutionally overbroad, and thus offends the first amendment, if it not only forbids conduct constitutionally subject to proscription but also sweeps within its ambit those actions ordinarily deemed to be constitutionally protected. *State v. Jaeger,* 249 N.W.2d 688 (Iowa 1977). *See State ex rel. Gonzales v. Manzagol,* 87 N.M. 230, 531 P.2d 1203 (1975). A statute is unconstitutionally vague, and thus offends due process, if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so he may act accordingly. *State v. Jaeger. See State v. Segotta,* 100 N.M. 498, 672 P.2d 1129 (1983). A statute must give fair warning of proscribed conduct in order to avoid arbitrary and discriminatory enforcement. *State v. Jaeger,* citing *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Statutes are to be construed, if possible, so that they will be constitutional. *State v. Wade,* 100 N.M. 152, 667 P.2d 459 (Ct.App.1983).

Several courts have considered constitutional challenges to statutes similar to Section 30–20–12. *See Annot.,* 95 A.L.R.3d 411 (1979). Defendant relies on one case, *People v. Klick,* 66 Ill.2d 269, 5 Ill.Dec. 858, 362 N.E.2d 329 (Ill.1977), to support his argument that Section 30–20–12 is overbroad and vague. We have found two other state courts which have struck down similar statutes. *City of Everett v. Moore,* 37 Wash.App. 862, 683 P.2d 617 (1984); *State v. Dronso,* 90 Wis.2d 110, 279 N.W.2d 710 (1979). Also, the Texas statute, after being upheld in several state court cases, *e.g., Alobaidi v. State,* 433 S.W.2d 440 (Tex.Crim.App.), *cert. denied,* 393 U.S. 943, 89 S.Ct. 313, 21 L.Ed.2d 281 (1968), was struck down by the Fifth Circuit as unconstitutionally vague. *Kramer v. Price,* 712 F.2d 174 (5th Cir.1983).

However, statutes of this type have been upheld in twenty-one states.[1] The Connecticut court, which upheld that state's statute in *State v. Anonymous,* was affirmed by the Second Circuit. *Gormley v. Director, Connecticut State Department of Probation.* The Third Circuit, in *United States v. Lampley,* 573 F.2d 783 (3rd Cir.1978), upheld the constitutionality of 47 U.S.C.A. § 223 (West Cum.Supp.1986), which prohibits threatening or harassing interstate telephone calls. Thus, courts that rejected arguments of overbreadth and vagueness in this type statute are in the majority.

A. Whether Section 30–20–12 is overbroad.

A statute is unconstitutionally overbroad if it criminalizes speech that is protected by the first amendment. *See State v. Jaeger.* The three states that struck down their statutes held that they were overbroad. *People v. Klick* ("call made with intent to annoy" not limited to unreasonable conduct); *State v. Dronso* ("intent to annoy" overly broad); *City of Everett v. Moore* ("alarms or seriously annoys" overbroad). The argument is that many constitutionally-protected calls may be made with the intent to annoy.

In determining what speech will be protected by the first amendment, courts must balance the right to free speech against other state interests.

Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. * * * To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973) (citation omitted).

People v. Klick held that the Illinois statute criminalized conduct protected by the first amendment, *i.e.,* the right to communicate to another in a reasonable manner. *Id.,* 362 N.E.2d at 331. Examples of reasonable communications that the court believed were prohibited by the statute include a call made by a customer to express dissatisfaction with a product or service, a call by an irate citizen to a public official, or a call by an individual bickering over family matters. The New Mexico statute requires that a call made with the intent to annoy or disturb must be made maliciously. This excludes valid calls of the type described in *People v. Klick* even if they are intended to cause minor annoyance, since "maliciously" is defined as the intentional doing of a harmful act *without just cause or excuse,* or in utter disregard of the

1. *Donley v. City of Mountain Brook,* 429 So.2d 603 (Ala.Crim.App.1982); *Baker v. State,* 16 Ariz.App. 463, 494 P.2d 68 (1972); *People v. Weeks,* 197 Col. 175, 591 P.2d 91 (1979) (en banc); *State v. Anonymous,* 34 Conn.Sup. 689, 389 A.2d 1270 (1978), *aff'd, Gormley v. Director, Connecticut State Department of Probation,* 632 F.2d 938 (2d Cir.), *cert. denied,* 449 U.S. 1023, 101 S.Ct. 591, 66 L.Ed.2d 485 (1980); *State v. Elder,* 382 So.2d 687 (Fla.1980); *Constantino v. State,* 243 Ga. 595, 255 S.E.2d 710, *cert. denied,* 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979); *Kinney v. State,* 404 N.E.2d 49 (Ind.App. 1980); *State v. Jaeger; State v. Thompson,* 237 Kan. 562, 701 P.2d 694 (1985); *State v. Meunier,* 354 So.2d 535 (La.1978); *Von Lusch v. State,* 39 Md.App. 517, 387 A.2d 306 (1978); *People v. Taravella,* 133 Mich.App. 515, 350 N.W.2d 780 (1984); *State v. Finance American Corp.,* 182 N.J.Super. 33, 440 A.2d 28 (1981); *People v. Smith,* 89 Misc.2d 789, 392 N.Y.S.2d 968 (1977); *State v. Camp,* 59 N.C.App. 38, 295 S.E.2d 766 (1982); *State v. Mollenkopf,* 8 Ohio App.3d 210, 456 N.E.2d 1269 (1982); *Commonwealth v. Lewis,* 30 Pa.D. & C.2d 133 (1962), supp.op. 32 Pa.D. & C.2d 1 (1963); *State v. Brown,* 274 S.C. 506, 266 S.E.2d 64 (1980); *State v. Crelly,* 313 N.W.2d 455 (S.D.1981); *State v. Thorne,* 333 S.E.2d 817 (W.Va.1985). In addition, the Oregon statute was originally upheld, *State v. Zeit,* 22 Or.App. 480, 539 P.2d 1130 (1975); then struck down, *State v. Blair,* 287 Or. 519, 601 P.2d 766 (1979) (en banc). The statute was later rewritten and upheld. *State v. Moyle,* 299 Or. 691, 705 P.2d 740 (1985) (en banc).

consequences. *Potomac Insurance Co. v. Torres,* 75 N.M. 129, 401 P.2d 308 (1965).

Some courts have held that statutes are not overbroad if they require a specific intent to threaten, harass, annoy, etc. "Freedom of speech does not encompass the right to abuse the telephone with the specific intent to annoy and to harass the recipient of the call." *von Lusch v. State,* 39 Md.App. at 525, 387 A.2d at 310. *See State v. Thompson; State v. Finance American Corp.; State v. Brown.* The New Mexico statute also requires specific intent to annoy or disturb. § 30–20–12(A).

In most cases that have rejected challenges of overbreadth, the court has distinguished between the content of speech, protected by the first amendment, and conduct which invades substantial privacy interests. *See generally Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Most statutes seek to prohibit the latter. Statutes that regulate only the content of speech have been struck down. *See Walker v. Dillard,* 523 F.2d 3 (4th Cir.1975) (Virginia statute prohibiting abusive comments by either caller or recipient and having no intent requirement was facially and substantially overbroad). *See also Radford v. Webb,* 446 F.Supp. 608 (W.D.N.C.1978), *aff'd,* 596 F.2d 1205 (4th Cir.1979) (per curiam) (portion of North Carolina statute regulating pure speech overbroad); *State v. Camp* (subsection of same statute which regulates conduct rather than speech not overbroad or vague).

Several other cases have relied on the distinction between pure speech and conduct. "[The Arizona statute] is not directed at the communication of thoughts or ideas but at conduct, in other words, the use of the telephone to terrify, intimidate, threaten, harass, annoy or offend people by use of the language proscribed." *Baker v. State,* 16 Ariz.App. at 465, 494 P.2d at 70. "[The unlawful use of telephone statute] is not an obscenity or lewdness statute * * * [it] is a statute prohibiting outrageous conduct * * *." *State v. Jaeger,* 249 N.W.2d at 691 (citations omitted). "Clearly the Connecticut statute regulates *conduct,* not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner. * * Indeed, by its express terms the statute may be violated where no conversation at all occurs." *Gormley v. Director, Connecticut State Department of Probation,* 632 F.2d at 941–42 (emphasis in the original). "[I]t is the manner and means employed to communicate [the messages] which is the subject of the prohibition rather than their content. * * * That words may be the instrument of annoyance does not insulate such wrongful conduct from criminal liability." *State v. Anonymous,* 389 A.2d at 1273–74. *See also State v. Thorne* (harassment is not protected merely because it is accomplished by using the telephone); *State v. Elder* (statute not directed at the communication of ideas but at a range of conduct); *People v. Weeks* (the first amendment does not extend to any person the right to use his power of speech as a battering ram to destroy the tranquility and repose of another person's home); *State v. Crelly* (conduct of this nature is obviously not protected by the guarantees of free speech provided for in the first amendment).

The New Mexico statute is likewise directed at conduct. The making of the call is the prohibited act, not the speaking of any particular words. In fact, the crime may be committed without any words being spoken. Section 30–20–12 is not unconstitutionally overbroad.

B. Whether Section 30–20–12 is unconstitutionally vague.

To be unconstitutionally vague, a statute must be so vague that men of common intelligence must guess at its meaning. *Broadrick v. Oklahoma.* Absolute precision is not a constitutional requirement. *Kinney v. State.* " '[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.' " *Kinney v. State,* 404 N.E.2d at 51, quoting *Screws v. United States,* 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945).

A specific intent requirement has also been held to save a statute from being void for vagueness. *von Lusch v. State.* "The appellant cannot claim confusion about the conduct proscribed where, as here, the statute precisely specifies that the actor must intend to perform acts of harassment in order to be culpable." *United States v. Lampley,* 573 F.2d at 787. But " 'there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with * * *.' " *Broadrick v. Oklahoma,* 413 U.S. at 608, 93 S.Ct. at 2913, quoting *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 578–79, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973). A statute proscribing obscene telephone calls, construed as proscribing only calls initiated by one with intent and with the sole purpose of conveying an unsolicited, obscene, imminently threatening or harassing message to an unwilling recipient, is neither unconstitutionally vague or overbroad. *State v. Brown.*

The portion of the statute under which defendant was convicted makes it unlawful "to maliciously make a telephone call, whether or not conversation ensues, with intent to annoy or disturb another * * *." § 30–20–12. This sets out " 'terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with * * *.' " *Broadrick v. Oklahoma,* 413 U.S. at 608, 93 S.Ct. at 2913, quoting *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. at 578–79, 93 S.Ct. at 2897. Section 30–20–12 is not void for vagueness.

2. Whether Substantial Evidence Supports the Convictions

Defendant does not deny that he made the telephone calls for which he was convicted. All three telephone calls were recorded and were traced to defendant's number. Tapes of the telephone calls were admitted into evidence. Defendant's only argument on appeal is that the evidence does not support a finding of malicious intent.

In determining whether the state has met its burden of proving guilt beyond a reasonable doubt, this court must review the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). This court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict. *Id.; State v. Robinson,* 94 N.M. 693, 616 P.2d 406 (1980). The fact finder may reject defendant's version of the incident. *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975). Where a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal. *State v. Anaya,* 98 N.M. 211, 647 P.2d 413 (1982).

The proven circumstances from which an accused's state of mind or intent can be inferred are his acts, conduct and words. *Caldwell v. State,* 26 Md.App. 94, 337 A.2d 476 (1975); *see also State v. Frank,* 92 N.M. 456, 589 P.2d 1047 (1979); *State v. Ortega,* 79 N.M. 707, 448 P.2d 813 (Ct.App.1968). The intent to harass may be shown by other harassing acts. *State v. Godwin,* 267 N.C. 216, 147 S.E.2d 890 (1966); NMSA 1978, Evid.R. 404(b) (Repl. Pamp.1983). The language used in calls may be considered in determining defendant's intent in making the calls. *Gormley v. Director, Connecticut State Department of Probation.* Likewise, the time that the calls were made and the previous efforts to make defendant desist may be considered. *State v. Zeit.*

Defendant argues that the content of the telephone calls to Anita cannot be connected to an inference of malicious intent. Defendant confuses the words spoken with the harassing act of making the telephone call. If the telephone call is made maliciously with the intent to annoy

or disturb, a crime has been committed even if no conversation ensues. § 30–20–12. We now examine the evidence, keeping in mind that "maliciously" denotes the intentional doing of a harmful act without just cause or excuse. *Potomac Insurance Co. v. Torres.*

The evidence shows a pattern of behavior by defendant toward Anita that supports a finding of malicious intent in making the telephone call on March 23. Defendant and Anita had had an affair some years ago. Defendant began calling her again in July 1984. She asked defendant to stop and sent a certified letter to him in August 1984, asking him not to call or see her again. Defendant admitted receiving the letter.

Between December 1984 and March 1985, Anita received four or five telephone calls which she recognized as being from defendant. One was at 2:20 a.m. and another at 2:00 a.m. Anita testified that the content of the calls included "I love you," "you have pretty tits," "I love your tits." Evidence of this type of call, made to a married woman in the middle of the night, and of Anita's requests to stop such calls, supports an inference that when defendant telephoned Anita at 1:50 a.m. on March 23, he maliciously (without just cause or excuse) intended to harass her. Defendant's conviction on Count 1 is thus supported by substantial evidence.

Counts II and IV are based on telephone calls defendant made to Vickie on April 12, 1985, and May 3, 1985. His relationship with Vickie was much more involved than that with Anita, but again there exists a pattern of harassing behavior.

Defendant and Vickie had had a rather lengthy affair which ended in December 1984. On April 9 Vickie married Greg L. She called defendant to tell him she had married. Vickie testified that defendant called her frequently around this time and so, on April 11, she had a tape recorder and trap installed on her telephone. When defendant called on April 11, the call was recorded. Vickie clearly asked defendant not to call her again. Defendant admitted making the call and that Vickie told him not to call her anymore. He also admitted that he called her again the next day, April 12.

Two telephone calls from defendant were recorded on April 12, one at 4:20 p.m. and another at 5:10 p.m. In these calls, defendant made insulting remarks about Vickie's husband. These calls are the basis for Count II. There is substantial evidence to support a finding that defendant was aware that Vickie considered his calls annoying and had asked him not to call again.

A week after her marriage, Vickie received an anonymous sympathy card. Expert testimony revealed that one of defendant's fingerprints was on the card. Three days later, defendant was arrested on Counts II and III, but he subsequently followed Vickie in her car for extended periods of time in a threatening manner. Four days after his first arrest, defendant was arrested on Count V.

Even after being arrested twice on charges of harassing Vickie, defendant telephoned her again on May 3, 1985. Vickie testified that defendant said, "I'm sorry, I'm sorry, I'll kill you, I love you," and that she was frightened because defendant had threatened her before.

The record shows a pattern of conduct on the part of defendant designed to annoy, disturb and harass Vickie. His argument on appeal that he was simply a rejected lover attempting to patch things up is not a logical inference. The fact that he once had a relationship with Vickie does not affect her right to be left alone once she has terminated that relationship and married another man. The evidence supports an inference that defendant's telephone call to Vickie on May 3 was made maliciously with the intent to annoy or disturb.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

730 P.2d 1184

In the Matter of Bruce G. STAFFORD Attorney At Law.

No. 14837.

Supreme Court of New Mexico.

April 20, 1983.

OPINION

In August 1981, Bruce G. Stafford, an attorney admitted to practice in New Mexico, was served with a Specification of Charges alleging two counts of misconduct.

Count I alleged that Stafford, at the conclusion of his own deposition, became involved in an altercation with opposing counsel and threw a five pound ashtray at counsel's head, barely missing it.

Count II alleged that after Stafford was retained by a party to represent him to recover damages to a fence and garage wall, he allowed the case to be dismissed with prejudice for failure to prosecute although he had already been paid a fee for the case. Stafford also in this case, sought relief from a court that had no jurisdiction to hear the matter.

Stafford admitted the physical confrontation in Count I, however, claimed it was instigated and initiated by opposing counsel. Concerning Count II, Stafford denied that he neglected or abandoned the case.

A hearing was held before the Disciplinary Board's hearing committee. The hearing committee submitted its findings of fact and conclusions of law sustaining both charges, and recommended to the Disciplinary Board that Stafford be publicly censured.

A panel of the Disciplinary Board upheld the hearing committee's findings and approved the recommendation to the Supreme Court that Stafford be publicly censured for each Count.

On March 23, 1983, a hearing was held before this Court to determine whether the Disciplinary Board's findings and recommendation should be upheld. Counsel for the Disciplinary Board appeared. Stafford did not appear.

Stafford's act of throwing an object at a fellow attorney demonstrates a great lack of respect for the judicial process and the legal system. The legal system exists to resolve disputes by means other than physical force or brute strength. By engaging in a physical confrontation immediately following a deposition and while still in the court's jury room, Stafford casts doubt upon his fitness to practice law.

We are also very concerned about Stafford's neglect of the case that was the subject of Count II. Stafford's apparent lack of preparation caused him to seek remedies that were unavailable in the court where the action was brought.

Although we are somewhat concerned at the mild disciplinary action recommended, we will follow the recommendation of the Disciplinary Board in this instance.

Stafford is hereby ordered to appear before this Court to be censured for his conduct in each of these counts within 30 days. He is also ordered to pay costs incurred by the Disciplinary Board and ordered to show cause why he should not be ordered to make restitution to the victims of each count.

Failure to comply with this order shall subject Stafford to suffer immediate suspension of his license to practice law.

It is so Ordered.

It appearing to the Court that Bruce G. Stafford has not abided by the Order of the Court entered herein on April 20, 1983, having failed to appear before this Court to be censured for his conduct as provided in the Opinion of the Court, nor has he paid any costs incurred by the Disciplinary Board or made restitution to the victims of each count of his Specification of Charges, and the Judgment of the Court further providing that failure to comply would subject Stafford to suffer immediate suspension of his license to practice law;

NOW, THEREFORE, IT IS ORDERED by the Court that BRUCE G. STAFFORD is hereby suspended from the practice of law in all of the Courts of the State of New Mexico, and reinstatement shall not be automatic but upon application and further proceedings by the Disciplinary Board.

730 P.2d 1185

In the Matter of Howard L. EVERIDGE Attorney At Law.

No. 14879.

Supreme Court of New Mexico.

June 2, 1983.

Barry M. Viuker, Chief Disciplinary Counsel, Albuquerque, for Board.

Howard L. Everidge, Phoenix, pro se.

OPINION

In May 1982, Howard L. Everidge (Everidge), an attorney admitted to practice in New Mexico, was served with a Specification of Charges alleging a number of instances of misconduct arising out of his representation of a client in a wrongful death action.

It was alleged that in April 1980, Everidge had accepted $6,900.00 from a client to be used as costs in connection with a wrongful death case which arose the accidental death of the client's husband. Everidge was also alleged to have agreed with the client that he would ultimately reimburse her for the costs from his share of any recovery and that if there was no recovery, he would repay her the $6,900.00. It was further alleged that Everidge never placed this money in a trust account, but instead proceeded to use it for personal and business-related expenses. Everidge then had allegedly moved to Arizona without notice to his client before completing any meaningful work or incurring any costs in connection with the case, thereby forcing his client to seek other counsel to complete the litigation. Finally, it was alleged that

none of the $6,900.00 had ever been returned to the client.

Everidge admitted that he received and spent the $6,900.00 but claimed that it was simply an interest-free loan to him in exchange for his agreement to accept the client's case on a 25% contingency fee basis. He acknowledged that the money had not been repaid but insisted that he intended to repay it when he could afford to do so.

Everidge further maintains that the Disciplinary Board (Board) is obligated to honor an agreement between the former chief disciplinary counsel and himself, whereby he was to received a private informal admonition pursuant to NMSA 1978, Supreme Court Rules Governing Discipline, Rule 4(a), 6. Therefore, Everidge claims that he should be given an informal admonition for this conduct, as he was offered by the former chief disciplinary counsel and had orally agreed to accept it. Although the admonition was never formally issued, he contends that the Board and this Court are without jurisdiction to proceed, since this matter was to have been disposed of by this agreement.

When the former chief disciplinary counsel resigned his position prior to the administration of the informal admonition, Everidge's file was forwarded to the acting disciplinary counsel. The file was still an "open" file in that the admonition had not been issued. It was reviewed by the chairman of the Board, who directed that further investigation be undertaken. NMSA 1978, Supreme Court Rules Governing Discipline, Rule 8(b), directs that "upon his own motion, the chairman of the board may order an investigation *at any time.* (emphasis added)." We find that the chairman's order to the disciplinary counsel to conduct further investigation of a pending matter was within his power under Rule 8(b).

Thereafter, a hearing was held before the Board's hearing committee in October 1982. The hearing committee found that the money had been a loan to Everidge but that he had failed to disclose to the client all facts necessary to enable her to decide if this arrangement would be beneficial to her interests. It further found that Everidge was in violation of NMSA 1978, Code of Professional Responsibility, Rule 7–101(A)(3) (Repl.Pamp.1982), by "damag[ing] his client during the course of the professional relationship * * * " and NMSA 1978, Code of Professional Responsibility, Rule 1–102(A)(6) (Repl.Pamp.1982), by "engaging in other conduct that adversely reflects on his fitness to practice law." The hearing committee recommended that Everidge be placed on probation and be ordered to return a portion of the $6,900.00 to the client.

A panel of the Board then reviewed this matter pursuant to NMSA 1978, Supreme Court Rules Governing Discipline, Rule 8(b)(3)(i). The panel partially adopted the findings of the hearing committee but rejected the hearing committee's finding that the $6,900.00 was a loan to Everidge. The panel found that the money was an advance for costs and should have been placed in a trust account with unexpended portions returned to the client. The panel also found as erroneous the hearing committee's findings that Everidge was not in violation of certain rules. In addition, the panel found that Everidge was in violation of NMSA 1978, Code of Professional Responsibility, Rules 1–102(A)(4), 2–110(A)(3), 5–101(A), 5–103(A), 5–104(A), 9–102(B)(3) and 9–102(B)(4) (Repl.Pamp.1982).

Although the findings and the recommendation of the Board's panel differ from the findings and recommendation of the hearing committee, Rule 8(i) allows the Board to disapprove the findings of a hearing committee for errors of law or lack of supporting evidence and to recommend discipline appropriate to the approved findings. The Board's panel correctly followed this Rule.

The Board recommended to the New Mexico Supreme Court that Everidge be suspended from the practice of law for at

least one (1) year with reinstatement conditional upon full restitution to the client and a showing that he had taken and passed the Multi-State Professional Responsibility Examination.

On May 11, 1983, a hearing was held before the New Mexico Supreme Court to determine whether the Board's findings and recommendation should be upheld. Counsel for the Board and Everidge appeared.

Everidge claims that his current problems with the Board are simply the result of an accident of fate in that the former chief disciplinary counsel resigned before admonishing him and argues that he should not be punished for past acts that arose out of his lack of experience. We determine that Everidge is not before this Court because of an accident of fate but because he took $6,900.00 from his client on the pretense of needing it to cover the costs of her litigation and then converted it to his own use.

We also note Everidge's apparent lack of concern about refunding the $6,900.00 to his client. He claims to have offered to repay the money by installment but acknowledges he has tendered no payments to her. He also admits that in the lawsuit brought against him by the client, he has denied owing her any money. We find this attitude reprehensible.

We adopt the findings of the Board and follow its recommendation. Everidge is hereby suspended from the practice of law in all courts of the State of New Mexico for a period of not less than one (1) year beginning May 11, 1983. At the end of this period, Everidge may move for reinstatement only upon a showing that he has made restitution to the client in the amount of $6,900.00, that he has taken and passed the Multi-State Professional Responsibility Examination with a score set by this Court under the Rules for Admission to the New Mexico State Bar and that he has paid all outstanding costs.

Costs of this action are assessed against Everidge in the amount of $1,512.92.

IT IS SO ORDERED.

730 P.2d 1187

Clark STOREY, Plaintiff-Appellee,

v.

UNIVERSITY OF NEW MEXICO HOSPITAL/BCMC, Defendants-Appellants.

and

Clark STOREY, Plaintiff-Appellant,

v.

UNIVERSITY OF NEW MEXICO and Bernalillo County Medical Center, Defendants-Appellees.

Nos. 16332, 16449.

Supreme Court of New Mexico.

Dec. 29, 1986.

Civerolo, Hansen & Wolf, Anthony J.D. Contri, Kathleen Davison Lebeck, Albuquerque, for University of New Mexico Hospital/BCMC.

Duhigg, Cronin & Spring, John Duhigg, Catherine Gordon, Albuquerque, for Clark Storey.

OPINION

FEDERICI, Justice.

Storey (plaintiff) filed this action in the District Court of Bernalillo County. He alleged that a lien claim of University of New Mexico Hospital/Bernalillo County Medical Center (defendant) upon the proceeds of his uninsured motorist policy was invalid and an abuse of process. Defendant counterclaimed for declaratory judgment on the validity of the lien and for debt and money due. The trial court held that defendant's lien was invalid. The trial court also entered summary judgment in favor of defendant on defendant's counterclaim for debt and money due. Both plaintiff and defendant appealed. The appeals were consolidated. We affirm in part and reverse in part.

Plaintiff was struck and injured by an uninsured motorist. Defendant hospital provided emergency care to plaintiff. Plaintiff carried uninsured motorist coverage with a policy limit of $25,000. Plaintiff's insurer has agreed to pay plaintiff $25,000 for his injuries in settlement under the uninsured motorist policy. Defendant, pursuant to the New Mexico Hospital Lien Act, NMSA 1978, Sections 48–8–1 through 48–8–7 (Act), filed a lien for $16,812.62 against the proceeds of the settlement recovered by plaintiff under the uninsured motorist coverage.

Two issues are presented by this appeal: (1) Did the trial court err in ruling that the Act does not permit a lien upon the proceeds of an uninsured motorist policy?; and (2) Did the trial court err in entering summary judgment in defendant's favor on defendant's counterclaim for debt and money due?

Issue (1): We hold that the trial court erred in holding that the Act does not permit a lien upon the proceeds of an uninsured motorist policy.

The trial court based its result upon a distinction between recovery in tort from a tortfeasor or the tortfeasor's insurer and recovery in contract under an uninsured motorist policy. According to the trial court, the Act only permits a lien upon the former. This result is contrary to what we consider to be the clear language of applicable statutes.

Sections 48–8–1(A) and 48–8–3(A) of the Act are particularly relevant to the issue before us. Section 48–8–1(A) states:

> Every hospital located within the state that furnishes emergency, medical or other service to any patient injured by

reason of an accident * * * is entitled to assert a lien upon that part of the judgment, settlement or compromise going, or belonging to such patient * * * based upon injuries suffered by the patient * *.

Section 48–8–3(A) states:

Any person, firm or corporation, including an insurance carrier, making *any* payment to a patient * * * as compensation for the injury sustained * * * shall [under specified circumstances] be liable to the hospital for the amount that the hospital was entitled to receive. (Emphasis added.)

Section 48–8–1(A) addresses a hospital's right to file a lien for emergency services rendered against settlement proceeds going to a patient based upon injuries suffered by the patient. Plaintiff's insurer has agreed to pay $25,000 in settlement as compensation for injuries suffered by plaintiff. Section 48–8–3(A) speaks unequivocally of *any* payment made by *any* person. An unambiguous statute should be given effect according to its clear language. *New Mexico Beverage Co. v. Blything,* 102 N.M. 533, 697 P.2d 952 (1985). Consistent with the unambiguous language of the Act, we hold that the Act permits a lien upon the proceeds of plaintiff's uninsured motorist policy and that defendant's lien for $16,812.62 is valid.

Issue (2): We hold that the trial court did not err in entering summary judgment in defendant's favor on defendant's counterclaim for debt and money due.

Summary judgment is proper if the moving party shows "that there is no genuine issue as to any material fact." NMSA 1978, Civ.P.R. 56(c) (Repl.Pamp.1980). By its pleadings, affidavits and other documents filed in the district court, defendant made a prima facie showing that no genuine issue of material fact existed concerning its counterclaim for debt and money due. The burden shifted to plaintiff to rebut the prima facie showing. *See Fidelity National Bank v. Tommy L. Goff, Inc.,* 92 N.M. 106, 583 P.2d 470 (1978). By failing to set forth specific facts, admissible in evidence, showing that there was a genuine issue for trial (*see* NMSA 1978, Civ.P.R. 56(e) (Repl.Pamp.1980)), plaintiff failed to carry his burden of proof.

The cause is remanded to the trial court for proceedings consistent with this opinion.

IT IS SO ORDERED.

STOWERS, C.J., and RIORDAN, J., concur.

730 P.2d 1189

Mary M. McINERNY, Director Financial Institutions Division, Regulation and Licensing Department, State of New Mexico, Petitioner-Appellee,

v.

GUARANTEED EQUITIES, INC., a New Mexico corporation, Respondent-Appellee,

v.

Donald A. PETERSON, et al., Petitioners-in-Intervention-Appellants.

No. 16086.

Supreme Court of New Mexico.

Dec. 31, 1986.

Bryan, Flynn-O'Brien & Estes, Charles N. Estes, Jr., Albuquerque, for petitioners-in-intervention-appellants.

Singer, Smith & Williams, Robert N. Singer, Richard Norton, Barry D. Williams, Albuquerque, for respondent-appellee.

Paul Bardacke, Atty. Gen., Kevin Reilly, Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

OPINION

SOSA, Senior Justice.

This action arose when the director of the Financial Institution Division of the Regulation and Licensing Department charged Guaranteed Equities, Inc. (Equities) with illegal and fraudulent activity. The trial court granted the director's petition to appoint a receiver and held a hearing to determine the distribution to investors of proceeds from the sale of the collateral securing their loans. This Court has recently ruled on a related disposition by the trial court. *See McInerny v. Guaranteed Equities, Inc.*, 105 N.M. 49, 728 P.2d 459 (1986) (*McInerny I*).

In this case also, the court below adopted the receiver's recommendation to distribute the proceeds on a pro rata, rather than on a priority basis. The group of investors whose interest was first recorded appeals. We reverse.

The issue we must decide is whether the "hybrid" loans brokered by Equities and secured by deeds of trust more closely resemble mortgages or investments in securities.

BACKGROUND

The transactions in question here were typical pieces of a complicated swindle scheme engineered by Equities and its alter ego, Continental Mortgage Exchange, Inc. (Continental). Continental would act as a broker of real estate mortgage loans, secured by deeds of trust that named Equities as trustee. Individuals like appellants "invested" in Continental and received in return "real estate mortgage notes" and individual deeds of trust.

The scheme collapsed in part because the properties were exceedingly overappraised and in part because the same loan would be sold to several groups of investors. Revenue from subsequent investors was supposed to repay earlier ones; often it simply disappeared. In the instant case the property in question was a lot and warehouse in Bernalillo County which had been appraised at $185,000. In October 1981, December 1981, and March 1982, Richard and Ruby King, husband and wife (Kings), obtained three separate loans of $30,000 each, all secured by the same property.

Each loan was syndicated by Equities to a group of several individual investors, referred to as Group I, Group II, and Group III. Appellants are the investors who represent Group I. In differing amounts these investors contributed the total of $30,000 that was loaned to the Kings in October, 1981.

Each individual lender/investor entered separately with Continental into an "Agreement for Investment in Deed of Trust Loan." Equities acted as escrow agent and trustee. The real estate mortgage note and "master" deed of trust executed by Kings nominated Continental as payee, "subject to: Deeds of Trust in favor of" the individual named investors. The Kings executed separate deeds of trust to Equities as trustee for each individual investor, but these were never recorded. Only the master deed of trust was recorded, on October 29, 1981, and again to correct a spelling error, on November 6, 1981.

On December 21, 1981, the Kings executed a second master deed of trust and real estate mortgage note, this time for $60,000, again payable to Continental with Equities acting as trustee. The first mortgage was mentioned expressly, but only Continental was named as mortgagee. Only the investors in Group II were named as beneficiaries on these master documents which were recorded on December 29, 1981. No mention was made of the underlying indebtedness in the "Agreement for Investment" offered to Group II.

There were no master documents for the investors in Group III, who each received an installment promissory note and a deed of trust from the Kings. The notes and deeds named Equities as trustee, gave the same property as security and were made expressly subject to the two prior deeds of trust that named Equities as trustee. These third deeds of trust were executed on March 11, and recorded on March 12, 1982.

The Kings defaulted on their payments and, on July 30, 1982, executed a quitclaim deed to Continental as trustee for all the investors in the three groups. No investor ever received any repayment.

The State instituted these proceedings on August 19, 1983, asking for a receiver to be appointed on the grounds that Equities was unlicensed and engaging in illegal and fraudulent security practices. The court appointed a receiver to collect and distribute the remaining loan proceeds. The receiver sold the King property for $45,000, only half of the total amount (excluding interest) claimed by the three groups of investors.

To determine the proper distribution of these funds, the court held a hearing on February 27, 1985. The receiver proposed that, since all of the investors were innocent victims of a scheme to defraud them, all should share equally in the loss. Adopting the receiver's recommendation, the court ordered that the proceeds be distributed to all investors on a pro rata basis. From that judgment the investors in Group I appealed to this Court.

The receiver argues here, as below, that this is an unprecedented problem, to which the normal rules of priority and recording do not apply, urging as a matter of public policy that similar schemes will be best deterred by affirming the trial court. He points out that all (not just the first) of the investor groups relied on representations by Continental or Equities that the property securing their loans was unencumbered [even though the prior recorded deeds of trust indicated otherwise].

Furthermore, the receiver asserts that all the investors accepted by acquiesence the creation of a tenancy in common in the property after it had been quitclaimed to Equities. Indeed, but for the intervention by the state, the rights of these investors would be determined, not by principles of mortgage priority, but rather by the bankruptcy courts.

We find the foregoing arguments plausible, but not persuasive. The record in this case does not indicate affirmatively that the three investor groups in any way ratified a tenancy in common by the fact of Equities accepting a quitclaim deed from the Kings. Rather, the lenders retained the expectation that their interests would be protected by the recorded instruments.

As this Court held in *McInerny I,* the law in New Mexico is clear that, "the deed of trust is, in essence, a mortgage and should be enforced as a mortgage." *Id.* at 2. The same principle applies with equal

force here. Despite the fact that the individual investors are not named in the "master" deed of trust issued to Group I, there is no question that the deed was duly recorded first and that the latter deeds were expressly made subject to it. The investors in Group II and Group III thus had record notice of the existence of the first deed of trust. Indeed, many of them had actual notice of the earlier indebtedness. We hereby uphold the policy underlying the recording statutes, NMSA 1978, Sections 14–9–1 and –2, by concluding that priority should prevail. *See Angle v. Slayton,* 102 N.M. 521, 697 P.2d 940 (1985).

The consequence of this conclusion, as appellants point out, is that the investors in Group I are entitled to have their lien satisfied from the sale proceeds of the property. In addition to the return of their principal, the appellants are entitled to the interest contractually specified from the date of default. Any remaining proceeds should be distributed to the investors in Group II, in proportion to their contributions.

For the foregoing reasons, the judgment of the trial court is reversed and the cause remanded for proceedings consistent with this opinion.

RIORDAN and WALTERS, JJ., concur.

[redacted]

730 P.2d 1194

Olivia HINOJOSA, Petitioner-Appellant,

v.

STATE of New Mexico, ex rel. EMPLOYMENT SECURITY DEPARTMENT and Village of Hatch, Respondents-Appellees.

No. 9153.

Court of Appeals of New Mexico.

Nov. 25, 1986.

Anthony F. Avallone, Law Systems of Las Cruces, P.A., Las Cruces, for petitioner-appellant.

Paul G. Bardacke, Atty. Gen., Richard Baumgartner, Sp. Ass't. Atty. Gen., Santa Fe, for respondent-appellee Employment Security Department.

Beverly Singleman, Martin, Cresswell, Hubert & Hernandez, P.A., Las Cruces, for respondent-appellee Village of Hatch.

OPINION

HENSLEY, District Judge (by designation).

Petitioner Hinojosa appeals from the district court judgment that the findings of the Employment Security Department Appeal Tribunal denying unemployment benefits were supported by substantial evidence, and that the conclusions of misconduct on the part of petitioner should be affirmed. The single issue asserted on appeal is whether petitioner was properly disqualified from receiving unemployment compensation benefits. We affirm.

FACTS

Petitioner was an employee of the respondent Village of Hatch (Village), and although she was paid by the Village, she was actually a clerk for the State Department of Motor Vehicles (DMV). She worked independently, by herself, within the offices of the Village clerk and did her own paperwork, collected monies on behalf of the state in her own separate cash drawer, gave receipts to customers, and deposited the monies collected in a bank account separate from the Village accounts. She was hired by the Village Board of Trustees, and worked as an independent agent of the State of New Mexico and was not supervised by any Village personnel.

Petitioner was responsible to the DMV for collection of all monies in the Village involving the Motor Vehicle Department, and had been informed by the Motor Vehicle Department, Santa Fe office, that any shortages in her cash drawer would have to

be made up out of her own pocket. She also admitted that on at least one occasion her cash drawer was short by $55.50, which amount she was required to make up from her personal funds. The evidence in the record below consists mainly of eight documentary exhibits reflecting petitioner's deliberate falsification of public records and mishandling of public funds. These exhibits, numbered 1 through 8, all show that a copy of the appropriate State DMV form was given to petitioner's customer showing a specific charge for services. The local bank deposit slip reflecting this transaction would agree with the amounts charged on the customer's copy. However, the original document sent to Santa Fe reflected a smaller charge and receipt from the customer than the local records showed. Petitioner explained all of these discrepancies, but there are no records, nor has the petitioner alleged that there are, which officially reflect or corroborate her explanations or account for the discrepancies in the official records. Petitioner admitted that she deliberately falsified records and diverted customer monies to her cash drawer shortages with regard to exhibits 5 & 6. The total amount of money shown diverted by petitioner was insignificant.

Petitioner was discharged from employment with the Village on February 15, 1984, and she filed a claim for unemployment compensation benefits on February 22, 1984. On March 14, 1984, the Employment Security Department awarded petitioner benefits because the Village had not responded to the notice of claim on a timely basis. The Village appealed from this determination and after a hearing of record, the Appeal Tribunal's hearing officer issued a decision reversing that determination and disqualifying the petitioner from receipt of benefits because she had been discharged for misconduct in connection with her employment. The Employment Security Department's Board of Review affirmed this decision on September 12, 1984. A petition for certiorari was filed with the District Court of Dona Ana County to review the final decision of the Board of Review. The district court, after reviewing the record and hearing oral argument by counsel for all parties, affirmed the decision of the Employment Security Department on both the facts and the law.

DECISION

The district court properly reviewed the entire record and held that the administrative hearing officer's findings made in the decision issued on July 30, 1984, were supported by substantial evidence in the whole record. *Grauerholtz v. N.M. Labor & Industrial Com'n.*, 104 N.M. 674, 726 P.2d 351 (1986); *Alonzo v. N.M. Employment Security Commission*, 101 N.M. 770, 689 P.2d 286, 288 (1984); *Duke City Lumber Co. v. N.M. Environmental Improvement Board*, 101 N.M. 291, 681 P.2d 717 (1984). In reviewing the decision and findings of an administrative tribunal of the district court, the correct standard is the "whole record standard" as enunciated in *Duke City Lumber Co. v. N.M. Environmental Improvement Board.* On certiorari, the district court correctly applied this standard.

The function of this court is to review the evidence considered by the lower court and not reweigh it. *Duke City Lumber Co. v. Terrel*, 88 N.M. 299, 540 P.2d 229 (1975); *Getz v. Equitable Life Assurance Society*, 90 N.M. 195, 561 P.2d 468 (1977). Every reasonable intendment and presumption will be resolved against the petitioner in favor of proceedings in the trial court. *Chavez v. Employment Security Commission*, 98 N.M. 462, 649 P.2d 1375, 1378 (1982); *Romero v. Sanchez*, 86 N.M. 55, 519 P.2d 291 (1974). This court will also view the evidence in the light most favorable to the successful party. *Clovis National Bank v. Harmon*, 102 N.M. 166, 692 P.2d 1315, 1317–18 (1984); *Jones v. N.M. State Racing Commission*, 100 N.M. 434, 671 P.2d 1145 (1983); *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973). We have defined "substantial evidence" as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Toltec International Inc. v. Village of Ruidoso*, 95 N.M. 82, 619 P.2d 186, 188 (1980).

Petitioner was a public servant working in a position necessarily requiring a high standard of ethical behavior, and the evidence and findings of the district court and Appeal Tribunal below clearly show that petitioner altered paperwork and collected money from customers in excess of that showed owing on the altered documents sent to Santa Fe. Her actions clearly constituted misconduct within the meaning of the unemployment compensation law. The ruling of the Employment Security Department and the district court were supported by substantial evidence and not contrary to law.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

730 P.2d 1196

STATE of New Mexico, Plaintiff-Appellee,

v.

James Earl WILLIAMS, aka Clint Williams, Defendant-Appellant.

No. 9099.

Court of Appeals of New Mexico.

Nov. 26, 1986.

Paul G. Bardacke, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from multiple convictions and sentences stemming from a residential burglary in Albuquerque. We address (1) defendant's two separate claims of double jeopardy; (2) claims of error as to jury instructions; and (3) a claim of judicial bias in sentencing. We affirm the convictions but vacate two of the sentences and remand for the entry of an amended judgment and sentence.

FACTS

The state's principal witness testified that she unknowingly entered the home of her father-in-law while it was being burglarized by defendant and an accomplice. She said defendant threatened her with a silver candelabra, then dragged her into one of the bedrooms where he bound her hands, removed her clothing, and began touching her breasts and genital area. Defendant was joined in this activity by his accomplice who did the same thing. She said defendant then tied her to the bed, and that he and the accomplice left the residence, taking her car with them. Defendant was convicted of aggravated burglary and aggravated assault, robbery, kidnaping, assault with intent to commit criminal

sexual penetration, four counts of criminal sexual contact, the unlawful taking of a vehicle, larceny over $2,500 and conspiracy to commit larceny. He was sentenced to consecutive terms of imprisonment for each conviction, resulting in a total term of imprisonment of thirty-seven and one-half years.

I. DOUBLE JEOPARDY

Defendant raises two separate claims of double jeopardy, both involving the concept of merger. He argues, first, that the four counts of CSC must be merged into one count; and secondly, that his conviction for assault with intent to commit CSP must be merged into the conviction for kidnaping. Both claims involve the constitutional prohibition on multiple punishments for the same offense. The first claim requires a determination of whether the separate acts of sexual contact constituted separate or multiple criminal offenses. *See State v. Edwards,* 102 N.M. 413, 696 P.2d 1006 (Ct. App.), *cert. quashed,* 102 N.M. 412, 696 P.2d 1005 (1985). The second claim requires a determination of whether the greater offense of kidnaping necessarily involved the commission of the lesser crime of assault with intent to commit CSP. *See State v. Johnson,* 102 N.M. 110, 692 P.2d 35 (Ct.App.1984).

A. CRIMINAL SEXUAL CONTACT COUNTS

The initial claim raises a question of first impression concerning the "allowable unit of prosecution" under the statutory offense of criminal sexual contact, NMSA 1978, Section 30–9–12 (Repl.Pamp.1984). *See State v. Edwards.* The state obtained four separate convictions on the theory that defendant committed one offense by touching the victim's breast, another by touching her genital area, both of which resulted in personal injury, and that he committed two additional offenses by touching the same areas, but was assisted the second time by his accomplice.

The proscription in Section 30–9–12 is as follows:

> Criminal sexual contact is intentionally touching or applying force without consent to the unclothed intimate parts of another who has reached his eighteenth birthday * * * * For purposes of this section "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

The statute makes the offense a misdemeanor when perpetrated through the use of force or coercion. It becomes a fourth degree felony under any of three aggravating circumstances: (1) the contact results in personal injury to the victim; (2) the perpetrator is aided or abetted by another; or (3) the perpetrator is armed with a deadly weapon. The state relied on the first aggravating factor for counts 6 and 7. It relied on the second aggravating factor for counts 8 and 9. Thus, two issues are presented: (1) whether Section 30–9–12 permits multiple counts based on multiple touchings, and (2) whether it permits multiple counts based on multiple aggravating factors.

The committee that drafted the uniform jury instructions applicable to Section 30–9–12 considered the latter question and determined that the aggravating factors should *not* be used to classify separate offenses:

> Throughout the statutes on sexual offenses * * * alternative methods are set forth for committing the offenses. For example, there are three ways in which a defendant can commit criminal sexual contact in the fourth degree. * * * Separate instructions have been prepared for each of these methods, and where force or coercion is an essential element of a particular method, separate instructions for each definition of force or coercion have been prepared. There are, therefore, ten separate instructions setting forth the essential elements of the single crime of criminal sexual contact in the fourth degree.
>
> In all cases where alternate methods of committing one offense are submitted to the jury, the defendant is being

charged with only one offense and may be found guilty of only one offense.

Committee commentary, NMSA 1978, UJI Crim. 9.03 (Repl.Pamp.1982). The committee's interpretation of the statute is persuasive. *See State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982). We agree that the enumeration of different aggravating factors, or alternative methods of committing fourth degree CSC, does not evince a legislative intent to authorize multiple punishments for the same act. Thus, defendant's conviction on counts 8 and 9, based on defendant's contact with the victim's breast and genital areas while aided by an accomplice, are not sustainable as separate offenses.

The question remains, however, whether the separate touchings of the breast and genital areas constitute separate offenses. In arguing that the offenses should be merged, defendant claims that the touching of the two areas constituted one continuing offense. He points to the victim's own testimony that the incident lasted no more than five minutes and that there was no break in activity by the defendant. We disagree, however, that these facts are dispositive. Defendant's premise is akin to the "same transaction" test which our supreme court rejected in *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975). Our courts have instead held that whether a particular course of conduct involves one or more punishable offenses is largely a question of the legislative intent in proscribing the conduct. *See State v. Ellenberger,* 96 N.M. 287, 629 P.2d 1216 (1981); *State v. Edwards.* In ascertaining legislative intent, the courts must consider the statutory elements of the crime and whether the evidence offered in support of one offense would sustain a conviction of the other offense. *See State v. Ellenberger.*

In this case, the facts offered in support of count 6 were that defendant "manually manipulated" the victim's breasts. The facts offered in support of count 7 were that defendant "pulled" the victim's "pubic hair and area." New Mexico courts have previously held that different operative facts will sustain separate convictions for the same offense. *See State v. Johnson,* 103 N.M. 364, 707 P.2d 1174 (Ct.App.), *cert. quashed,* 103 N.M. 344, 707 P.2d 552 (1985) (six different potential victims permit multiple convictions for attempted murder); *State v. Smith,* 94 N.M. 379, 610 P.2d 1208 (1980) (trafficking of different types of narcotic drugs permits separate offenses); *State v. Cuevas,* 94 N.M. 792, 617 P.2d 1307 (1980) (involvement of different minors would permit multiple convictions for contributing to the delinquency of a minor).

We agree with the state that the legislatively-protected interest under the CSP and CSC statutes is the bodily integrity and personal safety of the individual. *See State v. Srader,* 103 N.M. 205, 704 P.2d 459 (Ct.App.), *cert. denied,* 103 N.M. 177, 704 P.2d 431 (1985). In defining "intimate parts," the CSC statute lists five separate protected areas: the genital area, groin, buttocks, anus and breast. We hold that the legislative intent was to protect the victim from intrusions to each enumerated part. Thus, under the facts of this case, which showed distinctly separate touchings of two of the protected areas, defendant was properly convicted and separately sentenced for counts 6 and 7. Our decision here is limited. Separate punishments are sustainable where evidence shows distinctly separate touchings to the different parts. However, where alternative methods of committing criminal sexual contact are submitted to the jury, the accused may be found guilty of only one offense.

B. KIDNAPING AND ASSAULT

Defendant was convicted of kidnaping by holding for service. He claims that double jeopardy requires the merger of the kidnaping and the assault with intent to commit criminal sexual penetration convictions. Defendant concedes that the statutory elements for the two offenses are different. *Compare* NMSA 1978, §§ 30-4-1(A)(3) & -3-3 (Repl.Pamp.1984). However, he argues that the assault offense is an included offense of kidnaping under the facts of the

case. *See State v. Jacobs,* 102 N.M. 801, 701 P.2d 400 (Ct.App.1985). We disagree.

In *Jacobs,* this court concluded that it was factually—and hence legally—impossible for the defendant to have committed the greater offense of aggravated burglary without necessarily committing the lesser offense of dangerous use of explosives. The same is not true here. The victim testified that defendant restrained her in the kitchen and dragged her into the bedroom, where he knocked her to the floor and tied her hands and feet. The victim at this point thought she was going to be raped. Defendant, however, continued to ransack the residence, demanding that the victim tell him where valuables were located. He then returned to the victim, turned her on her back, and began removing her clothes, saying, "I'm gonna get me some of this." After fondling the victim's breast and pubic area, defendant began removing his clothes, saying that he was going to force the victim to engage in fellatio, although he never actually did so.

■ Kidnaping involves the physical act of restraint or confinement, committed with the intent of holding the victim for services or some other purpose. *See* 2 Torcia, *Wharton's Criminal Law,* § 210 (13th ed. 1979). To "hold for services" is defined as *including* "sexual purposes," which can be either sexual penetration or contact. *See* Committee commentary, NMSA 1978, UJI 4.04 (Repl.Pamp.1982). By contrast, the crime of assault with intent to commit CSP is specifically defined only in terms of CSP. Here, there was evidence apart from the subsequent sexual assault from which the jury could infer that defendant restrained the victim with the intent of holding her for services. Under the facts, the assault with intent to commit CSP occurred *after* the victim had been restrained and held for services. *See State v. Singleton,* 102 N.M. 66, 691 P.2d 67 (Ct.App.1984). Because different evidence underlies the two offenses, merger is not required. *Id.*

II. JURY INSTRUCTIONS

■ The jury was given the Uniform Jury Instruction for assault with intent to commit a violent felony, i.e., sexual penetration. NMSA 1978, UJI Crim. 3.11 (Repl.Pamp.1982). Defendant claims reversible error because the trial court drafted the instruction to specify the underlying felony as "criminal sexual penetration," rather than "rape," as the crime is referred to in the Use Note to UJI Crim. 3.11. Defendant contends that the substitution allowed the jury to return a guilty verdict based on defendant's intent to engage in either sexual intercourse or fellatio, while the Use Note would have restricted the jury to a finding of sexual intercourse only, as that term is used to define rape. *See* UJI Crim. 3.14. Defendant claims the error may be raised for the first time on appeal because it is fundamental error.

Defendant's arguments are frivolous. The statutory crime of rape was repealed in 1975. *See* 1975 N.M.Laws, ch. 109, § 8. However, it was not until 1977 that Section 30-3-3, which defines the crime of assault with intent to commit a violent felony, was amended to substitute "criminal sexual penetration" for "rape." The instructions at issue, UJI Crim. 3.11 and 3.14, were adopted prior to the 1977 amendment and, through apparent oversight, have not been modified to conform to the amendment. Thus, the committee commentary to UJI Crim. 3.14, on which defendant relies, is no longer applicable. *Cf. State v. Doe,* 100 N.M. 481, 672 P.2d 654 (1983).

Had the trial court used the term "rape," it would have instructed the jury on a nonexistent crime. Because the instruction correctly instructed the jury on the essential elements of the crime charged, there was no error. *See State v. Jennings,* 102 N.M. 89, 691 P.2d 882 (Ct.App.), *cert. quashed,* 102 N.M. 88, 691 P.2d 881 (1984).

Defendant also argues under point III of his brief-in-chief that the trial court committed reversible error when it modified the elements instruction for the crime of criminal sexual conduct. *See* NMSA 1978, UJI Crim. 9.04. In accord with our discus-

sion under point I(A), above, we conclude that Section 30–9–12 permits multiple punishments based on each separate unlawful touching of the bodily parts enunciated in the statute.

III. FAILURE TO RECUSE

During the interim between trial and sentencing, the presiding trial judge, Judge Ross Sanchez, was the victim of an unrelated residential burglary. As in the case at bar, the burglary involved the offenses of kidnaping, robbery, aggravated burglary and auto theft. Following the burglary, defendant filed a motion to disqualify the judge, alleging that the judge's impartiality was reasonably questioned in light of the judge's own experience as a victim of the same crimes of which defendant had been convicted. Defendant also sought to have a separate hearing on the motion before another judge. Both motions were denied. The court then imposed the statutorily-prescribed sentences and directed that each sentence run consecutively.

The New Mexico Constitution prohibits a judge from presiding over a cause in which "he has an interest." N.M. Const. art. VI, § 18. *See* NMSA 1978, Code of Judicial Conduct, Canon 4 (Repl.Pamp.1985). This language has been construed to encompass an "actual bias or prejudice" but not "some indirect, remote, speculative, theoretical or possible interest." *State ex rel. Anaya v. Scarborough,* 75 N.M. 702, 705, 410 P.2d 732, 734 (1966). *See also United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 629 P.2d 231 (1980).

Defendant asserts that "[n]otwithstanding the judge's personal belief in his impartiality, the appearance of bias or prejudice in this case was real." He would have this court infer actual bias or prejudice from Judge Sanchez' refusal to merge any of the convictions and from the imposition of consecutive sentences for each conviction. However, it is firmly established that allegations of judicial bias cannot be predicated upon unfavorable rulings, *State v. Case,* 100 N.M. 714, 676 P.2d 241 (1984), nor from the imposition of maximum allowable prison sentences. *State v. Augustus,* 97 N.M. 100, 637 P.2d 50 (Ct.App.), *cert. denied,* 97 N.M. 621, 642 P.2d 607 (1981). In addition, while our decision here requires that counts 8 and 9 be merged for sentencing, the decision is one of first impression under Section 30–9–12. Thus, no judicial bias can be inferred from a contrary ruling on the issue below.

The record shows that Judge Sanchez imposed sentence based on defendant's extensive criminal record, the violent nature of the crimes committed, defendant's apparent imperviousness to rehabilitation and probation, and his acknowledged drug abuse. Because there is record support for the sentences imposed, defendant's allegations of judicial bias fails to rise above the level of "indirect, remote, [and] speculative." *Scarborough.*

IV. SENTENCING

Defendant's brief raised an issue concerning the propriety of his eighteen-month sentence for unlawfully taking a motor vehicle, contrary to NMSA 1978, Section 66–3–504 (Repl.Pamp.1984). The state, however, pointed out that defendant's argument mistakenly relied on the pre-amended version of NMSA 1978, Section 66–8–9 (Cum.Supp.1986). Defendant's reply brief concedes the mistaken premise of his argument. He also acknowledges that his sentence was proper under the current versions of Section 66–8–9, and NMSA 1978, Section 31–18–15 (Repl.Pamp.1981).

The sentences for counts 8 and 9 are reversed. The convictions and sentences for counts 1 through 7, and 10 through 12 are affirmed. The cause is remanded for the entry of an amended sentence in conformity with this opinion.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

731 P.2d 363

Homer GARZA, d/b/a Sunshine Dairy, for himself as insured, and in behalf of Camilla, a/k/a Kammy Villalobos, Claimant and also insured, Plaintiffs-Appellees,

v.

GLEN FALLS INSURANCE COMPANY and Continental Insurance Companies, Defendants-Appellants.

No. 16633.

Supreme Court of New Mexico.

Dec. 17, 1986.

Rehearing Denied Jan. 30, 1987.

Farlow, Simone, Roberts & Weiss, LeRoi Farlow, Albuquerque, for defendants-appellants.

Edward E. Triviz, Las Cruces, for plaintiffs-appellees.

OPINION

FEDERICI, Justice.

This litigation arose out of a one vehicle automobile accident which occurred on May 18, 1985, in Dona Ana County, New Mexico. At that time, Adriel Garza, the son of plaintiff-appellee Homer Garza (plaintiff), was driving a vehicle owned by plaintiff and insured by defendants. Plaintiff-appellee Camilla Villalobos, also known as Kammy Villalobos (Villalobos), was a passenger in the vehicle driven by Adriel Garza. Both plaintiff and defendants filed motions for summary judgment. The court granted plaintiff's motion for partial summary judgment and denied defendants' motion for summary judgment. This Court granted an interlocutory appeal. We reverse.

The accident occurred while Adriel Garza was travelling at excessive speeds and was being chased by the New Mexico State Police. After being chased by the police vehicles for several miles, the motor vehicle driven by Adriel Garza ran off the road and turned over. As a result of the accident, the passenger, Villalobos, allegedly sustained personal injuries.

Villalobos has not instigated litigation against either Adriel Garza or plaintiff to recover damages for personal injuries sustained in the accident. The caption of the complaint reads: "HOMER GARZA d/b/a SUNSHINE DAIRY, Vado, New Mexico, for Himself, as Insured, and in Behalf of Camilla (a/k/a Kammy) Villalobos, Claim-

ant and Also Insured." There are no allegations in the complaint to support plaintiff's purported representation *in behalf of Villalobos.*

Plaintiff's first amended complaint asked for relief based upon several causes of action. Plaintiff asked for punitive damages against Glen Falls Insurance Company and Continental Insurance Companies (defendants) for bad faith denial of insurance coverage to plaintiff and Adriel Garza. Plaintiff also asked for compensatory damages for breach of contract and breach of fiduciary obligations. Plaintiff's motion for partial summary judgment asked the trial court to determine that he was entitled to insurance coverage under defendants' policies at the time of the accident.

Defendants insured plaintiff under Policy No. RFD 49670. In connection with this particular automobile policy, defendants, through a "drivers exclusion endorsement," excluded all coverage of plaintiff's insured automobiles while they were being driven or operated by Adriel Garza, effective December 1, 1984. The drivers exclusion endorsement to the policy was signed by plaintiff and reads:

> In consideration of the premium for which the policy is written, it is agreed that the company shall not be liable and no liability or obligation of any kind shall be attached to the company for losses or damages sustained after the effective date of this endorsement while any motor vehicle insured hereunder is driven or operated by *ADRIEL GARZA.*

The drivers exclusion endorsement was requested by defendants and was attached to the policy because Adriel Garza, plaintiff's son, had on previous occasions been involved in accidents, been convicted of driving while intoxicated, been cited for speeding, and had his driver's license revoked. Plaintiff, in his deposition, stated that he understood that there would be no insurance for him or for his son, Adriel, at any time that Adriel was driving one of plaintiff's cars after this drivers exclusion endorsement became effective. He acknowledged that he was told by defendants' insurance agent that his son was being excluded from the policies for the reasons mentioned above. Plaintiff knew and understood that Adriel was not to drive plaintiff's motor vehicles after the drivers exclusion endorsement became effective, and that if he did, there would be no coverage under the policy while Adriel was driving. Defendants denied insurance coverage for the accident of May 18, 1985, to plaintiff and Adriel Garza because of the drivers exclusion endorsement.

Defendants moved for summary judgment on the following grounds: (1) Plaintiff signed the drivers exclusion endorsement, set forth above, which was attached to the policy in question and excluded coverage while the motor vehicle was driven by Adriel Garza; and (2) Plaintiff was aware of the meaning of the drivers exclusion endorsement and knew there would be no coverage under the policy in question at any time any motor vehicle insured under the policy was driven by Adriel Garza.

The trial judge entered an order denying defendants' motion for summary judgment and granting plaintiff's motion for partial summary judgment. Relying on *State Farm Automobile Insurance Co. v. Kiehne,* 97 N.M. 470, 641 P.2d 501 (1982), the judge reasoned that *uninsured motorist coverage* can be bargained away since it is not mandatory coverage, whereas *liability insurance coverage* cannot be bargained away since it is statutorily mandated. We disagree.

The single issue presented by both motions for summary judgment concerns the validity of the drivers exclusion endorsement and whether that exclusion governs not only the driver of the vehicle, the insured's son, but also extends to liability incurred by others because of the conduct of the son.

This Court has held that a drivers exclusion endorsement is valid and enforceable

insofar as it concerns uninsured motorist coverage. *Kiehne.* However, this is a case of first impression because *liability coverage* of a named insured is involved.

The drivers exclusion endorsement provides that the company shall not be liable and no liability or obligation of *any kind* shall be attached to the company for damages sustained while any motor vehicle insured under the policy is driven by Adriel Garza, son of the insured.

In *Kiehne,* the drivers exclusion endorsement was clear and unambiguous and excluded "any kind" of liability when the excluded driver was driving. In that case, the Court held that when the excluded driver was driving, "no one could be an 'insured' and claim coverage under the uninsured motorist provision of the policy." *Id.* at 472, 641 P.2d at 503.

We now hold that the clear and unambiguous drivers exclusion endorsement in this case likewise relieves defendants from their obligations of any kind under *liability* provisions of the policy. We note that our holding is consistent with those of several other jurisdictions. *See, e.g., Bankers & Shippers Insurance Co. v. Phoenix Assurance Co.,* 210 So.2d 715 (Fla.1968); *Nelson v. Southern Guaranty Insurance Co.,* 221 Ga. 804, 147 S.E.2d 424 (1966); *Meyer v. Aetna Casualty Insurance Co.,* 46 Ill. App.2d 184, 196 N.E.2d 707 (1964); *Miller v. State Farm Mutual Automobile Insurance Co.,* 204 Kan. 694, 466 P.2d 336 (1970); *Deutsch v. State Farm Mutual Automobile Insurance Co.,* 457 S.W.2d 823 (Mo.App.1970); *Rooney v. Agricultural Insurance Co.,* 156 Mont. 118, 476 P.2d 783 (1970); *State Farm Mutual Automobile Insurance Co. v. Pierce,* 182 Neb. 805, 157 N.W.2d 399 (1968).

Plaintiff contends that the uninsured motorist statutes supercede the drivers exclusion endorsement. On the contrary, we note that the use of such a drivers exclusion endorsement is expressly permitted under the Mandatory Financial Responsibility Act. NMSA 1978, Section 66-5-221(K) (Repl.Pamp.1984) reads:

> *The certified motor vehicle liability policy may be endorsed to eliminate a named driver.* Such endorsement must bear the signatures of the named insured. Forms for such named drivers exclusion must be substantially similar to the form provided in Section 66-5-222 NMSA 1978. Such endorsement applies only to private passenger motor vehicles. (Emphasis added.)

NMSA 1978, Section 66-5-222 (Repl. Pamp.1984) provides the language to be used in a drivers exclusion endorsement form:

> In consideration of the premium for which the policy is written, it is agreed that the company shall not be liable and no liability or obligation of any kind shall be attached to the company for losses or damages sustained after the effective date of this endorsement while any motor vehicle insured hereinunder is driven or operated by (name of excluded driver(s)).

The drivers exclusion endorsement attached to defendants' policy in this case is exactly in the same form as set forth above in Section 66-5-222.

The operative language of the exclusion, that the insurer "shall not be liable and no liability or obligation of *any kind* shall be attached," is clear and unambiguous and withholds all coverage under the policy when Adriel Garza is driving. The Mandatory Financial Responsibility Act confirms this result since the Act specifically authorizes the use of the drivers exclusion endorsement and provides the words to be used in the drivers exclusion form. We cannot rewrite the insurance contract for the parties. Where the exclusion is clear and unambiguous we are required to enforce its provisions. *See Thompson v. Occidental Life Insurance Co.,* 90 N.M. 620, 567 P.2d 62 (Ct.App.), *cert. denied,* 91 N.M. 4, 569 P.2d 414 (1977).

Our opinion is limited to a determination of the legal issue submitted to us. We have been called upon to decide whether Homer Garza, plaintiff, has insurance coverage for the May 18, 1985 accident under the policy issued by defendants. We hold that plaintiff has no coverage for the accident under the automobile insurance policy as modified by the drivers exclusion endorsement. We do not determine in this case whether there are other causes of action or issues which may be available to or against other parties.

The judgment of the trial court is reversed with instructions to enter summary judgment for defendants and to deny summary judgment to plaintiff.

IT IS SO ORDERED.

STOWERS, C.J., and RIORDAN, J., concur.

731 P.2d 366

Fred BOONE, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 16085.

Supreme Court of New Mexico.

Dec. 31, 1986.

Rehearing Denied Feb. 3, 1987.

Winston Roberts-Hohl, Santa Fe, Morris Stagner, Dan B. Buzzard, Clovis, for petitioner.

Paul Bardacke, Atty. Gen., Charles D. Noland, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

STOWERS, Chief Justice.

Defendant Fred Boone was arrested without a warrant and charged with driving while under the influence of intoxicating liquor and drugs (DWI) after police officers discovered him in the driver's seat of his automobile, stopped in a traffic lane late at night with the automobile's engine running but its lights off. *See* NMSA 1978, § 66–8–102 (Cum.Supp.1986) (DWI). Ruling that the warrantless arrest was unlawful, the trial court ordered the suppression of all evidence obtained after the arrest and the dismissal of the charges. That evidence included the results of a field sobriety test that defendant failed, his refusal to take a breathalyzer test at the police station, and statements of defendant and his passenger. The State appealed pursuant to NMSA 1978, Subsection 39–3–3(B), and the Court of Appeals reversed the trial court's judgment.

We granted certiorari, and now affirm the Court of Appeals' decision in part and reverse it in part. This case presents the following issues:

(1) Is motion of the vehicle a necessary element of the misdemeanor offense of DWI under Section 66–8–102?

(2) Did the trial court err in ruling the warrantless arrest unlawful on the ground that the arresting officer had no probable cause to believe the misdemeanor offense of DWI had been committed in his presence?

(3) Did the Court of Appeals err in reversing the trial court's finding that defendant was arrested at the time he was requested to take the field sobriety test and not later when he formally was placed under arrest?

We hold that the offense of DWI under Section 66–8–102 does not require motion of the vehicle; the offense is committed when a person under the influence drives or is in actual physical control of a motor vehicle or exercises control over or steers a vehicle being towed. Therefore, under the facts of this case, the trial court clearly erred in ruling the warrantless arrest unlawful on the ground that DWI was not committed in the presence of the arresting officer. Finally, because substantial evidence in the record supports the trial court's finding regarding the time of arrest, we hold that the Court of Appeals erred in reversing the trial court's finding

on that issue. Accordingly, we reverse the Court of Appeals' decision in part and remand to the trial court for further proceedings.

I. DWI under Section 66–8–102.

Section 66–8–102 in pertinent part provides that "[i]t is unlawful for any person who is under the influence of intoxicating liquor to *drive* any vehicle within this state * * * *" (Emphasis added). Our Motor Vehicle Code, NMSA 1978, §§ 66–1–1 to 66–8–140 (Orig.Pamp., Repl.Pamp.1984 and Cum.Supp.1986), defines "driver" as any person who drives or is in actual physical control of a motor vehicle. *See* NMSA 1978, § 66–1–4(B)(18) (Repl.Pamp.1984). We hold, as a matter of law, that the meaning of "drive" in Section 66–8–102 is unclear; therefore, we may resort to the principles of statutory construction in order to resolve the ambiguity. *See New Mexico State Board of Education v. Board of Education,* 95 N.M. 588, 590, 624 P.2d 530, 532 (1981). We must ascertain and give effect to the intention of the Legislature. *Board of Education v. Jennings,* 102 N.M. 762, 765, 701 P.2d 361, 364 (1985).

Defendant draws our attention to the fact that prior to 1979, Section 66–8–102 made it unlawful for any person under the influence "to drive or be in actual physical control of any vehicle * * * *" NMSA 1978, § 66–8–102, *amended by* 1979 N.M. Laws, ch. 71, § 7 (codified at NMSA 1978, § 66–8–102 (Cum.Supp.1986)). He argues that adoption of an amendment is evidence that the Legislature intended to make a substantive change in the law, *Stang v. Hertz Corporation,* 81 N.M. 69, 73, 463 P.2d 45, 49 (Ct.App.1969), *aff'd on other grounds,* 81 N.M. 348, 467 P.2d 14 (1970), and that the 1979 elimination of the phrase "or be in actual physical control of" indicates the Legislature's intention to narrow the scope of the statutory offense. We disagree.

From 1953 until 1978, our Motor Vehicle Code made it unlawful for any person under the influence of intoxicating liquor "to drive or be in actual physical control of any vehicle within this state." 1953 N.M.Laws, ch. 139, § 54 (codified as amended at NMSA 1953, 2d Repl.Vol. 9, Part 2 (1972), § 64–22–2). Consistent with the DWI provision, the Motor Vehicle Code defined "driver" as "[e]very person who drives or is in actual physical control of a vehicle." 1953 N.M.Laws, ch. 139, § 11 (codified at NMSA 1953, 2d Repl.Vol. 9, Part 2 (1972), § 64–14–13).

In 1978, the Motor Vehicle Code was rewritten substantially, and the definition of "driver" was amended to encompass "every person who drives or is in actual physical control of a motor vehicle * * * or who is exercising control over, or steering, a vehicle being towed by a motor vehicle." 1978 N.M.Laws, ch. 35, § 4(B)(17) (codified as amended at NMSA 1978, § 66–1–4(B)(18) (Repl.Pamp.1984)). The new definition was inconsistent with the unchanged DWI section in its references to *motor* vehicles but not in its use of the phrase "drives or is in actual physical control of." *See* 1978 N.M. Laws, ch. 35, § 510 (codified at NMSA 1978, § 66–8–102 (Orig.Pamp.) (recompilation of DWI provision)).

The Legislature could have conformed Section 66–8–102 to the definition by adding the appropriate references to motor vehicles and towed vehicles. Instead it chose to streamline and clarify the DWI section by using only the statutorily defined term, "drives." *See* NMSA 1978, § 66–1–4(A) (Repl.Pamp.1984) (applicability of definitions); *cf. Commonwealth v. Kloch,* 230 Pa.Super. 563, 575–76, 327 A.2d 375, 383 (1974) (definition of nouns "operator" and "operation" apply to verb "operate"). *But cf. State v. Williams,* 20 Ohio Misc. 51, 251 N.E.2d 714 (C.P.1969) (similar amendment requires motion of vehicle). We believe that the 1979 amendment was

intended to rectify the inconsistency between the updated definition and the language of the DWI section and to make clear that the Legislature's definition of "driver" applies to the offense of DWI. We therefore hold that Section 66-8-102 makes it unlawful for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of a motor vehicle or to exercise control over or steer a vehicle being towed by a motor vehicle; motion of the vehicle is not a necessary element of the offense.[1]

II. Warrantless Arrest for Misdemeanor Committed in the Presence of Officer.

We long have held that, in the absence of statutory authority, a duly authorized peace officer may make an arrest for a misdemeanor without a warrant only if he has probable cause or reasonable grounds to believe that the offense has been committed in his presence. *See State v. Luna,* 93 N.M. 773, 777, 606 P.2d 183, 187 (1980); *City of Roswell v. Mayer,* 78 N.M. 533, 534, 433 P.2d 757, 758 (1967); *Cave v. Cooley,* 48 N.M. 478, 481-82, 152 P.2d 886, 888 (1944). The trial court in the present case concluded that defendant's arrest was unlawful because the police officer had no probable cause to believe that the offense of DWI was being committed in his presence when he discovered defendant's stationary automobile.

The trial court's holding clearly was premised upon its erroneous conclusion that Section 66-8-102 requires that the vehicle be placed in motion. A reviewing court is not bound by a trial court's ruling that is predicated upon a mistake of law. *State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.), *rev'd on other grounds,* 100 N.M. 470, 672 P.2d 643 (1983); *see also Martinez v. Martinez,* 93 N.M. 673, 676, 604 P.2d 366, 369 (1979). We therefore agree with the Court of Appeals' decision to reverse the trial court's order suppressing the evidence obtained and dismissing the charges against defendant.

However, we do not approve of the rationale of the Court of Appeals' decision. Assuming that motion of the vehicle was an element of the offense, the Court of Appeals held that an officer may make a warrantless arrest for the misdemeanor offense of DWI committed in his presence when he reasonably can infer from facts known to him through his senses that a person under the influence was driving a vehicle. The Court of Appeals' expansion of the meaning of the requirement that the offense be committed "in the presence of" the officer is unnecessary to the determination of this case because, under our interpretation of Section 66-8-102, the trial court had before it evidence upon which it could have found that the offense of DWI literally occurred in the arresting officer's presence. *See generally City of Roswell v. Mayer,* 78 N.M. at 534-35, 433 P.2d at 758-59; *State v. Trujillo,* 85 N.M. 208, 211, 510 P.2d 1079, 1082 (Ct.App.1973) (fact patterns supporting probable cause for DWI).

The record indicates that the officer found defendant in the driver's seat of his automobile, conscious, parked in a traffic lane with the automobile's motor running

1. We note that the language in Subsection 66-1-4(B)(18) generally limiting the definition of drivers to persons "upon a highway" does not apply to the offense of DWI. At the time it enacted that definition the Legislature expressly and specifically provided that Section 66-8-102 "shall apply upon highways and elsewhere throughout the state." 1978 N.M.Laws, ch. 35, § 372 (codified as amended at NMSA 1978, § 66-7-2). This specific statute will be construed as an exception to the general definitional statute. *See Western Investors Life Insurance Co. v. New Mexico Life Insurance Guaranty Association,* 100 N.M. 370, 372-73, 671 P.2d 31, 33-34 (1983).

but its lights off, at 11:10 p.m.; that he smelled alcohol on defendant's breath when he approached the automobile to investigate the situation; and that he observed defendant's slurred speech and unsteady walking even before he asked defendant to submit to a field sobriety test. We remand this case to the trial court in order for it to make appropriate factual findings and conclusions of law regarding whether the officer had probable cause to arrest defendant without a warrant.

III. Time of Arrest.

The trial court concluded that defendant was arrested at the time he was requested to take the field sobriety test, prior to the time he failed the test and formally was arrested and taken into police custody. The Court of Appeals reversed that ruling, holding that because the officer did not force or coerce defendant into taking the test and because defendant complied without objection, there was no arrest, seizure, or detention in violation of the fourth amendment. *See* U.S. Const. amend. IV. The defendant argues that the Court of Appeals' decision impermissibly exceeded the scope of appellate review, and we agree.

A person is arrested when his freedom of action is restricted by a police officer and he is subject to the control of the officer. *State v. Frazier,* 88 N.M. 103, 105, 537 P.2d 711, 713 (Ct.App.1975). The question exactly when has an arrest taken place is in the first instance for the trial court to determine. *Cf. Berkemer v. McCarty,* 468 U.S. 420, 441, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984) (custody). The appellate court determines only whether the evidence, viewed in the light most favorable to the trial court's finding, substantially supports the finding. *Cf. State v. Swise,* 100 N.M. 256, 258, 669 P.2d 732, 734 (1983) (custodial interrogation). We hold that substantial evidence supports the trial court's finding that defendant was arrested when he was asked to take a field sobriety test and further hold that the Court of Appeals erred in rejecting that finding.

Because N.M. Const. art. II, Section 10 and U.S. Const. amend. IV protect only against unreasonable searches and seizures, *see Doe v. State,* 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975), suppression of evidence obtained as a result of a seizure is not appropriate when the seizure is justified and reasonable. *See State v. Lewis,* 80 N.M. 274, 276, 454 P.2d 360, 362 (Ct.App.1969); *see generally State v. Luna,* 93 N.M. at 778, 606 P.2d at 188. We have reversed the trial court's conclusion that the warrantless arrest here was unlawful and unjustified. The trial court here failed to rule upon the reasonableness of defendant's detention and the police action taken in the course of that detention. *See Ryder v. State,* 98 N.M. 316, 319, 648 P.2d 774, 777 (1982); *State v. Lewis,* 80 N.M. at 276, 454 P.2d at 362. We therefore remand this case to the trial court in order for it to make appropriate findings and conclusions.

In conclusion, we affirm the trial court's finding that defendant was arrested at the time he was requested to take a field sobriety test. Because we hold that Section 66–8–102 does not require motion of the vehicle as an element of the offense of DWI, we reverse the trial court's ruling that no probable cause existed for the warrantless misdemeanor arrest of defendant for an offense committed in the presence of the arresting officer. For the foregoing reasons, the decision of the Court of Appeals is reversed in part, the order of the trial court suppressing the evidence and dismissing the charges is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

RIORDAN and FEDERICI, JJ., concur.

SOSA, Senior Justice, and WALTERS, J., dissent.

WALTERS, Justice (dissenting).

The majority opinion goes too far. Although we might agree that, in some circumstances, it is not necessary that a vehicle be in motion at the time the arresting officer observes the driver's intoxication, in order to establish probable cause to arrest without a warrant, those circumstances did not exist in the instant case.

Collected at 74 A.L.R.3d 1138–1166, and the supplement thereto, are cases which deal with arrests of drunken drivers. Seventeen jurisdictions apparently have considered that issue. Only five have held that presence of the officer at the time of the commission of the act of driving while intoxicated is not required. Of those five jurisdictions, in only one case was it held that there was probable cause to arrest when the officer deduced that the intoxicated person had been driving before he was found "passed out" at the scene of a one-car accident. In every other case, the arrest was declared unlawful, or it was held lawful because the defendant admitted he had been driving while intoxicated or an eye witness had told the officer that he had seen the defendant driving immediately before the accident or the arrest.

In the instant case, there was no evidence of how long the car had been parked, or when defendant became intoxicated. There is nothing to refute an equally logical inference that defendant realized at some point that he was, or was becoming, intoxicated, and he stopped driving before the alcohol impaired his ability to drive. None of the circumstances present in any of the cases of the annotation are present in the case now before us.

That is not to say that defendant could not have been charged with other violations of the Motor Vehicle Code; we are only concerned here with the violation he was charged with. When the facts would just as easily permit the inference that defendant stopped his car to avoid a DWI violation that could result had he continued to drive, it is inconsistent, as well as bad law, to signal intoxicated persons that they might just as well continue driving because they will be arrested for DWI whether they stop or not. The rationale of the majority opinion would apply as easily to anyone sitting in a parked car in front of his own house or in front of any establishment, if the arresting officer smelled alcohol and observed slurred speech. The record, as it stands, is without any corroboration of the officer's assumption that defendant stopped driving only after he had become intoxicated.

Even under the convoluted rationale of the majority opinion that attempts to illustrate why the meaning of "drive" is unclear, there was still no evidence that defendant was driving while intoxicated, was in actual control of the vehicle, was exercising control over it, or was steering it while it was being towed.

Finally, the determination of probable case should be left up to the trial judge. *See State v. Copeland,* 105 N.M. 27, 727 P.2d 1342 (Ct.App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986). Whether or not the trial judge felt that one of the elements of the violation required that the car had to be in motion, he also found no probable cause. The latter finding well could have been based on lack of evidence to show how long the car had been parked, when defendant became intoxicated, or whether he had been driving it after he became intoxicated.

If this Court is to decide, merely as a clarification of the law, that a car in motion is not always necessary to support a charge of DWI, it should nevertheless sus-

tain the trial court's decision on the basis of the court's finding that probable cause did not exist to arrest for DWI without a warrant. *State v. Copeland.*

For the foregoing reasons, we are unable to agree with the majority opinion and, therefore, we respectfully dissent.

SOSA, Senior Justice, concurs.

[redacted]

731 P.2d 374

STATE of New Mexico,
Plaintiff-Appellee,

v.

Yolanda DURAN, Defendant-Appellant.

No. 9509.

Court of Appeals of New Mexico.

Dec. 11, 1986.

Paul G. Bardacke, Atty. Gen., Patricia Frieder, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Deborah A. Moll, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals from her conviction on two counts of trafficking in controlled substances and conspiracy. Defendant's notice of appeal was filed more than a year late and, upon filing her notice of appeal, defendant alleges that the failure to timely

file notice of appeal was the result of ineffective assistance of counsel. We hold that there is a conclusive presumption of ineffective assistance of counsel where notice of appeal or affidavit of waiver are not filed within the time limit required. We therefore reach the merits of defendant's appeal and, on those merits, we affirm the conviction.

LATE FILING OF NOTICE OF APPEAL

Judgment and sentence in this matter were entered May 24, 1985. Defendant did not file her notice of appeal until September 3, 1986. With that notice of appeal, defendant filed her motion to accept notice of appeal as timely and an affidavit charging that failure to file timely notice of appeal in this case was the result of ineffective assistance of counsel.

This court is mindful of the holding of the United States Supreme Court in *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), to the effect that criminal defendants are not to be deprived of an appeal as of right where a procedural defect results from ineffective assistance of counsel on appeal. Consequently, in the second calendaring notice in this case, we proposed the adoption of a standard rule regarding the filing of late notices of appeal where ineffective assistance of counsel is alleged as the cause for the lateness. This court's proposal was that a conclusive presumption of ineffective assistance be adopted where defense counsel fails to timely file either a notice of appeal or an affidavit of waiver of appeal required by NMSA 1978, Crim.P.Rule 54(b) (Repl.1985). The state was invited to respond to this court's proposal.

The state responded with a memorandum in opposition to the second calendaring notice. In that memorandum, the state asked this court to consider the establishment of a rebuttable, rather than a conclusive, presumption of ineffective assistance under the circumstances stated. The state points out that there are conceivable instances where failure to file either notice of appeal or waiver of appeal may be the result of causes other than the attorney's failure to perform his duties. Only one example strikes us as having any merit, and that is where the defendant refuses to sign an affidavit of waiver after electing not to appeal. Arguably, in that instance, trial counsel is without recourse to file any documentation in the district court as contemplated by Crim.P.Rule 54(b). Common sense and the principles of good practice would suggest, however, that where a criminal defendant advises his attorney that he does not wish to appeal a conviction but refuses to sign an affidavit of waiver, trial counsel may file his own affidavit in the district court stating that he has advised his client of his right to appeal and that the client has neither authorized an appeal nor signed an affidavit of waiver. Crim.P.Rule 54(b). This would be deemed compliance with the requisites of the rule. Defense counsel would thereby not be faced with a "Hobson's choice" of filing a frivolous appeal or facing the consequences of being labeled as "ineffective." However, an attorney who fails to do anything within the time allowed for appeal can be said to have neglected his duty and a conclusive presumption of ineffective assistance arises.

The state asserts that our proposal will result in the possibility of our hearing appeals of defendants who may not be entitled to a late appeal as a factual matter. The state suggests applying a rebuttable instead of a conclusive presumption and an outside time limit even on that. According to the state, the person who would rebut the presumption would be trial counsel for defendant. We note that Disciplinary Rule 1.6, adopted by the supreme court on June 26, 1986, effective January 1, 1987, would permit, but not require, lawyers to reveal this information. Thus, similarly situated defendants may be treated differently, depending on their lawyers' view of what action lawyers should take when faced with the choice of allowing their clients an appeal at the expense of being deemed ineffective or depriving their clients of an appeal while saving face. We further note that, in the vast majority of our unpublished cases in which defendants sought

late appeals, late appeals were granted because there was no hint of any reason for delay other than attorney neglect. Additionally, there have been cases reinstated on our docket by the federal courts or by our supreme court because defendants have, in factual hearings held years after the appeal should have been taken, established their entitlement to delayed appeals. These cases sometimes take years to reach us.

We are primarily interested in the finality of criminal adjudications. Also, given the limited number of cases in which the problem is likely to arise, we do not consider it a burden on this court to hear the appeals, or a burden on some defense counsel to be deemed ineffective on this one small issue. Therefore, in the interest of finality and because of the insignificance of the countervailing burdens, we adopt the rule announced. We deem defendant's failure to timely appeal resulted from ineffective assistance of counsel and therefore entertain this appeal.

INEFFECTIVE ASSISTANCE AT TRIAL

We now reach the merits of defendant's appeal. Defendant's sole issue is that she was deprived of effective assistance of counsel when her attorney allegedly refused to permit her to testify on her own behalf at trial. In our third calendaring notice, this court proposed to affirm defendant's conviction because there is nothing in the record to support defendant's contention that her attorney refused to let her testify. In that calendaring notice, it was suggested that defendant's proper remedy, given her allegations, is to seek post-conviction relief so that a hearing may be held to establish an evidentiary basis for her issue on appeal.

Defendant responded with a memorandum in opposition to the disposition proposed. In her memorandum in opposition, defendant argues that the mere fact that she did not take the stand should have alerted the trial court to inquire as to whether she was knowingly and voluntarily waiving her right to testify. In the absence of such an inquiry by the court, defendant argues she should not be held accountable for failing to object and to make a record of her wish to take the stand.

Defendant's argument is unpersuasive. We are unwilling to impose on trial courts the burden of inquiring, each and every time a criminal defendant fails to testify on his own behalf, whether the defendant is waiving the right to testify. Given the extreme frequency with which defendants exercise their fifth amendment rights, such a rule would be unduly burdensome on trial courts. It is defendant's burden, where ineffective assistance of counsel is alleged, to prove that defendant's attorney failed to perform to the standard of a reasonably competent defense attorney, *State v. Orona,* 97 N.M. 232, 638 P.2d 1077 (1982), *and* that the defect in performance resulted in prejudice to the defendant. *State v. McGuinty,* 97 N.M. 360, 639 P.2d 1214 (Ct.App.1982). The trial must be shown to be unreliable and, as a result thereof, of having reached an unjust result. *State v. Talley,* 103 N.M. 33, 702 P.2d 353 (Ct.App.1985). These rules remain unchanged. In the absence of a record, we will not review defendant's claim of error. *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct.App.1975).

CONCLUSION

Accordingly, we hold that failure to file a timely notice of appeal or an affidavit of waiver constitutes ineffective assistance of counsel *per se,* and the presumption thereof is conclusive. We therefore consider this appeal timely, despite the late filing in violation of the rules of criminal procedure and the rules of appellate procedure governing such cases. We affirm the judgment and sentence of the trial court on the merits of this appeal as there is no record to support defendant's allegations. Affirmed.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

731 P.2d 377

Rudy T. GARCIA, Plaintiff-Appellee,

v.

SCHNEIDER, INC., Employer, and CNA Insurance Companies, Insurer, and Arizona Public Service Company, a Self-Insured Employer, Defendants-Appellants.

No. 9517.

Court of Appeals of New Mexico.

Dec. 16, 1986.

Byron Caton, Tansey, Rosebrough, Roberts & Gerding, P.C., Farmington, for defendants-appellants.

Jay L. Faurot Jay L. Faurot, P.A., Farmington, for plaintiff-appellee.

Martin J. Chavez, Director of the Workmen's Compensation Admin., Albuquerque, amicus curiae, the Workmen's Compensation Admin.

William H. Carpenter, Carpenter Law Offices, Ltd., Albuquerque, amicus curiae, New Mexico Trial Lawyers' Ass'n.

OPINION

BIVINS, Judge.

This appeal presents the question of whether NMSA 1978, Section 52-1-50 (Cum.Supp.1985) imposes a dollar limit on the cost of vocational rehabilitation services under the Workmen's Compensation Act. We hold it does not, thereby overruling, to the extent it conflicts, *Candelaria v. Hise Construction*, 98 N.M. 763, 652 P.2d 1214 (Ct.App.1981), *aff'd in part and modified in part*, 98 N.M. 759, 652 P.2d 1210 (1982). We also hold that, notwithstanding the absence of a dollar limit on vocational rehabilitation, reasonableness is the guideline.

Defendants appeal a worker's compensation judgment wherein the trial court awarded plaintiff vocational rehabilitation in the amount of $8,700.54. They also appeal from an order refusing to extend the time for appeal. Defendants' docketing statement raised three issues. We proposed summary affirmance on the first issue which challenged the sufficiency of the evidence that plaintiff required rehabilitation services. We also proposed summary affirmance on the second issue which

claimed the trial court exceeded its statutory authority in awarding rehabilitation costs in excess of $3,000. Finally, we proposed summary reversal on the third issue which challenged the trial court's order denying defendants an extension of time within which to appeal.

The parties have not filed memoranda in opposition to the proposed summary disposition and the time for doing so has expired. Accordingly, we entertain defendants' appeal and affirm the judgment for the reasons set out in our calendaring notice. Because disposition of issue number two requires overruling *Candelaria v. Hise Construction* to the extent it limits rehabilitation benefits to the statutory $3,000 amount, and since we do not have the benefit of briefs from the parties, we invited amici curiae to address the issue. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.Rule 502 (Repl.Pamp.1983). We extended the invitation to the Director of the Workmen's Compensation Administration, the Superintendent of Insurance for the Subsequent Injury Fund, the New Mexico Trial Lawyers' Association and the New Mexico Defense Lawyers' Association. Only the Director and the Trial Lawyers' Association responded. Both agreed with our proposed disposition.

The facts are not disputed and, therefore, become the facts on appeal. *Varos v. Union Oil Co. of California,* 101 N.M. 713, 688 P.2d 31 (Ct.App.1984). While working as a boilermaker, plaintiff injured his ankle. He subsequently enrolled in the Cheyenne Aero Technician School in order to become an aircraft mechanic. The trial court made the following findings of fact:

12. That Plaintiff is in need of vocational rehabilitation services.

13. That Plaintiff has incurred the following reasonable and necessary expenses in the pursuit of rehabilitation to date:

Tuition	$8,190.00
Book and Tool Expenses	$ 510.54
Total	$8,700.54

14. That Defendants should be ordered to pay all reasonable and necessary rehabilitation expenses incurred by Plaintiff including, but not limited to, tuition, books, tools and other learning aids.

15. In addition to any amounts Plaintiff incurred for tuition, books, tools and learning aids, Defendants should pay all reasonable and necessary expenses Plaintiff has incurred for his board, travel and lodging expenses and maintenance of his family during the period of rehabilitation, which expenses at the present time include moving expenses in the amount of $400.00 and travel expense in the amount of $264.00, which sum represents 6 miles per day for 200 days at 22 cents per mile. But, Defendants shall have no responsibility to pay incurred expenses exceeding the total amount of $3,000.00.

Defendants agreed to pay the $3,000 as set forth in Section 52–1–50; however, the trial court concluded that plaintiff's recovery for vocational rehabilitation expenses was not limited to $3,000. We agree.

In order to properly examine Section 52–1–50, it is helpful to separate the ideas conveyed. For convenience we have numbered each separate thought. So structured, Section 52–1–50 provides:

[1.] In addition to the medical and hospital services provided in Section 52–1–49 NMSA 1978, the employee shall be entitled to such vocational rehabilitation services, including retraining or job placement, as may be necessary to restore him to suitable employment where he is unable to return to his former job.

[2.] The court shall determine whether a disabled employee needs vocational rehabilitation services and shall cooperate with, and refer promptly all cases in need of such services to, the appropriate public or private agencies in this state or where necessary in any other state for such services.

[3.] An employee who, as a result of injury, is or may be expected to be totally or partially incapacitated for a remunerative occupation, and

who, under the discretion of the court, is being rendered fit to engage in a remunerative occupation, may, under regulations adopted by it, receive *such additional compensation* as may, in the discretion of the court, be deemed necessary for his board, lodging, travel and other expenses and for the maintenance of his family during the period of rehabilitation; *however, such additional compensation shall not exceed three thousand dollars ($3,000).* Such maintenance and other expense shall be paid by the employer in addition to compensation allowed under other sections of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978]. [Emphasis added.]

[4.] The refusal of the employee to avail himself for rehabilitation under the provisions of this act [this section] shall not result in any forfeiture or diminution of any award made pursuant to the Workmen's Compensation Act of the state of New Mexico.

With the section before us, it is clear that No. 1 gives the authority to provide rehabilitation services, in addition to medical services, to retrain the worker when he is unable to return to his former job; No. 2 deals with needs assessment and referral; No. 3 authorizes the trial court to award, as additional compensation, sums for "board, lodging, travel and other expenses and for the maintenance of [the worker's] family during the period of rehabilitation," subject to a limitation of $3,000; and No. 4 covers the effect of a refusal by the worker to accept rehabilitation.

The question then is whether the limitation of $3,000 applies to all of the vocational rehabilitation services or only to the special expenses of board, lodging, travel, etc., incurred during rehabilitation. We hold the monetary limitation applies only to the special expenses.

Statutes must be read according to their grammatical sense. *In re Forfeiture of 1982 Ford Bronco,* 100 N.M. 577, 673 P.2d 1310 (1983); *Aetna Finance Co. v. Gutierrez,* 96 N.M. 538, 632 P.2d 1176 (1981). Under the doctrine of the "last antecedent," relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or indicating others more remote. *In re Goldsworthy's Estate,* 45 N.M. 406, 115 P.2d 627 (1941); *see also In re Forfeiture of 1982 Ford Bronco.*

Applying that doctrine to our case, the restrictive phrase that contains the $3,000 limitation applies to "board, lodging, travel and other expenses and for the maintenance of [the worker's] family during the period of rehabilitation. . . ." Those words immediately precede the restrictive phrase. To apply the restrictive phrase to all rehabilitative services, we would have to refer to the more remote first sentence under No. 1. Doing so would change the grammatical sense and the plain, unambiguous meaning of the language of the statute.

> If the words used are unambiguous, and the pertinent sections read together do not create an ambiguity or an absurd result, this Court will not construe a statute to mean something other than what it plainly says. *See Atencio* [*v. Board of Education of Penasco Independent School District No. 4,* 99 N.M. 168, 655 P.2d 1012 (1982)]; *Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980); and *State v. Ortega,* 77 N.M. 312, 422 P.2d 353 (1966).

Ashbaugh v. Williams, — N.M. —, —, — P.2d —, —, 25 SBB 825, 827 (Ct.App.1986).

Thus, we hold that the $3,000 limitation applies to the "additional compensation" and not to vocational rehabilitation services. In reaching this result we have not overlooked the fact that the legislature has met on several occasions since *Candelaria v. Hise Construction* without amending

the statute.[1] While a number of decisions have held that legislative inaction following a judicial interpretation of a statute affords some evidence that the legislature intends to adopt the interpretation, "[l]egislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A *Sutherland Statutory Construction* § 49.10 (Sands 4th ed. 1984). While judicial interpretation of a statute, acquiesced in by the interested parties, may form a basis for an inference of approval, "courts are properly chary of equating mere inaction with approval, in the absence of a solid foundation for the inference of conscious ratification." *Duncan v. Railroad Retirement Board,* 375 F.2d 915, 919 (4th Cir.1967).

Furthermore, the courts have recognized that the doctrine ought not come into play where more direct aids at statutory construction are available. As noted by our supreme court in *State ex rel. Lee v. Hartman,* 69 N.M. 419, 427, 367 P.2d 918, 923 (1961), legislative interpretation by acquiescence "is to be resorted to only where meaning is doubtful * * * and when direct methods of interpretation have failed." (Citations omitted.) Here, the plain meaning of Section 52–1–50 is not open to doubt and direct methods of interpretation have not failed.

[redacted] Having concluded that Section 52–1–50 does not impose a dollar limit on the cost of vocational rehabilitation, we must answer the question of whether there is *any* limitation on the amount which may be expended for that benefit. While application of the plain meaning doctrine renders it unnecessary to resort to principles of statutory construction in deciding that Section 52–1–50 imposes no dollar limitation on the cost of vocational rehabilitation services, use of other statutory construction principles is helpful in deciding if there is any limitation at all. *See Vaughn v. United Nuclear Corp.,* 98 N.M. 481, 650 P.2d 3 (Ct.App.1982).

It is a rule of universal application in statutory construction that all parts of an act relating to the same subject matter are to be construed together. *Kendrick v. Gackle Drilling Co.,* 71 N.M. 113, 376 P.2d 176 (1962). The introductory clause of No. 1 states, "In addition to the medical and hospital services provided in Section 52–1–49 NMSA 1978, the employee shall be entitled to such vocational rehabilitation services. ..." NMSA 1978, Section 52–1–49(A) requires the employer to furnish all "reasonable" medical and hospital services. When Sections 52–1–49(A) and –50 are read together, as required by the rules of statutory construction and the introductory clause to No. 1, two things become clear. First, there is a limit on the amount that may be spent for vocational rehabilitation services. The amount that may be expended for rehabilitation must be reasonable, just as the amount that may be expended for medical and hospital services must be reasonable. Second, the employer is responsible for that expense. No. 3 of Section 52–1–50 makes the employer responsible for "such maintenance and other expense" up to the $3,000 limit. Sections 52–1–49 and –50, when read together, limit the employer's obligation for both medical and vocational rehabilitation services to what is reasonable.

In construing a statute, courts must do so with the ultimate purpose of giving effect to the intent of accomplishing the ends sought by the legislature. *Wells v. County of Valencia,* 98 N.M. 3, 644 P.2d 517 (1982); *C. de Baca v. Baca,* 73 N.M. 387, 388 P.2d 392 (1964). One of the purposes of the Workmen's Compensation Act is to assist injured workers by restoring them to suitable employment where they are unable, by reason of an accidental injury, to return to their former jobs. The purpose of the Act is not to turn every injury into a disability. In fact, a determination of disability cannot be properly assessed, except in the obvious cases, until the injured worker, unable to return to his or her former job, has been afforded the benefit of voca-

1. The legislature did amend Section 52–1–50 in 1986, 1986 N.M.Laws, ch. 22, § 16, but only to substitute "hearing officer" for "court" and to make minor stylistic changes.

tional rehabilitation. *See National Tea Co. v. Industrial Commission,* 97 Ill.2d 424, 73 Ill.Dec. 575, 454 N.E.2d 672 (1983). A court-imposed limit of $3,000 on vocational rehabilitation can only serve to hamper the legislative purpose of restoring injured workers to suitable employment.

The legislature has previously restricted medical expense to a dollar amount, but by 1977 N.M.Laws, ch. 275, § 3, deleted that limit. The legislature has not seen fit to impose a dollar limit on vocational rehabilitation, except that it must be reasonable, and the courts should not intervene on its own by imposing a dollar limit.

Thus, *Candelaria v. Hise Construction* was incorrectly decided and to the extent it conflicts with our holding today, it is overruled. We observe that the supreme court, in affirming *Candelaria v. Hise Construction* in part and modifying it in part, did not address the issue before us. The clear language of Section 52–1–50 does not limit actual rehabilitation services to $3,000, only the "additional compensation" discussed above. The limit for actual rehabilitation services is one of reasonableness to be applied by the trial courts and the Workmen's Compensation Administration. For a good discussion on this subject, see *National Tea Co. v. Industrial Commission.*

The judgment is affirmed. We wish to express our appreciation to amici for their assistance in briefing the issue.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

731 P.2d 381

STATE of New Mexico, Plaintiff-Appellant,

v.

Francisco GONZALES, Defendant-Appellee.

No. 8737.

Court of Appeals of New Mexico.

May 8, 1986.

Certiorari Quashed Jan. 9, 1987.

Paul G. Bardacke, Atty. Gen., Elizabeth Major, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Donald D. Montoya, Montoya, Murphy, Kauffman & Garcia, Santa Fe, Ron Koch Koch & Jones, P.A., Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Chief Judge.

The trial court granted defendant a new trial following his conviction for criminal sexual penetration in the second degree. The state appeals, raising the single issue of whether the trial court abused its discretion in granting defendant a new trial. We affirm.

Facts

Defendant was charged with criminal sexual penetration. His first trial resulted in a hung jury, 7–5 for acquittal, and a mistrial was declared. After a second trial, the jury returned a verdict finding defendant guilty of second degree criminal sexual penetration. The trial court granted defendant's motions for new trial which alleged improper arguments of the prosecutor during closing summation to the jury.

The victim was employed as a legislative secretary during the legislative session at the Capitol in February 1985. During this time, defendant was a state senator and his office was located near the office where the victim worked. Defendant stayed at the same motel where the victim was registered.

During the early evening hours of February 23, 1985, defendant and the victim obtained a ride with a friend of defendant from the Capitol to the motel where both were residing. Each had separate rooms. The victim testified that, as she was opening the door to her motel room, defendant asked her if he could watch television in her room. She stated that she let defendant in, but informed him that he could only stay a while because she was expecting her aunt to arrive. She turned on the television, picked up a few items, and sat down on a chair. Defendant sat down on the bed.

The victim testified that defendant thereafter asked her how old and how tall she was. The victim told defendant her height and defendant approached her and said, "Let's see." Defendant threw his arms around the victim, pushed her onto the bed, and got on top of her. The victim told him, "This isn't right," and told him to get off of her. She tried to push him away. Defendant tried to kiss her, but she turned her head and attempted to push him away. The victim related that defendant told her to make love to him, but she responded she did not want to and again told him to release her.

During the direct examination of the defendant, his attorney asked him what he would have done if the victim had told him to "get off," "this isn't right," or "I'm going to report you to the police." Defendant replied, "I would have gotten off totally and I would have left, only because I wouldn't have wanted to jeopardize myself * * * *"

The victim testified that defendant pinned one of her arms and sought to undress her. She stated that with her free arm she tried to resist defendant's advances, but he removed her pants and forced her to have sexual intercourse. Thereafter, defendant left at the victim's request. The victim then contacted relatives and the Rape Crisis Center. The police were notified and she was taken to the hospital for an examination. There was physical evidence supporting the victim's version: the clasp on her slacks was bent at an angle; she had an abrasion on her thumb; and she had some vaginal trauma consistent with forced sexual intercourse. However, the bent clasp testimony depended on the credibility of the victim for a determination of when it was bent. Also, the doctor who testified to the trauma was impeached with his inconsistent testimony at the first trial.

After being confronted by the police, defendant admitted having sex with the victim, but claimed it was consensual. At trial, defendant testified there was no resistance from the victim, she never told him to "get off" or that she did not want to have sex with him. Defendant also testified that, if the victim had told him to get off or had indicated that she did not want to have sex, he would have immediately left her room. Defendant also testified he would not have raped anyone because of his family, "the position that I hold," and "also that I believe that sex should be consensual."

During closing argument, the prosecutor, referring to the testimony of the defendant, made the following statement:

> Let's put something else out of the way. Senator Gonzales says, "I have too much to lose to do this." That is true of every politician up to the president of the United States when they do a bad act, an illegal act, they have too much to lose. They would have you believe that because they have a lot to lose that they wouldn't do it. Well, we know the contrary. Our experience is contrary. There's all sorts of people in high places * * * *

At this point, defense counsel objected, stating, "Your Honor, [the prosecutor] needs to argue the facts and evidence and not beyond." The trial court sustained the objection.

During rebuttal argument, another prosecutor made the following remark: "This is not slapping somebody around; this is not hitting somebody; this is not using a knife or a gun. That's a higher offense. That's not why we are here. We're here because he held her." Defense counsel objected upon the grounds that the latter statement was an incorrect statement of the law because the offense of committing criminal sexual penetration while armed with a deadly weapon does not constitute a higher offense than criminal sexual penetration with personal injury. The court responded, "I've instructed the jury and they will follow my instructions. Go ahead."

Defendant moved for a new trial on the basis of both comments, asserting the prosecutor had incorrectly instructed the jury, and contending the remarks were prejudicial and that the second statement left

the jury with the impression defendant was charged with a less serious offense than if he had used a weapon to commit the same offense.

The trial court did not impose sentence and, following a hearing on defendant's motions for new trial, granted defendant a new trial.

Award of New Trial

In considering a motion for a new trial, the trial court is invested with a broad discretion. *State v. Volpato,* 102 N.M. 383, 696 P.2d 471 (1985); *Mares v. State,* 83 N.M. 225, 490 P.2d 667 (1971); *State v. Pope,* 78 N.M. 282, 430 P.2d 779 (Ct.App. 1967). After a verdict of guilty, the court on motion of defendant or on its own motion may grant a new trial if required in the interest of justice. NMSA 1978, Crim. P.R. 45 (Repl.Pamp.1985). The trial court's decision will be reversed only upon a showing of a clear and manifest abuse of discretion. *State v. Chavez,* 101 N.M. 136, 679 P.2d 804 (1984) (*Chavez II*); *State v. Romero,* 42 N.M. 364, 78 P.2d 1112 (1938).

A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances of the case. *State v. Simonson,* 100 N.M. 297, 669 P.2d 1092 (1983). An abuse of discretion is a decision that is clearly untenable. *State v. Hargrove,* 81 N.M. 145, 464 P.2d 564 (Ct.App.1970). A review of the action of the trial court in the exercise of its discretion does not depend upon whether the appellate court would have reached the same conclusion. *See Edington v. Alba,* 74 N.M. 263, 392 P.2d 675 (1964). *See also State v. Doe,* 100 N.M. 649, 674 P.2d 1109 (1983).

In ruling upon a motion for a new trial, however, there are limits upon the trial court's exercise of discretion. In *Chavez II,* our Supreme Court reversed an order of the trial court which granted a new trial, stating that the discretion of the court below is not unrestricted, and the discretion invested in the trial court does not permit it to reweigh the evidence or the credibility of witnesses. *See also State v. Chavez,* 98 N.M. 682, 652 P.2d 232 (1982) (*Chavez I*). *Chavez II* also established that a trial court could not grant a new trial on the basis of asserted legal error when there is, in fact, no legal error present.

Moreover, the state has a strong interest in enforcing a lawful jury verdict. *Chavez I.* Motions for new trials are not favored. *State v. Stephens,* 99 N.M. 32, 653 P.2d 863 (1982). New trials for purely technical reasons are against the public interest; they should be granted only for the correction of misconduct prejudicial to the accused. *State v. Evans,* 48 N.M. 58, 145 P.2d 872 (1944).

Thus, our cases suggest a two-step approach for the appellate court in reviewing the grant of a new trial: first, a determination of whether the grant of a new trial is based upon legal error; second, a determination of whether the error is substantial enough to warrant the exercise of the trial court's discretion. In our evaluation of each of these steps, we do not need to determine whether the error was of a magnitude necessary to require a reversal on appeal. If the trial court could grant a new trial only when the error is such as would compel a reversal on appeal, then the trial court would never have discretion to grant a new trial. Yet, our cases agree that the trial court does have discretion in the matter. For these reasons, reliance on cases upholding the trial court's decision not to award a new trial are not the most pertinent to our inquiry. Rather, we must engage in the two-step process outlined above.

Legal Error

The excerpt from closing argument which invited comparison to other politicians was in part proper and in part improper. Of course, once defendant testified that he would not have raped anybody because of the position he held, this became a legitimate topic upon which to comment in closing argument. A prosecutor may comment on the evidence, and counsel is entitled to wide latitude in closing argu-

ment. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981).

However, while the topic of comment was proper, the manner was not. The prosecutor invited comparison to the president of the United States and began to argue about facts not in evidence. The trial court was of the opinion that the argument conjured up images of Watergate and President Nixon. The prosecutor may not compare defendant to other wrongdoers not involved in the case. *See State v. Cummings,* 57 N.M. 36, 253 P.2d 321 (1953) (comment directed to the number of traffic deaths in New Mexico was improper in trial arising out of traffic death); *State v. Henderson,* 100 N.M. 519, 673 P.2d 144 (Ct.App.1983) ("true" story about a rape case was improper); *State v. Vallejos,* 86 N.M. 39, 519 P.2d 135 (Ct.App.1974) (reference to crime against a United States Senator was improper).

It is important to note that defendant did not seek to exonerate himself by associating himself with other politicians. He simply gave his personal reasons why he would not have committed the crime—his family and his position. The testimony about position did not open the door to comparison to other political office holders any more than the testimony about family would have opened the door to a supposedly true story of a good, family man acquitted of rape, when it later turned out that he was guilty. *See Henderson.*

■ The comment concerning penalties was more improper. The prosecutor made a legally incorrect statement of the law when he told the jury the crime for which defendant was charged was less serious than committing the crime with a weapon. NMSA 1978, § 30-9-11(B) (Repl.Pamp. 1984). The court instructs on the law, and the prosecutor invades that province when he instructs on the law. *State v. Payne,* 96 N.M. 347, 630 P.2d 299 (Ct.App.1981), *overruled on other grounds, Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981). This invasion becomes tainted when the instruction is incorrect. *State v. Diaz,* 100 N.M. 210, 668 P.2d 326 (Ct.App.1983). Moreover, the prosecutor has no business making argument concerning the penalties for offenses. *See State ex rel. Schiff v. Madrid,* 101 N.M. 153, 679 P.2d 821 (1984).

Prejudice

Legal error having been established, it is next necessary to analyze whether the impact of the error was substantial enough to have called for the trial court's exercise of discretion. Although the trial court does not sit in the position of the "thirteenth juror," we recognize that any assessment of prejudice calls into play a balancing process which involves an assessment of the evidence both for and against the defendant. *See State v. Moore,* 94 N.M. 503, 612 P.2d 1314 (1980) (test for harmless error involves three inquiries which balance the strengths of the state's case against the strengths of defendant's case and the impact of the error). In addition to this balancing of the relative strengths of the cases, the possibility of cure must be evaluated. *See State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979).

In this case, the trial court said, "The evidence of guilt is not overwhelming. The case was essentially a swearing match." The state agrees: "[T]his type of case often boils down to the jury's determination that it either believes the victim or it doesn't." In cases of a swearing match, the question is whether the impropriety could have tipped the balance. *State v. Ross,* 88 N.M. 1, 536 P.2d 265 (Ct.App. 1975). Improper matter that is not sufficient to impact on a stronger case against defendant may impact on a case that is a swearing match.

■ The strength of the case against defendant will have a bearing on whether the impropriety was cured by instruction. *Vialpando.* The evidence in this case was not so overwhelming that there was no reasonable possibility that the improper argument did not contribute to the verdict. *Id. See also Henderson; Payne; State v.*

Day, 91 N.M. 570, 577 P.2d 878 (Ct.App. 1978).

Our cases have found it easier to cure impropriety which was inadvertently injected into the trial by a witness than impropriety which was injected into the trial by the prosecutor. *See Vialpando. Compare also State v. Ramirez,* 98 N.M. 268, 648 P.2d 307 (1982), *with State v. Baca,* 89 N.M. 204, 549 P.2d 282 (1976).

Finally, we evaluate the instructions given. No instruction was given with regard to the comment inviting comparison to other politicians. We recognize that none was sought. We also must take note of the fact that the trial court did not admonish the jury after defense counsel objected to the prosecutor's "higher offense" statement. Instead, the trial court said only that it had instructed the jury, and they would follow his instructions. There is no indication that this response, which is not even a ruling, was directed to the jury. We do note that an instruction was given on this topic later in the proceedings.

Thus, on the side of the state, we have the fact that the topic of the first comment was invited by defendant's testimony, the fact that defendant did not request timely cure, and the fact that the second comment was the subject of some instruction by the trial court. On the side of defendant, we have the fact that the comments were improper; the fact that the comments were made by the prosecutor, not a witness; the fact that the comments were not each neutralized by instruction or admonition; and the fact that this was a close case—a swearing match. Considering the definition of abuse of discretion and who bears the burden of demonstrating it, it cannot be said that the trial court's grant of a new trial was arbitrary or without reason.

The trial judge who sat through the entire trial, and who sat through the previous trial in this case, is in the best position to evaluate whether the court's instructions have the desired effect of curing any error. *See Rogers v. United States,* 411 F.2d 228 (10th Cir.1969); *State v. Jefferson,* 11 Wash.App. 566, 524 P.2d 248 (1974). This follows from our recognition that the trial court is in the best position to evaluate any possible prejudice. *Id.* There is a presumption of rectitude and regularity in the proceedings below. *State v. Deats,* 82 N.M. 711, 487 P.2d 139 (Ct.App.1971). An abuse of discretion is never presumed—it must be affirmatively established. *State v. Greene,* 92 N.M. 347, 588 P.2d 548 (1978). The burden is always on the appellant, in this case the state, to clearly point to any alleged error. *State v. Weber,* 76 N.M. 636, 417 P.2d 444 (1966).

For the foregoing reasons, we cannot say as a matter of law that the trial court clearly and manifestly abused its discretion in awarding a new trial.

Affirmed.

IT IS SO ORDERED.

FRUMAN, J., concurs.

DONNELLY, J., dissents.

DONNELLY, Judge (dissenting).

I respectfully dissent.

The award of a new trial was predicated upon two comments made by the prosecutor during closing arguments to the jury. Neither comment rose to the level of prejudicial error.

The first comment referred to defendant's testimony during trial, where he admitted having sexual intercourse with the prosecutrix, but denied that he had committed forcible rape because such act would have reflected adversely upon his wife and family, *"the position that I hold"* and because the use of force was contrary to his beliefs. [Emphasis added.] Referring to this testimony, the prosecutor stated in closing argument:

> Let's put something else out of the way. Senator Gonzales says, "I have too much to lose to do this." That is true of every politician up to the president of the United States when they do a bad act, an illegal act, they have too much to lose. They would have you believe that be-

cause they have a lot to lose that they wouldn't do it. Well, we know to the contrary. Our experience is contrary. There's all sorts of people in high places.

Defendant objected to this comment and the trial court promptly sustained the objection.

The prosecutor, as well as the defense, is allowed wide latitude in commenting on the evidence during closing argument. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981); *State v. Ruffino,* 94 N.M. 500, 612 P.2d 1311 (1980); *State v. Anaya,* 79 N.M. 43, 439 P.2d 561 (Ct.App.1968). The prosecutor is allowed to refer during closing arguments, to statements and facts in the evidence, together with reasonable inferences deductible therefrom. *State v. Molina,* 101 N.M. 146, 679 P.2d 814 (1984); *State v. Herrera,* 84 N.M. 46, 499 P.2d 364 (Ct.App.1972). When defendant's own testimony directly alluded to his official position, and placed before the jury the suggestion that he did not commit the charged offense because of the "position" held by him, the prosecutor's reference to defendant's remark did not constitute prejudicial error. Defendant initially raised this issue and placed it before the jury. Under these facts defendant opened the door to the state's comment. *See State v. Cordova,* 100 N.M. 643, 674 P.2d 533 (Ct.App.1983); *State v. Jaramillo,* 88 N.M. 60, 537 P.2d 55 (Ct.App.1975). The prosecution comment did not exceed the scope of permissible closing argument.

Moreover, under the facts herein, any alleged prejudice to defendant resulting from the statement was neutralized by the ruling of the trial court. In the instant case, the trial court sustained defendant's objection to the prosecutor's comment. Defendant did not request the trial court to admonish the jury to disregard the statement. The prompt sustaining of the objection cured any claim of prejudice. *See State v. Duran,* 83 N.M. 700, 496 P.2d 1096 (Ct.App.1972); *see also State v. Simonson,* 100 N.M. 297, 669 P.2d 1092 (1983); *State v. Vialpando,* 93 N.M. 289, 599 P.2d 1086 (Ct.App.1979).

During the state's rebuttal argument, the prosecutor also stated that in committing the offense, defendant did not use "a knife or a gun * * * that's a higher offense * * * * that's not why we are here. We're here because he held her." Defense counsel objected on the grounds that the statement was an incorrect statement of the law, and that committing sexual penetration while armed with a weapon was not a higher offense. The trial court in response to the objection, observed that it had instructed the jury as to the law and "they will follow my instructions." Following the jury verdict, defendant argued that this second remark also warranted the award of a new trial. The trial court agreed.

This argument of the prosecutor was ambiguous. Defendant was charged with second degree criminal sexual penetration. The trial court also instructed the jury as to the lesser included offense of third degree criminal sexual penetration. *See* NMSA 1978, § 30-9-11(C) (Repl.Pamp. 1984). During rebuttal argument, the prosecutor discussed elements of both the charged offense and the lesser included offense. This remark of the prosecutor was not an erroneous statement insofar as it referred to the lesser included offense of third degree criminal sexual penetration. The prosecution argument discussed both jury instructions. Moreover, not every inaccurate statement by a prosecutor, or inadvertent misstatement of the law made during closing argument, mandates a new trial. *United States v. Chapman,* 615 F.2d 1294 (10th Cir.1980). Misstatements in closing arguments do not require an award of new trial unless the remark prejudiced defendant to the extent that he was denied a fair trial. *State v. Jefferson,* 11 Wash.App. 566, 524 P.2d 248 (1974). The comment was not prejudicial. The prosecutor's remark expressly disclaimed the use of any weapon and emphasized the state's contention that force had been used.

A new trial is not required where viewed the totality of the circumstances, together with the reasonable inferences to be drawn

from the evidence, the statements, even if erroneous, were not prejudicial. *See Commonwealth v. Mandeville,* 386 Mass. 393, 436 N.E.2d 912 (1982); *Commonwealth v. Dennis,* 313 Pa.Super. 415, 460 A.2d 255 (1983).

In determining whether a motion for a new trial, based upon comments of the prosecutor, should be granted, the test is whether defendant was prejudiced by the remark, and the prejudice deprived the defendant of a fair trial. *State v. White,* 101 N.M. 310, 681 P.2d 736 (Ct.App.1984); *State v. Ruffino.* To be reversible, error must be prejudicial. *State v. Wright,* 84 N.M. 3, 498 P.2d 695 (Ct.App.1972); *State v. Orzen,* 83 N.M. 458, 493 P.2d 768 (Ct. App.1972). A party asserting prejudice has the burden of demonstrating that he was prejudiced by the claimed error. *See State v. Garcia,* 93 N.M. 51, 596 P.2d 264 (1979); *State v. Evans,* 48 N.M. 58, 145 P.2d 872 (1944).

The trial court gave NMSA 1978, UJI Crim. 50.06 (Repl.Pamp.1982), instructing the jury that it was not to consider the consequences of its verdict. Similarly, the trial court gave NMSA 1978, UJI Crim. 1.04 (Repl.Pamp.1982), advising the jury that what is said in the arguments did not constitute evidence. The trial court also properly instructed the jury both as to the elements of the charged offense, and the lesser included offense. *See* NMSA 1978, UJI Crim. 9.46 (Repl.Pamp.1982); *see also* NMSA 1978, UJI Crim. 9.40 (Repl.Pamp. 1982). Under these circumstances, the prosecutor's second remark did not reach the level of prejudicial error. The trial court gave instructions which neutralized any deleterious effect from this comment. *See State v. Moore,* 94 N.M. 503, 612 P.2d 1314 (1980).

Misstatements in arguments do not require the award of a new trial unless the statements are of such dimension as to prejudice defendant's right to a fair trial, and the effect of the statements have not been neutralized by the trial judge. *United States v. Rich,* 580 F.2d 929 (9th Cir. 1978). Motions for a new trial are not favored. *State v. Stephens,* 99 N.M. 32, 653 P.2d 863 (1982). An award of a new trial where the basis relied upon did not deprive the accused of a fair trial, constitutes an abuse of the trial court's discretion. *See State v. Chavez,* 101 N.M. 136, 679 P.2d 804 (1984). A jury verdict should be set aside only upon a showing of prejudicial error. The arguments of the prosecutor did not warrant the granting of a new trial.

The order granting the new trial should be reversed.

731 P.2d 942

In the Matter of Esteban A. MARTINEZ, An Attorney Admitted to Practice Before the Courts of the State of New Mexico.

No. 16286.

Supreme Court of New Mexico.

Jan. 8, 1987.

ORDER

This matter came before this Court on December 17, 1986, after an evidentiary hearing on an Order to Show Cause why the probation of attorney Esteban A. Martinez should not be revoked and the deferred sanction of suspension imposed. The Court has reviewed the transcripts and exhibits from that hearing and has heard the arguments of counsel. We adopt the findings and conclusions of the hearing officer and, with slight modification, his recommendation that the probation of Martinez be revoked and suspension imposed.

The evidence in the record shows that Martinez has failed to fully cooperate with his supervisor and to comply with other provisions of this Court's previous order of probation. While there has been no showing that Martinez's failure to abide by the conditions of his probation was in any way malicious or fraudulent, his failure to fulfill his obligations as an attorney on probation gives us no choice but to revoke the probation at this time.

IT IS THEREFORE ORDERED that the probation of Esteban A. Martinez is revoked and that he is suspended from the practice of law for a period of six (6) months pursuant to NMSA 1978, Rules Governing Discipline, Rule 11(a)(2) (Repl. Pamp.1985) commencing on December 17, 1986. He will not be readmitted until June 17, 1987, and then only upon a showing that all restitution and costs assessed against him in connection with this hearing and his previous hearing have been paid.

IT IS FURTHER ORDERED that upon readmission Martinez will be supervised for an additional period of six (6) months by a licensed attorney from Las Vegas, New Mexico, to be appointed at that time by the Honorable Leon Karelitz, District Judge for the Eight Judicial District. Martinez shall comply with all directions of that supervisor or be subject to an additional six (6) months period of suspension.

IT IS FURTHER ORDERED that Martinez shall file with this Court on or before January 31, 1987, evidence of his compliance with all of the requirements of NMSA 1978, Rules Governing Discipline, Rule 17 (Repl.Pamp.1985).

IT IS FURTHER ORDERED that the Clerk of the Supreme Court strike the name of Esteban A. Martinez from the roll of those persons permitted to practice law in New Mexico and that this Order be published in the State Bar of New Mexico *News and Views* and in the *New Mexico Reports.*

Costs of this proceeding in the amount of $458.90 are hereby assessed against Martinez, and this amount (as well as the $394.09 previously assessed) shall be paid by him to the Disciplinary Board on or before June 17, 1987, if he wishes to be readmitted to the practice of law at that time.

IT IS SO ORDERED.

COST BILL

Simon S. Romero, Jr.	Attempted Service of Order to Show Cause on Martinez	$ 5.00
U.S. Postal Service	Certified mailing of Order to Show Cause of Martinez	3.06
Patrick Casey, Esq.	Witness fee	65.00

Manuel M. Chavez	Witness fee and mileage reimbursement	$ 93.16
Patricia Tiernam	Witness fee and mileage reimbursement	106.36
Ofelia Montoya	Witness fee and mileage reimbursement	93.16
	TOTAL	458.90

731 P.2d 943

STATE of New Mexico, Plaintiff-Appellee,

v.

Phillip C. BOEGLIN, Defendant-Appellant.

No. 15746.

Supreme Court of New Mexico.

Jan. 21, 1987.

Rothstein, Bailey, Bennett, Daly & Donatelli, Martha A. Daly, Santa Fe, for defendant-appellant.

William McEuen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

STOWERS, Justice.

Defendant Phillip Boeglin was charged with murder, conspiracy to murder, kidnapping, conspiracy to distribute a controlled substance (methamphetamines), and possession of a controlled substance (methamphetamines), charges arising from events surrounding the February 12, 1982, killing of David Eastman. Codefendants Ralph Earnest and Perry Conner separately were charged with the same offenses. Earnest was tried by a jury and found guilty on all counts but his conviction was reversed by this Court. *See State v. Earnest,* 103 N.M. 95, 703 P.2d 872 (1985), *vacated,* 477 U.S. 648, 106 S.Ct. 2734, 91 L.Ed.2d 539 (1986). Conner entered a guilty plea and was sentenced to life imprisonment.

After numerous pretrial motions, orders, and interlocutory appeals resulting in the suppression of two of the three statements made by defendant to the police on the day of the crime and of his arrest, defendant went to trial before a jury on December 4, 1984. At the close of the State's case, the district court dismissed the counts regarding controlled substances. After defendant rested his case, the district court submitted to the jury the remaining counts of first degree murder, conspiracy to murder, and kidnapping. The jury returned guilty verdicts on all three counts, and the district court sentenced defendant to life imprisonment on the murder count and to concurrent terms of nine years each on the conspiracy and kidnapping charges, which terms were to run concurrent with his murder sentence.

Defendant appeals from this judgment and sentence, asserting that the district court erred (1) in failing to instruct the jury on the lesser included offense of second degree murder; (2) in admitting into evidence a photograph of the victim's wounds; and (3) in admitting into evidence a tape recording of defendant's statement to the police which constituted false evidence and deprived defendant of the real evidence. We affirm the district court, discussing each of defendant's contentions separately.

I. Lesser Included Offense Instructions.

At the close of the State's case, the district court found that sufficient evidence had been presented to support a jury verdict of first degree murder. For the first

time, the district court expressed its willingness to give an instruction on the lesser included offense of second degree murder, if defendant were to request it. At the conclusion of defendant's case, the district court for the second time expressed its willingness to give the lesser included offense instruction if defendant requested it.

Finally, after the State finished presenting its rebuttal evidence, the district court inquired whether the defense had any requested instructions to submit. Replying that the defense did not, defense counsel put on the record a difference of opinion between counsel and defendant. Counsel stated that he would request a second degree instruction if it were his decision to make; however, defendant adamantly had instructed him not to do so.

The district court then examined defendant, informing him that he was entitled to an instruction on the lesser included offense of second degree murder and that without that instruction the jury would be placed in the position of having to acquit him or find him guilty of first degree murder. Defendant indicated that he understood the situation and that he had instructed counsel not to request the lesser included offense instruction. The prosecutor, repeating the court's cautions, asked defendant if it was still his desire to waive his right to that instruction. Defendant said that it was and that it was his choice, despite his counsel's advice to the contrary. The only homicide instruction submitted was first degree murder, and the jury returned a verdict of guilty.

Defendant now asks this Court to reverse his conviction by a jury instructed as he desired. Primarily, he argues that as a matter of policy we should require the giving of a second degree murder instruction, regardless of the defendant's wishes, in order to assure him a fair trial. Alternatively, defendant argues that if we continue to permit waivers of the right to lesser included offense instructions, we nevertheless should find that his waiver was not knowing and voluntary and, therefore, that his rights to due process and a fair trial were violated.

We recently held that where the trial court and the defense agree that a lesser included offense instruction on second degree murder should not be given to the jury, the defendant cannot complain on appeal that reversible error was committed in not giving that instruction. *State v. McCrary,* 100 N.M. 671, 675 P.2d 120 (1984). Defendant attempts to distinguish his case from *McCrary* on the ground that his waiver of the right to a second degree murder instruction was contrary to the express advice of counsel. We believe this distinction is untenable because the defendant, not defense counsel, ultimately must decide whether to seek submission of lesser included offenses to the jury. *See Standards for Criminal Justice,* § 4–5.2 commentary at 4.68 (1980); *cf. State v. Martinez,* 92 N.M. 256, 258, 586 P.2d 1085, 1087 (1978) (guilty plea); *State v. Shroyer,* 49 N.M. 196, 203, 160 P.2d 444, 447–48 (1945) (waiver of jury trial); *State v. Henry,* 101 N.M. 277, 280, 681 P.2d 62, 65 (Ct.App. 1984) (waiver of right to testify on own behalf); NMSA 1978, Crim.P.R. 21 (Repl. Pamp.1985) (guilty plea); NMSA 1978, Crim.P.R. 38 (Repl.Pamp.1985) (waiver of jury trial).

Defendant urges us to rule that whenever the evidence in a first degree murder prosecution warrants the submission of a second degree murder instruction, the trial court must give that instruction sua sponte, regardless of requests or objections made by the prosecution or the defendant and his counsel. That policy argument was considered and rejected by this Court in *McCrary. See id.,* 100 N.M. at 676–77, 675 P.2d at 125–26 (Sosa, J., dissenting). Following *McCrary,* we decline to rule that the district court should have given a second degree murder instruction sua sponte.

A review of our decisions indicates that, with one exception, we consistently have imposed upon the defendant the duty to make the tactical decision whether or not to seek jury instructions on lesser degrees of homicide supported by the evidence, and

we repeatedly have held that the defendant cannot be heard to complain if the trial court instructed the jury as he desired. *See, e.g., State v. McCrary,* 100 N.M. at 675, 675 P.2d at 124; *State v. Garcia,* 46 N.M. 302, 307, 128 P.2d 459, 462 (1942); *State v. Trujillo,* 27 N.M. 594, 603, 203 P. 846, 849 (1921); *State v. Najar,* 94 N.M. 193, 195–96, 608 P.2d 169, 171–72 (Ct.App. 1980). The one exception occurred over half a century ago, in *State v. Diaz,* 36 N.M. 284, 13 P.2d 883 (1932), where we held that in first degree murder cases the trial court had the responsibility to instruct on lesser degrees of homicide supported by the evidence regardless of the requests or objections of the defendant and the prosecution. *Id.,* 36 N.M. at 286–87, 291, 13 P.2d at 885, 887. Less than two years later, however, this Court effectively repudiated the rule of *Diaz* when it promulgated a rule requiring objection to the instructions given or tender of correct instructions at trial in order to challenge instructions on appeal. *See State v. Garcia,* 46 N.M. at 306–07, 128 P.2d at 461–62.

■ Although defendant's failure to object properly to the district court's allegedly incomplete or erroneous instructions constituted a waiver of the objection, *see id.,* 46 N.M. at 307–08, 128 P.2d at 462; *State v. Najar,* 94 N.M. at 196, 608 P.2d at 172, we nevertheless will grant relief if fundamental error has occurred in a particular case, *State v. Garcia,* 46 N.M. at 308–09, 128 P.2d at 462–63. Defendant's contention that the district court erred in failing to submit to the jury a second degree murder instruction sua sponte neither raises a jurisdictional question, *see State v. Najar,* 94 N.M. at 195, 608 P.2d at 171, nor one involving an issue of general public interest, *cf. State v. Garcia,* 99 N.M. 771, 779, 664 P.2d 969, 977, *cert. denied,* 462 U.S. 1112, 103 S.Ct. 2464, 77 L.Ed.2d 1341 (1983) (possible death sentence insufficient ground). *See generally* NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp.1983). Under the circumstances of this case, however, we shall consider whether the district court's instructions "[took] from * * * defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Garcia,* 46 N.M. at 309, 128 P.2d at 462.

We conclude that the defendant's right to lesser included offense instructions warranted by the evidence is not such a fundamental right. In New Mexico courts, as well as in federal courts, the defendant is entitled to lesser included offense instructions warranted by the evidence. *See State v. Riggsbee,* 85 N.M. 668, 671, 515 P.2d 964, 967 (1973); NMSA 1978, Crim. P.R. 41 (Repl.Pamp.1985); *see also Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973); Fed.R.Crim.P. 31(c). The United States Supreme Court regards the availability of such instructions as a valuable procedural safeguard. *See Beck v. Alabama,* 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980); *see also Keeble v. United States,* 412 U.S. at 213, 93 S.Ct. at 1998.

In *Beck v. Alabama,* the Court struck down a unique Alabama statute that prohibited the submission of lesser included offense instructions in capital cases and mandated imposition of the death penalty upon conviction, holding that the statutorily mandated unavailability to the jury of the "third option" of convicting on a lesser included offense enhanced the risk of an unwarranted conviction to an extent intolerable in death penalty cases. *Id.,* 447 U.S. at 637–43, 100 S.Ct. at 2389–2392. Broad language in *Hopper v. Evans,* 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), suggested that *Beck* established that due process requires the giving of a lesser included offense instruction when the evidence warrants it. 456 U.S. at 611, 102 S.Ct. at 2052.

The question whether the defendant must be compelled to take advantage of the third option of a lesser included offense instruction in fact available to him was not before the Court in *Beck* or *Hopper.* In *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), however, the Court held that the defendant should

not be forced to waive a statute of limitations bar to the giving of lesser included offense instructions in order to provide the jury with a third option if he knowingly chose to take his chances with the jury on a charge of capital murder alone. 468 U.S. at 456–57, 104 S.Ct. at 3160–3161. We believe that the *Spaziano* court stated a basic principle applicable to the case before us: the defendant is free to make strategic choices regarding the manner in which he will or will not avail himself of procedural safeguards afforded by the law, and he generally will be bound by those choices.

This Court prefers not to compel defendants to avail themselves of rights they believe may not be advantageous and long has held that defendants' rights, even fundamental constitutional rights, may be waived. *See State v. Garcia,* 46 N.M. at 305, 128 P.2d at 460; *cf. State v. Ball,* 104 N.M. 176, 718 P.2d 686, 693 (1986) (right to appeal); *Baird v. State,* 90 N.M. 667, 669, 568 P.2d 193, 195 (1977) (right to appeal defects in grand jury proceedings); *Neller v. State,* 79 N.M. 528, 532, 445 P.2d 949, 953 (1968) (right to counsel); *State v. Henry,* 101 N.M. at 280, 681 P.2d at 65 (right to testify on own behalf). The courts of many other jurisdictions permit defendants to make strategic choices regarding the offenses to be submitted to the jury and, even after *Beck,* refuse to hear the complaints of defendants who have gambled and lost, failing to preserve error properly. *See, e.g., Shepard v. Foltz,* 771 F.2d 962 (6th Cir.1985) (dicta); *Look v. Amaral,* 725 F.2d 4 (1st Cir.1984); *Crowe v. State,* 435 So.2d 1371 (Ala.Crim.App.1983); *Collins v. State,* 271 Ark. 825, 611 S.W.2d 182, *cert. denied,* 452 U.S. 973, 101 S.Ct. 3127, 69 L.Ed.2d 984 (1981); *Harris v. State,* 438 So.2d 787 (Fla.1983), *cert. denied,* 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984); *Cargill v. State,* 255 Ga. 616, 340 S.E.2d 891 (1986) (dicta); *People v. Lewis,* 97 Ill. App.3d 982, 53 Ill.Dec. 353, 423 N.E.2d 1157 (1981); *State v. Sands,* 123 N.H. 570, 467 A.2d 202 (1983) (dicta); *State v. Patterson,* 285 S.C. 5, 327 S.E.2d 650 (1984), *cert. denied,* 471 U.S. 1036, 105 S.Ct. 2056, 85 L.Ed.2d 329 (1985); *Jahnke v. State,* 692 P.2d 911 (Wyo.1984). Many of the courts in the minority of jurisdictions that by state constitution, statute, or judicial decision impose upon trial courts the duty to give a second degree murder instruction sua sponte nevertheless hold that the defendant has waived the instruction or has invited non-reversible error if the trial court declines to give the lesser included offense instruction in accordance with the defendant's wishes. *See, e.g., People v. Sedeno,* 10 Cal.3d 703, 112 Cal.Rptr. 1, 518 P.2d 913 (1974) (en banc) (state constitution; invited error; pre-*Beck*); *People v. Stuart,* 110 Idaho 163, 715 P.2d 833 (1985) (statute; invited error); *Mercer v. State,* 666 S.W.2d 942 (Mo.App.1984) (statute and U.S. Constitution; waiver); *State v. Coleman,* 660 S.W.2d 201 (Mo.App.1983) (invited error); *but see, e.g., State v. Vickers,* 129 Ariz. 506, 633 P.2d 315 (1981) (en banc) (U.S. Constitution; capital cases only); *People v. Jenkins,* 395 Mich. 440, 236 N.W.2d 503 (1975) (statute and judicial decision; pre-*Beck*); *State v. Lopez,* 160 N.J.Super. 30, 388 A.2d 1273 (1978) (judicial decision; pre-*Beck*); *State v. Wright,* 304 N.C. 349, 283 S.E.2d 502 (1981) (statute and judicial decision). We hold that, consistent with the constitutional guarantees of a fair trial, the defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses and cannot be heard to complain on appeal if he has gambled and lost.

The record in this case clearly demonstrates that defendant knowingly, intelligently, and voluntarily waived his right to have the jury instructed on second degree murder. Defendant stated that it was his choice and only his choice. Both the district court and the prosecution informed defendant of his entitlement to the lesser included offense instruction and of the consequences of proceeding on instructions concerning first degree murder alone. We may presume that defense counsel also informed defendant of his rights in the course of coming to a difference of opinion with him. *See State v. Tipton,* 78 N.M. 600, 602, 435 P.2d 430, 432 (1967) (presump-

tion that defendant represented by counsel was fully informed when he entered guilty plea). There was an "intentional relinquishment or abandonment of a known right or privilege" here, *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), sufficient to constitute a waiver of even the most fundamental constitutional rights. *Cf. State v. Vaughn,* 74 N.M. 365, 393 P.2d 711 (1964) (right to counsel); *State v. Hernandez,* 46 N.M. 134, 123 P.2d 387 (1942) (right to trial by jury); *State v. Henry* (right to testify on one's own behalf).

Defendant, however, urges us to go farther and require the trial court, before it permits a waiver of lesser included offense instructions supported by the evidence, to conduct an inquiry similar to the one required before it accepts a plea of guilty. Under NMSA 1978, Crim.P.Rule 21(e) (Repl.Pamp.1985), the trial court must inform the defendant of the nature of the charge to which he is pleading, the minimum and maximum penalties for the offense, his right to plead not guilty, and his waiver of any further trial after the guilty plea is accepted. Historically, the waiver of jury instructions has not been held to the same standard as the entry of a guilty plea. *Compare State v. Garcia,* 46 N.M. at 307, 128 P.2d at 462 (acquiescence to instructions by failure to object to those given or to tender others) *with State v. Robbins,* 77 N.M. 644, 648–49, 427 P.2d 10, 12–13, *cert. denied,* 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967) (guilty plea must be voluntarily made after proper advice from competent counsel and with a full understanding of the consequences; decided prior to promulgation of Rule 21(e)).

■ We do not believe that it is necessary to subject the defendant's decision to waive lesser included offense instructions to the formulaic inquiry required under Rule 21(e) for all pleas of guilty. Because the decision to plead guilty is not only a tactical choice but amounts to an admission of every element of the offense pled, it is distinguishable from the often tactical decision not to submit to the jury a lesser included offense instruction. *See Henderson v. Morgan,* 426 U.S. 637, 644–47 & n. 13, 96 S.Ct. 2253, 2257–59 & n. 13, 49 L.Ed.2d 108 (1976). Furthermore, because defendant here was represented by counsel throughout trial and chose to act against the advice of his counsel, we may assume that he knew of his right to a second degree murder instruction and of the possible consequences of his waiver. *Cf. State v. Tipton,* 78 N.M. at 602, 435 P.2d at 432 (guilty plea; decided prior to promulgation of Rule 21(e)); *State v. Garcia,* 47 N.M. 319, 328, 142 P.2d 552, 557 (1943) (waiver of right to assistance of counsel and plea of guilty).

In summary, we hold that the defendant's right to a jury instruction on second degree murder as a lesser included offense of first degree murder, warranted by the evidence, may be waived. Defendant here failed to object to the instructions given or to tender instructions on second degree murder but in fact knowingly, intelligently, and voluntarily waived his right to the lesser included offense instruction. Under these circumstances, defendant is bound by his decision, contrary to the advice of counsel, to gamble on a verdict of acquittal, and the district court did not commit reversible error by instructing the jury as defendant desired.

II. Admission into Evidence of Photographs.

At trial the State, through an investigating police officer, offered into evidence one sketch of the scene of the killing and six photographs: two of the body at the scene; one showing the victim's bruised upper arm, a bullet wound in his temple and neck wounds; one showing the full neck wounds; a left side close-up of neck wounds; and a right side close-up of neck wounds. Defendant objected only to admission of the photograph showing the full neck wounds and the close-up photograph of the left side of the neck. The district court ruled that it would admit one of the two challenged photographs, and the State selected the close-up view.

On appeal, defendant asks this Court to find that the district court committed reversible error in admitting the close-up photograph of the left side of the neck, arguing that the photograph was neither probative nor material to the issues at the trial, was merely cumulative of other photographs and testimony, and was introduced solely to inflame the passions and prejudices of the jury. The trial court may not admit evidence that is not relevant, NMSA 1978, Evid.R. 402 (Repl.Pamp.1983), but may, within its sound discretion, exclude reasonably relevant evidence on the ground that its probative value is substantially outweighed by the dangers of unfair prejudice or needless presentation of cumulative evidence, NMSA 1978, Evid.R. 403 (Repl.Pamp.1983). *See also State v. Hutchinson,* 99 N.M. 616, 624–25, 661 P.2d 1315, 1323–24 (1983); *State v. Webb,* 81 N.M. 508, 510, 469 P.2d 153, 155 (Ct.App. 1970). The trial court ought to exclude photographs which are calculated to arouse the prejudices and passions of the jury and which are not reasonably relevant to the issues of the case. *State v. Upton,* 60 N.M. 205, 209, 290 P.2d 440, 442 (1955).

Although the fact that defendant administered the knife wounds to the victim's neck was not at issue in this case, his intent was. Defendant claimed that he acted unwillingly, at gunpoint, without the intention of causing death; the State argued that he willfully attempted to kill the victim but was frustrated by a dull knife. The close-up photograph of the left side of the neck was relevant to a contested issue. *See* Evid.R. 402. Therefore we will not disturb the district court's decision unless it abused its discretion under Evid.Rule 403. *See State v. Hutchinson,* 99 N.M. at 625, 661 P.2d at 1324.

On the record before us, *see State v. Hoxsie,* 101 N.M. 7, 9, 677 P.2d 620, 622 (1984), which includes only the admitted close-up photographs of the left and right sides of the victim's neck and testimony regarding all the photographs, we cannot say as a matter of law that the danger of unfair prejudice arising from the admission of the gruesome left side photograph substantially outweighed its probative value. Nor can we say that the district court abused its discretion by admitting cumulative evidence, for the record before us indicates that both close-up photographs were necessary to depict the full extent of the victim's wounds.

The district court was well aware of the dangers posed by admitting into evidence the photographs and exercised its discretion carefully by compelling the State to choose one of the two proffered relevant photographs which served to illustrate, clarify, and corroborate the testimony of witnesses for the prosecution and the defense. *See State v. Gilbert,* 100 N.M. 392, 399, 671 P.2d 640, 647 (1983), *cert. denied,* 465 U.S. 1073, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984); *see also State v. Brown,* 100 N.M. 726, 729, 676 P.2d 253, 256 (1984); *State v. Hutchinson,* 99 N.M. at 624–25, 661 P.2d at 1323–24. Under these circumstances, we hold that the district court did not abuse its discretion by admitting into evidence the challenged close-up photograph of the left side of the victim's neck.

III. Admission into Evidence of Taped Confession and Transcript.

At trial, the state produced a tape recording of defendant's confession to the police made in custody shortly after the killing, along with an erroneous transcript of the taped statement. Without objection by defendant, the district court admitted both into evidence. When defendant took the stand, he testified to several misstatements in the transcript and stated as well that he had been coerced at gunpoint to cut the victim's throat. On cross examination, the prosecution pointed out that there was no mention of coercion in the taped statement; defendant replied that two tape recorders were in use during the interrogation and that one was running when he spoke about the gun. After a recess, the prosecution offered into evidence a second tape recording which, it claimed, was the duplicate original simultaneously recorded on the second machine. This tape recording,

which like the first contained no mention of defendant's acting at gunpoint, was admitted into evidence without objection by the defendant.

On appeal, defendant argues that the State knowingly used false evidence and therefore denied him his rights to due process and fair trial. We do not agree. During closing arguments, the State conceded that the transcript of the first tape was erroneous, and the district court, counsel for the prosecution, and defense counsel urged the jury to rely upon the tapes over the transcript as evidence. Although the knowing use of false evidence or the failure to correct false evidence constitutes a violation of due process if the evidence is material to the guilt or innocence of the accused, *see State v. Morris,* 69 N.M. 244, 246, 365 P.2d 668, 669 (1961); *State v. Hogervorst,* 87 N.M. 458, 459, 535 P.2d 1084, 1085 (Ct.App.), *cert. denied,* 87 N.M. 457, 535 P.2d 1083 (1975), *cert. denied,* 423 U.S. 1048, 96 S.Ct. 773, 46 L.Ed.2d 636 (1976), any misleading statements in the transcript here were corrected adequately by testimony, argument, and admonitions to the jury, *see State v. Chouinard,* 96 N.M. 658, 660, 634 P.2d 680, 682 (1981), *cert. denied,* 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1982).

On appeal, defendant renews his closing argument contention that the second tape recording was not a duplicate original but was merely a copy of the first. He further suggests that the State throughout trial withheld the real duplicate original which, he alleges, contains exculpatory evidence of coercion. Because the State deprived him of evidence, defendant argues, he was denied his rights to due process of law and a fair trial. We do not agree.

We have adopted a three-pronged test to determine whether deprivation of evidence constitutes reversible error. In order to prevail on appeal, the defendant must establish (1) that the State either breached some duty or intentionally deprived the defendant of evidence; (2) that the improperly "suppressed" evidence was material; and (3) that its suppression prejudiced the defendant. *State v. Chouinard,* 96 N.M. at 661, 634 P.2d at 683; *State v. Lovato,* 94 N.M. 780, 782, 617 P.2d 169, 171 (Ct.App.1980).

We need not consider whether defendant has established the first and third elements of the test, because it is clear to us that he has failed to establish the second element, materiality. Because duress is no defense to homicide, *Esquibel v. State,* 91 N.M. 498, 501, 576 P.2d 1129, 1132 (1978), defendant's testimony that he was being threatened at gunpoint when he cut the victim's throat, and that he told his interrogators so, is not material to his guilt or innocence; nor is the corroborating evidence defendant claims the alleged duplicate original tape contains. The alleged tape recording would have been relevant only to support defendant's credibility generally and to attack the credibility of the two investigators who offered into evidence tapes described as originals and who denied recollection of defendant's coercion claim. After considering the alleged omission of evidence in the context of the entire record, we hold that defendant was not denied his constitutional rights to due process and a fair trial. *See State v. Johnson,* 99 N.M. 682, 686, 662 P.2d 1349, 1353 (1983).

In conclusion, we hold that the defendant in a first degree murder case may waive his right to jury instructions on lesser included offenses and that defendant here waived his right to a second degree murder instruction when he knowingly, intelligently, and voluntarily opted not to tender such an instruction nor to object to the instructions given by the district court. We hold that the district court did not abuse its discretion in admitting into evidence a close-up photograph of the left side of the victim's lacerated neck in addition to various other photographs. We hold that the district court did not abuse its discretion in admitting into evidence an imperfect transcript of defendant's taped confession nor in admitting into evidence the two tape recordings offered by the State.

Because we believe that neither the instructions nor the evidence submitted to the jury denied defendant his constitutional rights to due process and a fair trial, his conviction of first degree murder is affirmed.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and WALTERS, J., concur.

731 P.2d 951

In the Matter of Sonia K. ROTH an Attorney Admitted to Practice before the Courts of the State of New Mexico.

No. 16772.

Supreme Court of New Mexico.

Jan. 26, 1987.

Virginia Ferrara, Chief Disciplinary Counsel, Albuquerque, for Board.

Sonia K. Roth, Albuquerque, no appearance.

OPINION

PER CURIAM.

This matter is before this Court after disciplinary proceedings conducted pursuant to NMSA 1978, Rules Governing Discipline (Repl.Pamp.1985), wherein attorney Sonia K. Roth was found to have violated the Code of Professional Responsibility, NMSA 1978, Code of Prof.Resp. (Repl. Pamp.1985), by abandoning clients and neglecting legal matters entrusted to her. We adopt the Disciplinary Board's findings and conclusions but find that the Board's recommendation that Roth be allowed to assume inactive status would, under the circumstances, be impractical. We elect instead to adopt the Board's alternative recommendation that she be suspended indefinitely from the practice of law.

A specification of charges was filed against Roth on May 16, 1986, after her apparent failure to complete several cases, to take steps to insure that the interests of her clients were protected upon her withdrawal from their cases, and to promptly refund any unearned portions of fees paid in advance. In addition, the record indicates that Roth was uncooperative with disciplinary counsel. This conduct violates NMSA 1978, Code of Prof.Resp. Rules 1–101(C), 1–102(A)(5), 1–102(A)(6), 2–110(A)(2), 6–101(A)(3), 7–101(A)(1) and 9–102(B)(4).

Roth has shown no interest in these proceedings. She failed to file an answer to the specification of charges against her and did not appear at the hearing scheduled before the Board's hearing committee. The allegations against her were, therefore, deemed to have been admitted. NMSA 1978, Disc.Brd.P.R. 10(c) (Repl. Pamp.1985, as amended.) She also failed to appear at a hearing conducted by a panel of the Disciplinary Board and was not

present before this Court despite having received notice of both hearings.

The only explanation from Roth concerning her conduct is contained in a handwritten letter from her to disciplinary counsel, which is a part of the record before us. In her letter, Roth stated that she was "seriously depressed" and had decided to leave the legal profession and cease practicing law as soon as possible. She did not seek to have these proceedings delayed pursuant to the provisions of NMSA 1978, Rules Governing Discipline, Rule 13(c) (Repl. Pamp.1985).

It is obvious from the record that the hearing committee, the Disciplinary Board and disciplinary counsel were sympathetic toward Roth's apparent inability to appreciate the possible ramifications of her conduct. The hearing committee recommended that Roth be formally reprimanded, although it also found that the continued practice of law by Roth in her present emotional condition would constitute a danger to the public. A panel of the Disciplinary Board subsequently recommended that Roth be permitted to take inactive status (*see* NMSA 1978, Rules Governing Discipline, R. 3(d) (Repl.Pamp.1985)), or, in the alternative, be suspended indefinitely from the practice of law until she is able to demonstrate that her emotional problems have been corrected and that she is once again fit to resume the practice of law.

The committee and the Board found several factors in mitigation of Roth's conduct. She is a relatively inexperienced attorney and has no prior record of disciplinary complaints against her. There is nothing in the record to suggest that Roth was motivated by dishonesty or that any client was injured by her actions. Although not supported by competent testimony, the finding that Roth is apparently suffering from a depressive disorder is not disputed. We are also troubled by the implication that Roth may have been emotionally incapable of dealing with the pressures and demands of the practice of law and, if such is the case, sympathize with her inability to extricate herself in a more professional manner from a situation she found overwhelming.

On the other hand, we are cognizant of our obligation to the public. An attorney is a professional and may not capriciously meander in and out of the practice of law according to whatever whim seems most attractive at the moment. A person entrusting a legal matter to a lawyer licensed by this Court is entitled to have confidence that his or her attorney will handle the matter in a prompt and competent fashion. While the purpose of attorney discipline is not to punish the attorney, and while suspension may be viewed as somewhat harsh under the circumstances of this case, we see no other way of insuring that Roth will not resume the practice of law unless and until she is capable of doing so in a manner consistent with her obligations as a member of the bar of this state. To adequately insure that Roth's readmission to practice occurs only upon an appropriate demonstration of fitness, a reinstatement hearing will be essential. *See* NMSA 1978, Rules Governing Discipline, Rule 17-204 (Recomp.1986). There is no absolute requirement that such a hearing be held where an attorney on inactive status wishes to resume practice.

We also note that Roth's license to practice law is presently under suspension due to her failure to pay required fees and dues to the State Bar of New Mexico in 1986 and that she would need to be an attorney in good standing in order to seek inactive status. Given Roth's lack of interest in the instant case, we have no reason to believe that she would undertake the necessary steps to accomplish this.

IT IS THEREFORE ORDERED that Sonia K. Roth be, and she hereby is, suspended indefinitely from the practice of law pursuant to NMSA 1978, Rules Governing Discipline, Rule 11(a)(3) (Repl.Pamp.1985). Her readmission to the practice of law will be conditioned upon a showing that the emotional problems to which she admitted in letters to disciplinary counsel have been sufficiently overcome to permit her to engage in the active practice of law without

endangering the public, the reputation of the profession, or the administration of justice, and that she has paid the costs of this proceeding.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court strike the name of Sonia K. Roth from the roll of those persons permitted to practice law in New Mexico and that this Opinion be published in the State Bar of New Mexico *News and Views* and in the *New Mexico Reports.*

Costs of this action in the amount of $145.00 are assessed against Roth and must be paid to the Disciplinary Board prior to any application for reinstatement.

IT IS SO ORDERED.

RANSOM, J., not participating.

731 P.2d 953

In the Matter of Rogan THOMPSON an Attorney Admitted to Practice Before the Courts of the State of New Mexico.

No. 16775.

Supreme Court of New Mexico.

Jan. 26, 1987.

Virginia Ferrara, Chief Disciplinary Counsel, Albuquerque, for Board.

Shannon Robinson, Albuquerque, for respondent.

OPINION

PER CURIAM.

This matter is before the Court after disciplinary proceedings wherein attorney Rogan Thompson agreed not to contest allegations that he had engaged in various acts of misconduct. On condition that Thompson receive as a sanction an indefinite period of suspension of not less than five years, the Court adopts the recommendations of the Disciplinary Board and accepts the stipulations agreed to by Thompson and disciplinary counsel.

The uncontested facts concern business transactions wherein Thompson was entrusted with large sums of money by several individuals.

In one transaction, Thompson agreed in April 1985 to act as an escrow agent for John and Barbara Stromberg in connection with their building a home in Thompson's neighborhood. Under the terms of this agreement with Strombergs, Thompson was co-signor on an account wherein Strombergs deposited one hundred thousand five hundred dollars ($100,500.00), to be paid to the contractor, an acquaintance of Thompson.

Everything apparently proceeded according to the agreement until November 1985, when Strombergs complained to the Disciplinary Board that Thompson could not be located and that they were unable to withdraw funds to complete payments to the contractor. Additionally, some of the checks previously issued had been made payable to both Thompson and the contractor, and Strombergs desired some accounting of how this money had been spent.

During the course of the investigation into this complaint, the Disciplinary Board learned that shortly after having entered into the agreement with Strombergs, Thompson negotiated a personal loan from Moncor Bank and pledged the money in Strombergs' account as collateral for the loan. He never advised Strombergs of his actions or requested their permission to use their account in this manner. On January 6, 1986, Thompson's note became due at Moncor, and the money remaining in the Stromberg account was applied to this debt. Strombergs learned of this only when they received their monthly statement on January 13, 1986, and they quickly demanded immediate repayment from Thompson. Thompson promptly reimbursed the account and subsequently accounted for all monies previously paid to him and the contractor.

Thompson acknowledges that surreptitiously pledging Strombergs' funds as collateral for his personal loan and his general course of conduct in this matter violated NMSA 1978, Code of Prof.Resp.Rules 1-102(A)(4) and 1-102(A)(6) (Repl.Pamp.1985). That these actions occurred outside the realm of Thompson's practice of law is of no consequence. The public has a right to expect that attorneys licensed by this Court can be trusted to deal honestly at all times.

A second instance of misconduct by Thompson occurred when a former client, Cedric P. Drake, was killed in an airplane crash. Drake's widow Roberta sought Thompson's advice concerning how to invest the proceeds of a life insurance policy to provide maximum protection for her and her children. Thompson suggested she give the money to him to invest on her behalf. Relying on Thompson's expertise as a lawyer and trusting his integrity, Mrs. Drake gave him nearly one hundred eleven thousand dollars ($111,000) to invest.

Thereafter, despite repeated requests from Mrs. Drake, Thompson provided no accounting to her of the money in his possession. He issued several promissory notes to her and delivered to her a mortgage for the purpose of securing the notes. Only when she retained an attorney and filed suit against him, however, did Thompson return the money. At least part of Mrs. Drake's money was invested by Thompson in a corporation in which he had an ownership interest, although he never disclosed this fact to Mrs. Drake. This conduct violates NMSA 1978, Code of Prof. Resp.Rules 1-102(A)(4), 1-102(A)(6), 5-104(A), 7-101(A)(3), 9-102(A), 9-102(B)(3) and 9-102(B)(4) (Repl.Pamp.1985).

Ordinarily, when an attorney engages in intentional conduct involving dishonesty, he or she is disbarred. *Matter of Duffy*, 102 N.M. 524, 697 P.2d 943 (1985); *Matter of Ayala*, 102 N.M. 214, 693 P.2d 580 (1984). This is true even where restitution has been made to persons injured by the lawyer's misconduct. *Matter of Stewart*, 104 N.M. 337, 721 P.2d 405 (1986). In the instant case, however, it is unclear whether Thompson's actions were intentional acts of deceit designed to enrich himself or the result of a careless disregard for his responsibilities as a fiduciary. Apparently the hearing committee and the Disciplinary Board gave Thompson the benefit of the doubt in view of his having made full restitution to all concerned and in view of his cooperation in acknowledging his misconduct and agreeing to accept the consequences of his actions. We also note that the recommended period of suspension is for a period of at least five years. We accept the Board's recommendation and approve the stipulation.

IT IS THEREFORE ORDERED that Rogan Thompson be, and hereby is, suspended indefinitely from the practice of law pursuant to NMSA 1978, Rules Governing Discipline, Rule 11(a)(3) (Repl.Pamp.1985).

IT IS FURTHER ORDERED that Thompson may not apply for reinstatement to the practice of law for a period of at least five (5) years from the date of this order. At any reinstatement hearing held at that time, Thompson will have the burden of demonstrating not only that he has the requisite moral qualifications and fitness to resume the practice of law and that his readmission would not be detrimental to the integrity of the bar and the public interest, but also that he has taken and received a passing grade on the Multistate Professional Responsibility Examination.

IT IS FURTHER ORDERED that Thompson file with this Court on or before January 19, 1987, evidence of his compliance with all of the requirements of NMSA 1978, Rules Governing Discipline, Rule 17–212 (Recomp.1986).

IT IS FURTHER ORDERED that the Clerk of the Supreme Court strike the name of Rogan Thompson from the roll of those persons permitted to practice law in New Mexico and that this Opinion be published in the State Bar of New Mexico *News and Views* and in the *New Mexico Reports.*

Costs of these proceedings in the amount of $858.33 are assessed against Thompson and should be paid to the Disciplinary Board on or before March 31, 1987.

IT IS SO ORDERED.

RANSOM, J., not participating.

731 P.2d 955

Debalee WILSON, as Guardian of the Person and Conservator of the Estate of Leroy Lunsford, Plaintiff-Appellee,

v.

Gregory GILLIS, Defendant and Third-Party Plaintiff-Appellant,

and

Bobby GILLIS and Patsy Gillis, Defendants and Third-Party Plaintiffs,

v.

Charles FRANZOY and Annalee Franzoy, his wife, Third-Party Defendants-Appellees.

No. 9420.

Court of Appeals of New Mexico.

Nov. 4, 1986.

Certiorari Denied Jan. 12, 1987.

See 105 N.M. 230, 731 P.2d 373.

Michael W. Lilley, Allred, Lilly & Macias, Las Cruces, for plaintiff-appellee.

Thomas A. Sandenaw, Jr., Manuel I. Arrieta, Weinbrenner, Richards, Paulowski & Sandenaw, P.A., Las Cruces, for defendant and third-party plaintiff-appellant.

Edward E. Triviz, Edward E. Triviz, P.A., Las Cruces, for third-party defendants-appellees.

OPINION

GARCIA, Judge.

This is an interlocutory appeal from an order granting dismissal of the third-party defendants which defendants sought to implead. The issue presented is whether a tortfeasor defendant can force a settling tortfeasor to have his negligence apportioned by a jury as a third-party defendant rather than as a non-party witness.

A personal injury action was brought in the district court for damages sustained in

a motor vehicle accident. The accident occurred when Price Franzoy and his passenger, Leroy Lunsford, proceeding north on a state road, collided with defendant, Gregory Gillis. Lunsford was seriously injured.

Lunsford's guardian filed a complaint against defendants on March 14, 1986. Prior to this date, the trial court, in a separate action, approved a settlement stipulation and release between plaintiff and the Franzoys. Defendants subsequently filed an answer and a third-party complaint, alleging negligence and an agency relationship between plaintiff and third-party defendants, the Franzoys. In each count of the third-party complaint, defendants stated that the presence of third-party defendants was required to grant quick relief and to assure a true determination of the parties' proportionate share of liability under a comparative negligence theory. Third-party defendants filed a motion to dismiss, which was granted, and defendant, Gregory Gillis now appeals from that order.

Under NMSA 1978, Civ.P.R. 14(a) (Repl.Pamp.1980), a defendant may bring in a non-party "who is or may be liable to him for all or part of the plaintiff's claim against him." Here, since the Franzoys settled with plaintiff, their liability is extinguished. Defendant cannot claim a right to contribution or indemnification in light of the abolition of joint and several liability in a comparative negligence action and the lack of any basis for indemnification. Lacking any potential liability, the Franzoys cannot reasonably be expected to participate as parties in the lawsuit. Just as a jury compares the negligence of an unknown tortfeasor in a comparative negligence case, it can compare the Franzoys' negligence without having them participate as a party. *See generally Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct.App.1982); *see St. Sauver v. New Mexico Peterbilt, Inc.*, 101 N.M. 84, 678 P.2d 712 (Ct.App.1984); *Wilson v. Galt*, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct.App.1983).

Defendant relies on *Tipton v. Texaco, Inc.*, 103 N.M. 689, 712 P.2d 1351 (1985), in support of a third-party joinder. His reliance is misplaced. In *Tipton*, the trial court was reversed for dismissing defendants' third-party complaint against the employer of the injured party and two other independent contractors. *None* of the parties dismissed had settled with plaintiff. The supreme court noted that the trial court is required to allow impleader of parties when their presence is required to grant complete relief. Impleading additional defendants to seek affirmative relief, to assure complete disposition, to conserve judicial resources, or to obtain joint tortfeasor contribution has always had a healthy vitality in New Mexico practice. *Id.* at 693, 712 P.2d at 1355. *Tipton* can be distinguished from the instant case on the facts. There is no affirmative relief sought here. There is no potential liability on the part of the Franzoys. *Tipton* is properly limited to cases in which a third-party defendant is potentially liable and, therefore, does not control this case.

In *Tipton*, the supreme court held that a defendant may file a third-party action against other alleged concurrent tortfeasors as a means of raising the *Bartlett* defense. In so doing, the supreme court acknowledged that Rule 14 was not designed for this purpose. *See* Occhialino, *Procedural Ramifications of the Bartlett Decision: Tipton Tiptoes Toward a Solution*, IX The New Mexico Trial Lawyer 37 (April 1986). In our view, the question implicitly raised by this appeal is whether under *Tipton*, defendant must raise the *Bartlett* defense by impleading non-parties who may be liable for all or a portion of plaintiff's claim. The answer to this question is no. In this case, defendant's answer contained a sufficient statement to raise an affirmative defense, and we see no reason why a defendant cannot raise the *Bartlett* defense in the same manner as other affirmative defenses.

The amount of the settlement between plaintiff and the Franzoys is immaterial to defendant's liability. "If the injured person settles and releases one tortfeasor,

the consideration paid would satisfy only that tortfeasor's percentage of fault, even though no jury determination of the amount of his liability exists at the time of settlement." *Wilson v. Galt,* 100 N.M. at 232, 668 P.2d at 1109. "The factfinder would still assess the injured person's total damages and apportion fault among all tortfeasors, *present or absent.*" (Emphasis added). *Id.* at 232, 668 P.2d at 1109.

Defendant's contention that he will be unable to obtain full discovery unless the Franzoys are made parties is meritless. While defendant will not be able to propound requests for production of documents, interrogatories and requests for admission, he can still use available discovery to secure any needed information. He can take the Franzoys' depositions and serve a subpoena duces tecum requiring them to produce any necessary documents at the deposition. NMSA 1978, Civ.P.R. 45(d)(1) (Repl.Pamp.1980). During the deposition, he can request that the Franzoys make admissions and ask any other questions within the scope of discovery rules. To ensure the Franzoys' presence at trial, he can subpoena them as witnesses.

Defendant's claim that juror confusion will result if the Franzoys are not made parties is also without merit. Defendant's argument fails to recognize and credit the significant abilities and talents of jurors to carefully sift through conflicting positions and ascertain the true facts. Juries are frequently asked to compare the negligence of an unknown tortfeasor without resulting confusion. *See Bartlett v. New Mexico Welding Supply, Inc.* Defendant will have every opportunity to explain to the jury the circumstances surrounding the accident, and the jury can reasonably be asked to make an assessment as to percentages of negligence. An entity does not actually have to be present in the courtroom for the jury to comprehend that it must consider and apportion that entity's fault.

Defendant further complains that the jury will be confused because plaintiff is aligning himself with the settling tortfeasor. This would be true regardless of whether the Franzoys were joined or were merely witnesses. Plaintiff will still attempt to have the jury assess a greater percentage of fault on the non-settling defendant. Jury instructions can resolve any potential confusion over the alignment and role of the parties in this case.

Finally, it is imperative that the judiciary encourage settlement when at all possible. If a tortfeasor desires to buy his peace, other tortfeasors should be discouraged from taking advantage of his good faith efforts. *Wilson v. Galt.* A settling tortfeasor ought to enjoy the benefit of his settlement; joinder as a third party, after settlement, eliminates a major benefit of settlement. Defendant further suggests that the Franzoys would incur only nominal expenses in the event of joinder because they would be passive defendants. This argument is unrealistic. Having to pay an attorney to participate in the trial, whether passive or not, will doubtless cost considerable expense. Judicial economy is best served by the dismissal.

If this court requires that a settling tortfeasor continue to participate in the lawsuit, much of the incentive to settle will be removed. In cases where the cost of litigation is an equal or more important consideration than the amount of the liability, a defendant will feel no need to negotiate a settlement. If he has to litigate anyway, a tortfeasor may as well attempt to obtain a determination of no liability. The essence of settlement is that a tortfeasor will pay a sum certain, liability will be extinguished and the accompanying lawsuit and expenses will terminate as far as that tortfeasor is concerned. Deprived of its attractiveness, there would be no incentive to settle controversies and claims; the result would have an adverse impact on the parties and the entire court system.

In sum, *Tipton* is properly limited to cases in which the third-party defendant is potentially liable and, therefore, it is not controlling under the facts of this case. The Franzoys have settled and have no

potential liability to plaintiff, defendant will not incur any prejudice resulting from the dismissal and, as a matter of public policy, settlement should be encouraged. Settlement would be discouraged by forcing settling tortfeasors to become parties.

We granted the application for an interlocutory appeal without considering the possibility that the order was in fact final, *see* NMSA 1978, Civ.App.R. 54(C)(2) (Cum.Supp.1985). It has been the practice of this court to deny an application for interlocutory appeal when the record discloses a judgment or order from which an appeal lies. Under the circumstances of this case, we conclude that the order was interlocutory in nature if not form, since the trial court implicitly ruled that defendant's answer was sufficient to raise the *Bartlett* defense. We note that in *Tipton* the comparable issue was raised after trial as an appeal from a final judgment, although Texaco attempted to appeal the dismissal immediately.

It would not be in the interest of justice now to dismiss the application on the ground that defendant should have pursued a different form of appeal. We have, therefore, treated the appeal as a proper interlocutory appeal.

The trial court is affirmed.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

731 P.2d 959

Jerry DORBIN, Petitioner-Appellee,

v.

Janette B. DORBIN, a/k/a Janet Dorbin, Respondent-Appellant.

No. 8438.

Court of Appeals of New Mexico.

Nov. 12, 1986.

Saul Cohen, Sutin, Thayer & Browne, Santa Fe, for petitioner-appellee.

Randolph B. Felker, Felker & Ish, P.A., Santa Fe, for respondent-appellant.

OPINION

ANNE KASS, District Court Judge.

These parties were married on July 3, 1976. It was a second marriage for both.

It was a rather stormy marriage. They separated for the third and last time and filed for divorce in October 1981.

A trial setting for November 1982 was vacated at husband's request. In December 1983, a stipulated partial decree was entered in which the divorce was granted and the court retained jurisdiction to resolve money issues. The parties also then stipulated to try the case to a special master, Fletcher Catron. Trial was held on December 22, 1983. On April 4, 1984, the special master filed his report, findings of fact and conclusions of law. On December 6, 1984, the special master filed a revised report. On December 19, 1984, wife objected to the special master's report. On March 4, 1985, the Honorable Art Encinias, District Judge, filed a final decree adopting the special master's report, findings of fact and conclusions of law. Notice of appeal was timely filed by wife.

The issues wife raises are:

1. Whether it was error to allow the community to recover both principal paydown and the amount of interest paid during the marriage, which benefited the wife's sole and separate residence. It was error.

2. Whether the court abused its discretion when it denied wife alimony. It did not.

The trial court is reversed as to the first issue and affirmed as to the second issue.

I. It was error to reimburse to the community both $3,000, being the principal paydown, and $24,148, being the amount of interest paid during the marriage which benefited the wife's sole and separate residence.

The parties were married on July 3, 1976. In October 1978, wife purchased a townhouse. The purchase price was $69,000. The cash down payment of $10,000 came from wife's sole and separate money. The balance of $59,000 was financed by way of a real estate contract. Title was taken in wife's name alone, as her sole and separate property, with husband's knowledge and consent. Wife's unrebutted and unchallenged testimony was that she bought the townhouse as an investment. The plan was that when husband received his share of the house sale proceeds from his prior marital residence, wife would sell the townhouse. Wife would contribute her townhouse sale proceeds and husband would contribute his house sale proceeds, and together they would purchase their own marital residence.

Husband received his sale proceeds of $90,000 after the October 1981, separation, and wife received no benefit therefrom.

From the date of marriage until November 1978, the parties lived in a rental property. Their rent payments were $450 monthly. Apparently, in November 1978, they moved into wife's newly-acquired townhouse, where they lived together until sometime shortly before October 1981, when this divorce action was filed. Between the date of separation and the date of trial, it seems wife alone lived in the townhouse and wife alone paid the monthly payments for the townhouse for those twenty-seven months.

The record shows that during the marriage the parties had monies available from the following sources:

Husband's wages as a stockbroker of approximately $25,000 annually; husband's separate trust income of approximately $6,800 annually; wife's alimony of $400 monthly for one year; wife's child support of $350 monthly; and wife's earnings, which are impossible to determine from the record.

During the marriage, the record shows that the parties each kept his/her own bank account into which each deposited his/her own monies. Wife apparently paid for the parties' day-to-day living expenses from her account. Husband contributed monies to wife's account as follows:

1976	$200/mo.	$ 600
1977	$200/mo.	$2,400
1978	$200/mo.	$2,400
1979	?	$3,950
1980	?	$4,440

1981	?	$6,433
1982	—0—	—0—
1983	—0—	—0—

After the townhouse was purchased, wife paid the monthly payment of $438 out of her own account. How the parties paid the $450 monthly payment for the rental property in which they lived before the townhouse was purchased is not specifically revealed in the record. However, given that both parties agreed that until 1979, husband contributed only about $200 monthly toward the community expenses paid by wife from her account, one must assume husband paid that rent, in addition to the $200 per month he paid to wife.

At the time of trial, the value of the townhouse was $100,000. The balance of the real estate contract owed thereon was about $56,000, leaving an equity (without considering costs of sale) of $44,000.

TOWNHOUSE EQUITY

			$	10,000	Wife's cash down payment, plus
Cash Equity	$	**13,000**			
			$	3,000	Principal paydown on R.E. contract (from purchase date to divorce date)
PLUS					
Appreciation Equity	$	**31,000**			
EQUALS					
Total Equity	$	**44,000**			

The special master held that sixty-two months elapsed from the date the townhouse was purchased until date of divorce, thus, at $438 per month, $27,156 community dollars were spent on the townhouse during those sixty-two months. Of the $27,156, $3,000 was principal paydown and $24,156 was interest. The monthly payment did not cover taxes or insurance which were paid separately, the amounts of which are not revealed in the record.

As stated above, during the last twenty-seven months of the sixty-two months during which payments for the townhouse were being paid, the undisputed evidence is that husband contributed nothing towards those twenty-seven payments. The community existed as a matter of law until the divorce decree was entered in December 1983; however, it appears that as a matter of reality, the parties behaved as though there were no longer a marriage or a community as of the date of separation in that husband kept and spent all of his $20,500 1982 wages and all of his $21,000 1983 wages, as well as his $6,800 trust income during each of those years of separation without contributing anything toward wife's living expenses or toward the townhouse payments. Wife, too, kept all of her own 1982 and 1983 wages, the amounts of which are unknown. At the time of trial, she was earning wages of $400 per month; and she was still receiving the child support of $350 per month.

There are two concepts that should be considered here: (1) apportionment; and (2) reimbursement.

Apportionment is the principle courts apply when an asset is acquired during marriage using both separate and community monies. At divorce, the asset is apportioned between separate and community interests in a manner which achieves substantial justice.

New Mexico case law has long recognized the principle of apportionment. In *Laughlin v. Laughlin,* 49 N.M. 20, 155 P.2d 1010 (1944), the court addressed the issue of whether crops grown on farmland, which was separate property, are all separate property as well because the law says

that "rents, issue and profits" of separate property are separate. In *Laughlin,* the court concluded that the act of raising crops required the investment of time, labor, management and skills, and that the portion of the crops attributable to such time, labor, management and skills is community property. Thus, profits and increased values were to be apportioned between separate and community interests.

In *Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976), the court apportioned the equity in husband's sole and separate residence between the parties. The facts were as follows:

(a)	House value at time of trial	$100,000
(b)	The mortgage balance at trial	53,560
(c)	Husband had purchased the land on which the house was built before marriage	14,000
	Equity	$ 32,000

Monies were spent to improve the property during the marriage, and both parties had spent a good deal of time and effort in decorating, designing, furnishing and landscaping the home.

The court decided that half of the $32,440 equity was attributable to natural appreciation, and the other half ($16,220) represented the community's interest. A very similar result occurred in *Hertz v. Hertz,* 99 N.M. 320, 657 P.2d 1169 (1983).

Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981), involved a residence which was the separate property of wife. When the parties married, the structure was a four-hundred-square-foot, two-room, adobe building without electricity or running water. During the parties' twenty-six year marriage, husband used community monies and his own labor to double its size, and to add plumbing and electricity. The wife died, and the husband sought an interest in the residence. Wife's children resisted. The evidence showed that had no improvements been made, the property would have been worth $8,500 at the time the wife died. As improved, it was worth $33,400. Husband had kept few or no records or receipts as to the cost of the improvements. The trial court awarded husband a $2,800 lien on the house, being reimbursement for community monies and labor spent to improve the house. This court affirmed the trial court's decision. The New Mexico Supreme Court reversed, holding that husband was entitled to one-half of the enhanced value, being the difference between the present value of the house with the improvements, and the present value of the house without improvements. The supreme court disallowed "reimbursement" and required "apportionment."

In *Chance v. Kitchell,* 99 N.M. 443, 659 P.2d 895 (1983), the New Mexico Supreme Court reaffirmed the *Portillo v. Shappie* ruling that appreciation must be apportioned between separate and community interests. The court also stated, in *Chance,* that along with a portion of the appreciation, the community was entitled to a lien for mortgage payments made with community money, but only to the extent that the mortgage principal was reduced. That is, the portions of the mortgage payments attributable to interest, insurance or taxes would not be held to benefit the community because interest, insurance and tax payments do not increase the equity value of real estate.

In *Chance v. Kitchell, supra,* the New Mexico Supreme Court cited to *In re Marriage of Moore,* 28 Cal.3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980), in which the facts were startlingly similar to the facts of the case at bar. A piece of real estate was purchased using a separate cash down payment and the community made monthly mortgage payments, reducing the mortgage balance somewhat.

The California Supreme Court apportioned the appreciation equity according to the ratio that the payments on the original purchase price with community funds bear to the payments made with separate funds —i.e., the percentage shares of separate and community funds in the purchase price. It then apportioned the total equity by calculating the separate property share (down payment plus percentage of appreciation equity) and the community property share

(principal paydown plus the balance of the appreciation equity).

Applying the *Moore* formula to the case at bar results in the following apportionment:

APPORTIONMENT OF EQUITY

	(1) **Separate Property Percentage Share of Appreciation Equity** ($31,000)	
	Separate Down Payment	$ 10,000
PLUS	Full Amount of Loan ($59,000) MINUS community reduction of principal balance ($3,000 principal paydown)	$ 56,000
EQUALS	Separate contribution to purchase price	$ 66,000
DIVIDED BY	Purchase Price	$ 69,000
EQUALS	Separate property Percentage Share of Appreciation Equity	**96%** (95.65217)
	(2) **Community Property Percentage Share of Appreciation Equity** ($31,000)	
	Community Reduction of Principal Balance (Principal Paydown)	$ 3,000
DIVIDED BY	Purchase Price	$ 69,000
EQUALS	Community Property Percentage Share of Appreciation Equity	**4%** (4.34782)
	(3) **Separate Property Share of Total Equity** ($44,000)	
	Separate Property Percentage Share of Appreciation Equity	96%
MULTIPLIED BY	Appreciation Equity	$ 31,000
EQUALS		$ 29,760
PLUS	Separate Down Payment	$ 10,000
EQUALS	Separate Property Dollar Share of Total Equity	**$ 39,760**
	(4) **Separate Property Share of Total Equity** ($44,000)	
	Community Property Percentage Share of Appreciation Equity	4%
MULTIPLIED BY	Appreciation Equity	$ 31,000
EQUALS		$ 1,240
PLUS	Principal Paydown	$ 3,000
EQUALS	Community Property Dollar Share of Total Equity	**$ 4,240**

While the *Moore* formula has never been specifically applied in New Mexico, it is an equitable formula. The New Mexico Supreme Court has repeatedly held that there is no one method of apportionment to the exclusion of others. The standard is substantial justice. *See Portillo v. Shappie.* The *Moore* formula is still applied in California. *See In re Marriage of Marsden,* 130 Cal.App.3d 426, 181 Cal.Rptr. 910 (1982); *In re Marriage of Gowdy,* 178 Cal. App.3d 1228, 224 Cal.Rptr. 400 (1986).

The special master erred in awarding the community $27,156, comprised of $3,000 of principal paydown and $24,156 in interest.

Applying the *Moore* formula, the award to wife as her separate property is $39,760 (comprised of her $10,000 down payment and $29,760, the separate property share of appreciation equity) and the award to the community is $4,240 (comprised of the $3,000 principal paydown and $1,240, the community property share of appreciation equity).

The matter should be remanded to determine what the principal paydown was in October 1981 when the parties separated and apply the *Moore* formula using that figure. On December 22, 1983, the error made by the special master was that he

applied the concept of reimbursement rather than that of apportionment.

As stated above, apportionment is a legal concept that is properly applied to an asset acquired by married people "with mixed monies"—that is, partly with community and partly with separate funds.

When community money is spent to the benefit of separate property, without the *acquisition* of an asset, for example, when money is paid for interest, taxes and insurance, neither New Mexico statute nor case law authorizes reimbursement. Similarly, when separate money is spent for the benefit of the community, but no asset is acquired, for example, if separate money is spent for food, clothing, travel, etc., reimbursement is not authorized. It is notable that husband cites no authority, from New Mexico or elsewhere, to support the trial court's reimbursement award. Specific authority to the contrary is found at *Mitchell v. Mitchell,* 104 N.M. 205, 719 P.2d 432 (Ct.App.1986), in which this court affirmed a trial court's refusal to allow reimbursement for husband's separate monies spent to benefit the community because in *Mitchell,* husband could not trace the monies to any particular, existing asset. Specific authority denying reimbursement for separate funds spent to meet community living expenses is found at *See v. See,* 64 Cal.2d 778, 51 Cal.Rptr. 888, 415 P.2d 776 (1966). In *See,* Justice Traynor noted that husbands and wives have a mutual duty to support one another, including the use of separate funds where necessary or appropriate. It is sound policy to allow apportionment of an existing asset acquired with mixed monies (community and separate monies) and to deny reimbursement of monies spent, but not to acquire an asset. To do otherwise would be to invite litigation for accountings between spouses to determine who paid for the least significant thing.

Husband cites to *Hughes v. Hughes,* 101 N.M. 74, 678 P.2d 702 (1984), as support for the trial court's reimbursement of interest. In *Hughes,* the New Mexico Supreme Court approved the trial court's award to wife of half the community funds spent, (1) to make mortgage payments, and (2) to improve husband's separate residence, plus interest on those community monies.

The "interest" which the court awarded was not the interest portion of the mortgage payments. Rather, the court was applying yet another method of apportionment, which method is a four-step formula:

1) The value of the separate asset or the separate portion of an asset at the date of marriage is determined.

2) That pre-marriage value is treated as though it had been a well-secured, long-term investment and such interest as a well-secured, long-term investment would have earned is added to the separate pre-marriage value. The total is the separate property interest.

3) The fair market value of the asset is determined as of the date of divorce.

4) The fair market value of the asset as of the date of divorce is apportioned with the separate property owner taking an interest equal to the value found at step 2 while the community receives the balance of the fair market value.

This method of apportionment was applied by the New Mexico Supreme Court in *Laughlin v. Laughlin,* and in *Katson v. Katson,* 43 N.M. 214, 89 P.2d 524 (1939). The California Supreme Court applied this apportionment method in *Periera v. Periera,* 156 Cal. 1, 103 P. 488 (1909). Simply put, this method of apportionment gives the separate property owner "a fair return on his investment." The method, of course, requires (a) evidence of the asset's value, both at date of marriage and at date of divorce; and (b) evidence of what constitutes a "fair return," or what interest on a long-term, well-secured investment would have been. Since no such evidence was presented in the case at bar, the method could not be considered herein.

II. The trial court did not abuse its discretion in denying wife alimony.

Wife was forty-four years of age at the date of trial. The parties had been married seven years (five years to date of separation). Wife had a GED. During her first marriage, she had not worked out of the home. She was the mother of four. After her first divorce, and during this marriage, she worked as a receptionist, a sales clerk and a real estate salesperson. She does not seem to have been particularly successful at any of these occupations. She suffers from an inner ear disease which results in vertigo and causes nausea. The assets awarded her are meager enough. Clearly, had the trial judge awarded alimony, the award would not have been an abuse of discretion. The standard to determine whether an award or denial of alimony is abuse of discretion is whether the award/denial was beyond all reason, *see Hurley v. Hurley,* 94 N.M. 641, 615 P.2d 256 (1980) and *Michelson v. Michelson,* 86 N.M. 107, 520 P.2d 263 (1974). The trial court's denial of alimony in this case cannot be said to have been an abuse of discretion.

The matter is remanded to the trial court to apply the *Moore* formula, using the October 1981 principal paydown figure. Wife is awarded $2,000 toward her attorney fees on appeal. This award is based largely on the fact that husband urged, both at trial and on appeal, a ruling that is contrary to existing New Mexico case law. *See Chance v. Kitchell.* Husband so urged without citing persuasive authority and without providing a policy argument as to why the *Chance* holding should not control. Counsel should be aware of their responsibilities as officers of the court to advise the court of the existence of case law which is on point, be it supportive or contrary to their client's position. This is not to suggest that counsel ought not challenge existing case law, but in doing so, counsel should alert the court that such a challenge is being presented and why.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

731 P.2d 965

STATE of New Mexico, Plaintiff-Appellee,

v.

Joseph A. MARQUEZ, Dawson Cole, and Lee Slaughter, Defendants-Appellants.

Nos. 9298, 9299 and 9300.

Court of Appeals of New Mexico.

Nov. 25, 1986.

Certiorari Denied Jan. 6, 1987.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Paul G. Bardacke, Atty. Gen., Barbara F. Green, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BIVINS, Judge.

Each of these cases involves the common appellate issue of whether a conviction resulting from a plea of nolo contendere may be used to enhance a sentence of an habitual criminal pursuant to NMSA 1978, Section 31–18–17 (Cum.Supp.1986). On defendants' motion, we consolidated the cases. Defendant Marquez raises an additional issue, pursuant to *State v. Franklin,* 78 N.M. 127, 428 P.2d 982 (1967), regarding improper cross-examination. For the reasons stated in the calendaring notice in Marquez's case, we affirm on that additional issue, and for the reasons which follow, we affirm on the common issue.

The state charged each defendant with being an habitual offender. When the prosecutor offered proof of a prior felony conviction, the respective defendants objected on the basis that the prior conviction was obtained pursuant to a nolo contendere plea and, therefore, barred under NMSA 1978, Evid.Rule 410 (Repl.Pamp.1983). Under Evid.Rule 410, evidence of a plea of nolo contendere is inadmissible in any civil or criminal proceeding against the person who made the plea. The trial court overruled the objections and, in the Marquez case, stated: "The fact that [defendant] pled nolo contendere is not being used against him. The fact that there was a conviction following that plea is being used." We agree with both the ruling and its rationale.

The habitual criminal statute, Section 31–18–17, provides that an individual who has incurred one or more prior felony convictions shall be deemed an habitual offender, and upon a subsequent conviction, the basic sentence shall be increased upon proof of the prior conviction or convictions. It is the conviction, or finding of guilt, which is relevant for enhancement purposes. *See State v. Davis,* 104 N.M. 229, 719 P.2d 807 (1986); *Padilla v. State,* 90 N.M. 664, 568 P.2d 190 (1977); *State v. Larranaga,* 77 N.M. 528, 424 P.2d 804 (1967).

The New Mexico habitual criminal statute does not create a new offense, but merely increases the sentence. *Linam v. Griffin,* 685 F.2d 369 (10th Cir.1982), *cert. denied,* 459 U.S. 211, 103 S.Ct. 1207, 75 L.Ed.2d 447 (1983); *State v. Nelson,* 96 N.M. 654, 634 P.2d 676 (1981). Habitual offender proceedings do not charge a distinct criminal offense; rather, they relate only to the punishment to be imposed for a subsequent felony conviction. *State v. Archunde,* 91 N.M. 682, 579 P.2d 808 (Ct.App. 1978). As stated in Annot., 89 A.L.R.2d 540, 610 (1963):

> [T]he effect of a prior plea of nolo contendere on the status of one convicted for another crime under a statute providing for increased penalties for multiple offenders, [adheres to] the generally accepted rule ... that an individual who has entered a plea of nolo contendere in one proceeding is a multiple offender after a subsequent conviction in another proceeding * * *. *The reason for this holding is that in a prosecution for a second offense the prior conviction is the controlling factor, and not the plea interposed, the conviction of the previous offense being equally conclusive*

whether the plea was guilty, not guilty, or nolo contendere. [Emphasis added.]

A majority of the jurisdictions that have considered this question sanction the use of prior convictions resulting from nolo contendere pleas to enhance a sentence under an habitual criminal statute. *See, e.g., United States v. Skeen,* 126 F.Supp. 24 (N.D.W.Va.1954), *appeal dismissed,* 222 F.2d 423 (4th Cir.1955); *People v. Goodwin,* 197 Colo. 47, 593 P.2d 326 (1979); *Miller v. State,* 162 Ga.App. 730, 292 S.E.2d 102 (1982); *State v. Ondrak,* 212 Neb. 840, 326 N.W.2d 188 (1982); *State v. Staples,* 100 N.H. 283, 124 A.2d 187 (1956); *People v. Daiboch,* 265 N.Y. 125, 191 N.E. 859 (1934); *State v. Teague,* 680 S.W.2d 785 (Tenn.1984); *State v. Moss,* 108 W.Va. 692, 152 S.E. 749 (1930); *Ellsworth v. State,* 258 Wis. 636, 46 N.W.2d 746 (1951); *see also United States v. Brzoticky,* 588 F.2d 773 (10th Cir.1978) (interpreting Colorado law) (prior conviction based on nolo plea used to find violation of statute prohibiting use of firearms after felony conviction); *Smith v. State,* 248 Ga. 828, 286 S.E.2d 709 (1982). *Contra State v. Stone,* 245 N.C. 42, 95 S.E.2d 77 (1956).

Defendants rely on North Carolina case law in *State v. Stone.* The court in *State v. Stone* held that a nolo contendere plea was an insufficient basis to support the allegation of a prior conviction. The *Stone* reasoning, unsupported by citations, is not persuasive herein since, in New Mexico, the conviction is the controlling factor. *See* § 31–18–17.

In New Mexico, a plea of nolo contendere in a criminal proceeding provides the basis for the criminal conviction. NMSA 1978, § 30–1–11 (Repl.Pamp.1984); *see also State v. Apodaca,* 80 N.M. 155, 452 P.2d 489 (Ct.App.1969). Section 30–1–11 provides in part:

> No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt *or a plea of nolo contendere, accepted and recorded in open court;* or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged. [Emphasis added.]

A plea of nolo contendere accepted and recorded in open court is tantamount to an admission of guilt. *State v. Apodaca.*

Defendants point to a quotation from an Idaho case found in *State v. Larranaga,* which specifies that a conviction means the establishment of guilt through a guilty plea or finding or verdict by court or jury. Because *State v. Larranaga* did not involve a nolo contendere plea, the fact that the definition used therein did not include a nolo contendere plea is not persuasive. Moreover, by specific statutory provision, Section 30–1–11 expressly contemplates that a nolo contendere plea provides a proper basis for conviction.

Defendants also argue that *State v. Baca,* 101 N.M. 415, 683 P.2d 970 (Ct.App. 1984), supports their position. *State v. Baca* dealt with the state's burden in establishing proof of a probation violation in order to revoke probation. In *State v. Baca,* this court held that defendant's nolo contendere plea, standing alone, was not adequate proof of violation of defendant's probation. However, our ruling in *State v. Baca* has a narrow application. In *State v. Baca,* the state focused on defendant's plea of no contest, rather than the conviction based on the plea. Had the state sought to revoke defendant's probation based on the conviction, rather than the plea itself, we might have reached a different result.

Relying on *State v. Keith,* 102 N.M. 462, 697 P.2d 145 (Ct.App.1985), defendants contend that in the construction of criminal statutes, doubts are to be resolved in favor of lenity. The provisions of the habitual criminal statute are, nevertheless, mandatory. *State v. Davis; State v. Santillanes,* 98 N.M. 448, 649 P.2d 516 (Ct.App.1982). We ascertain no room for doubt in the construction of Section 31–18–17. The intent of habitual criminal statutes is to provide an increased penalty in order to deter commission of a subsequent offense. *State v. Linam,* 93 N.M. 307, 600 P.2d 253, *cert. denied, Linam v. New Mexico,* 444

U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Fixing penalties is a legislative function. *State v. Crespin,* 96 N.M. 640, 633 P.2d 1238 (Ct.App.1981). In Section 31–18–17, the legislature has provided that a basic sentence is to be increased by a specific amount, according to the number of prior felony convictions.

Adopting the rule followed by the clear majority of other jurisdictions, we hold that a prior conviction resulting from a nolo contendere plea can be used to enhance a sentence under the habitual criminal statute. We affirm defendants' convictions and sentences. Affirmance of Cole's and Marquez's appeals is conditional since those defendants have appealed their underlying convictions which have not been decided.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

731 P.2d 968

Van CHADWICK, Plaintiff-Appellant,

v.

PUBLIC SERVICE COMPANY OF NEW MEXICO, Employer, a self-insurer, Defendant-Appellee.

No. 9193.

Court of Appeals of New Mexico.

Dec. 2, 1986.

Certiorari Denied Jan. 26, 1987.

Jay L. Faurot, P.A., Faurot & Titus, P.A., Farmington, Winston Roberts-Hohl, Santa Fe, for plaintiff-appellant.

Barbara Albin, Keleher & McLeod, P.A., Albuquerque, for defendant-appellee.

OPINION

MINZNER, Judge.

Plaintiff appeals denial of his claim for benefits under the New Mexico Occupational Disease Disablement Law. We affirm.

While employed by Public Service Company of New Mexico (PNM) as a journeyman working mechanical foreman at the San Juan Generating Station, plaintiff developed a rash, diagnosed as contact dermatitis. After he stopped working at the station, the rash lessened and eventually disappeared. Plaintiff sought benefits for total disablement due to an occupational disease as well as benefits for total disability under the Workmen's Compensation Act.

The trial court found that plaintiff's rash was caused by an allergy, but that no one had been able to identify the chemical or substance which caused the allergic reaction. The trial court also found, however, that the allergy was, to a reasonable medical probability, caused by an airborne substance or substances in the atmosphere at the station. The trial court further found that, while plaintiff's condition prevents him from working at that location, he is wholly able to perform the same work elsewhere.

Based on these findings, the trial court concluded that, while plaintiff's allergy is a disease, it is not a compensable occupational disease. The trial court reasoned that the allergy is neither a material and direct result of the particular occupation or work plaintiff performed nor incidental to it; rather, the allergy related only to the place of employment. The trial court dismissed the complaint, awarding costs to PNM. On appeal, plaintiff argues that the trial judge used an incorrect criterion in determining whether his disease is an occupational dis-

ease under the Act, and that there is no statutory authority for PNM recovering its costs.

In the statement of proceedings in his brief, plaintiff states he is also challenging the trial court's findings that he is able to perform the same occupation at another location and that he is not entitled to attorney's fees. Because these issues were not mentioned elsewhere in the brief, we have treated them as abandoned, *see State v. Sandoval,* 88 N.M. 267, 539 P.2d 1029 (Ct.App.1975), and we accept the findings as facts on appeal. *See City of Farmington v. Sandoval,* 90 N.M. 246, 561 P.2d 945 (Ct.App.1977).

WHETHER PLAINTIFF'S ALLERGY IS AN OCCUPATIONAL DISEASE.

An allergy may be an occupational disease. *See Holman v. Oriental Refinery,* 75 N.M. 52, 400 P.2d 471 (1965) (filling station attendant's allergy to gasoline an occupational disease). Whether it is an occupational disease depends upon whether there is a recognizable link between the disease and some distinctive feature of the claimant's job. *Martinez v. University of California,* 93 N.M. 455, 601 P.2d 425 (1979). An allergic reaction may be compensable under the Workmen's Compensation Act rather than as an occupational disease. *See Schober v. Mountain Bell Telephone,* 93 N.M. 337, 600 P.2d 283 (Ct. App.1978).

Plaintiff cites *Marable v. Singer Business Machines,* 92 N.M. 261, 586 P.2d 1090 (Ct.App.1978), to support his argument that, because the allergy was peculiar to the working conditions at the generating station, the trial court should have found that it was an occupational disease. The discussion and rationale underlying the opinion in *Marable* do not constitute binding precedent within the meaning of the state constitution, *see* N.M. Const. art. VI, § 28, because two judges concurred only in the result. *Casias v. Zia Co.,* 94 N.M. 723, 616 P.2d 436 (Ct.App.1980). Nevertheless, we conclude that the opinion contains language that is consistent with NMSA 1978, Section 52–3–33, and a definition that we should adopt. Under that definition, the trial court's conclusions must be affirmed.

The *Marable* opinion followed the reasoning of various New York courts in stating that the disease must result from the occupation, not the workplace.

> Thus an occupational disease is one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a safe place to work, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general.

Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 318–19, 12 N.E.2d 311, 313 (1938). *See also Harman v. Republic Aviation Corp.,* 298 N.Y. 285, 288, 82 N.E.2d 785, 786 (1948) ("[a]n ailment does not become an occupational disease simply because it is contracted on the employer's premises"). Another New York court has said, "we view an occupational disease as an ailment which is the result of a distinctive feature of the kind of work performed by claimant and others similarly employed, not an ailment caused by the peculiar place in which [the] particular claimant happens to work * * *." *Paider v. Park East Movers,* 19 N.Y.2d 373, 380, 280 N.Y.S.2d 140, 144, 227 N.E.2d 40, 43 (1967). We agree.

Adopting the argument that conditions of a particular workplace, unrelated to the claimant's occupation, may give rise to a compensable occupational disease would, in effect, transform the law's protection into health insurance. *See Goldberg v. 954 Marcy Corp.* While the law should be construed liberally in favor of the claimant, its coverage should not be extended beyond the scope of the statute. *See Aranbula v. Banner Min. Co.,* 49 N.M. 253, 161 P.2d 867 (1945).

The trial court found plaintiff's allergy was caused by airborne substances at the generating station. Such a disease is not a distinctive feature of the work of a mechanic, and the risk of such a disease is not a hazard common to a mechanic's job. *Cf. Holman v. Oriental Refinery; Schober v. Mountain Bell Telephone,* 93 N.M. at 338, 600 P.2d at 284 ("[a]n allergic reaction to cigarette smoke is not an occupational disease").

Plaintiff also cites *Schober v. Mountain Bell Telephone,* 96 N.M. 376, 630 P.2d 1231 (Ct.App.1980), in support of his argument that conditions of the workplace may cause an occupational disease. In that case, the claimant collapsed at work due to an allergy to cigarette smoke. This court held that his disability "arose out of his employment" for purposes of NMSA 1978, Section 52–1–9(B). Because the only treatment for his condition was avoidance of tobacco smoke, and since all of the jobs for which claimant was suited by training and background could only be performed in an office, claimant was entitled to worker's compensation benefits for partial disability.

Plaintiff's appellate claim must be distinguished. The only issue on appeal is his entitlement to recovery for an occupational disease.

The finding that plaintiff is able to work as a mechanic at other locations in itself precludes his eligibility under the law. He is not unable to work in the pursuit in which he was engaged. *See Holman v. Oriental Refinery; Vincent v. United Nuclear-Homestake Partners,* 89 N.M. 704, 556 P.2d 1180 (Ct.App.1976). *See also* NMSA 1978, § 52–3–4(A), which was amended while this appeal was pending but the amendment is not effective until July 1, 1987 (*see* 1986 N.M.Laws, ch. 22, § 105).

We hold that plaintiff's allergy is not an occupational disease within the meaning of the Act. *Cf. Bird v. Pennfield Agricultural School District No. 1,* 348 Mich. 663, 83 N.W.2d 595 (1957) (schoolteacher's allergic symptoms from paint used to paint classroom held a compensable occupational disease, where history was of recurrent exposure and recurrent disabling symptoms).

RECOVERY OF COSTS BY PNM.

The trial court awarded PNM costs. Defendant submitted a cost bill that totalled $603.50; the bill listed two expert witness fees for depositions taken from medical experts. Both depositions were used in lieu of trial testimony.

Plaintiff contends that, because an unsuccessful claimant is not responsible for the cost of depositions, the trial court lacked authority to award these items as costs. *See* NMSA 1978, § 52–3–23 (repealed effective May 21, 1986, 1986 N.M. Laws, ch. 22, § 102). Defendant observes that the medical experts in this case were deposed under subpoena, and the trial court may assess against the plaintiff, as costs, fees of expert witnesses who testify for the defense under subpoena. *See* NMSA 1978, Section 52–3–24(B), repealed effective May 21, 1986, 1986 N.M.Laws, ch. 22, § 102. The proposition that a conflict exists between the statute governing depositions and the statute governing costs raises a question of first impression.

We must deal at the outset with defendant's contention that no error was preserved. Plaintiff neither moved for review of the costs assessed, *see* NMSA 1978, Civ.P.Rule 54(e) (Cum.Supp.1985), nor made an objection of record. The record indicates that the trial court awarded costs before, but the clerk assessed costs after, the notice of appeal was filed. Under these circumstances, it is not clear that plaintiff had a sufficient opportunity to raise the issue at trial. For this reason, *see* NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.Rule 308 (Repl.Pamp.1983), and because the statute on which plaintiff relies, *see* Section 52–3–23, contains the phrase "in no event," we reach the merits of this issue.

Costs are a creature of statutes and may not be imposed in the absence of clear legislative authorization. *Reck v. Robert E. McKee General Contractors,*

Inc., 59 N.M. 492, 287 P.2d 61 (1955). In the absence of a statute shifting the incidence of litigation costs, parties must bear the fees and expenses they incur. *See* 3 A. Larson, *Workmen's Compensation Law*, § 83.20 (1983). Some states have lightened this burden for claimants. *See id.* For workers who win, NMSA 1978, Sections 52–1–35(B) (repealed effective May 21, 1986, 1986 N.M.Laws, chapter 22, Section 102) and 52–3–24(B) provide for costs to be awarded, but only under the terms of the statute. Where these statutes apply, the matter of assessing costs lies within the discretion of the trial court. *Archuleta v. Safeway Stores, Inc.*, 104 N.M. 769, 727 P.2d 77 (Ct.App.1986).

For losing claimants, the statutes governing depositions protect against the expense of discovery ordered by the court. NMSA 1978, §§ 52–1–34 (repealed effective May 21, 1986, 1986 N.M.Laws, ch. 22, § 102); 52–3–23. Where the deposition statute applies, there is no discretion in the payment of costs. *Trujillo v. Beaty Electric Co.*, 91 N.M. 533, 577 P.2d 431 (Ct.App. 1978). However, we recently held that a general discovery order, such as was entered in this case, is not sufficient to protect claimants against the expense of discovery. *Soliz v. Bright Star Enterprises*, 104 N.M. 202, 718 P.2d 1350 (Ct.App.1986).

The two witnesses listed in the cost bill were Dr. Willis and Dr. Johnson. With respect to Dr. Johnson, he was deposed by plaintiff under subpoena. The record indicates plaintiff introduced his deposition at trial. Nevertheless, the bill of costs submitted by defendant indicates defendant paid Dr. Johnson's expert witness fee. We need not decide whether this fee is a cost or expense within the meaning of Section 52–3–23. In the absence of a specific order as to Dr. Johnson, Section 52–3–23 provides no authority for shifting his fee as an expert to defendant. *Soliz v. Bright Star Enterprises.*

Dr. Willis was deposed by defendant under subpoena. The notice expressly stated that the deposition would be used in lieu of live testimony. At trial, Dr. Willis's deposition was introduced by defendant. The cost bill lists his fee as an expert at the deposition.

Witness fees for a witness testifying under subpoena may be taxed as costs under Section 52–3–24(B). *See Sedillo v. Levi Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (Ct.App.1982). In *Goolsby v. Pucci Distributing Co.*, 80 N.M. 59, 451 P.2d 308 (Ct.App.1969), this court noted that the trial court may assess against the plaintiff, as costs, the fees of expert witnesses who testify for the defense under subpoena. In that case, the court relied on the predecessor of NMSA 1978, Section 52–1–35(B) (repealed effective May 21, 1986; *see* 1986 N.M.Laws, ch. 22, § 102), which is essentially the same as Section 52–3–24(B), the applicable statute in this occupational disease case. *See Sedillo v. Levi Strauss Corp.* Assuming but not deciding that Dr. Willis's fee is a cost or expense within the meaning of Section 52–3–23, that section does not preclude assessment of this cost against plaintiff, because the deposition was not specifically ordered by the court. *Soliz v. Bright Star Enterprises.*

We hold that under Section 52–3–24(B), the expert witness fees for Dr. Willis and Dr. Johnson were properly assessed. We therefore affirm the trial court's award of costs as within its discretion.

CONCLUSION.

The trial court correctly ruled that plaintiff's allergy was not compensable under the New Mexico Occupational Disablement Law. We also affirm the award of costs. Under these circumstances, the judgment is affirmed in its entirety.

IT IS SO ORDERED.

DONNELLY and ALARID, JJ., concur.

731 P.2d 973

Orlando DURAN, Plaintiff-Appellee,

v.

XEROX CORPORATION, employer, and Employees Insurance Company of Wausau, insurer, Defendants,

and

Vicente B. Jasso, Superintendent of Insurance of the State of New Mexico, and the New Mexico Subsequent Injury Fund, Defendants-Appellants.

and

XEROX CORPORATION, employer, and Employers Insurance Company of Wausau, insurer, Third-Party Plaintiffs-Appellees,

v.

Vicente B. JASSO, Superintendent of Insurance of the State of New Mexico, and the New Mexico Subsequent Injury Fund, Third-Party Defendants-Appellants.

No. 9240.

Court of Appeals of New Mexico.

Dec. 2, 1986.

Certiorari Denied Jan. 26, 1987.

Gregory D. Huffaker, Jr., Poole, Tinnin & Martin, P.C., Albuquerque, for defendants-appellants New Mexico Subsequent Injury Fund and Superintendent of Insurance for the State of New Mexico.

James A. Mungle, James A. Mungle, P.A., Albuquerque, for plaintiff-appellee Orlando Duran.

Mark B. Thompson, III, Douglas R. Vadnais, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, for defendants/third-party plaintiffs-appellees Xerox Corporation and Employers Insurance Corporation of Wausau.

OPINION

MINZNER, Judge.

The Subsequent Injury Fund (Fund) appeals from judgments in favor of the employer and the worker, contending (1) that the worker's complaint against the Fund is barred because the certificate of preexisting physical impairment was executed as well as filed after the subsequent injury on which his complaint is based; (2) that, in any event, both the worker's and the employer's complaints against the Fund were time-barred; and (3) that neither the worker nor the employer may proceed against the Fund because they had entered a court-approved settlement prior to trial. Other issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Doe,* 99 N.M. 456, 659 P.2d 908 (Ct.App. 1983). We affirm.

BACKGROUND.

The worker is forty-eight years old. He was employed as an electronic copier service technician by Xerox Corporation on May 4, 1983, when he suffered a work-related low back injury. He briefly returned to limited duty, but ultimately left work to have back surgery in August 1983. He has not returned to employment of any kind since that time.

He had experienced two prior low back injuries. One occurred in 1974, when he was working for another employer; as a result of that injury, he underwent surgical removal of two discs. He did not return to that job; rather, he obtained work with Xerox two years later. In 1981, he reinjured his low back, and again underwent surgery; Xerox re-employed the worker after he had been released for work.

The worker filed a complaint for worker's compensation against Xerox on April 23, 1984. At a deposition taken in June

1985, there was medical testimony that the worker "is now in the category of the failed back syndrome," "is unable to return to gainful employment of any type," and "has a permanent disability." The same doctor signed the certificate of preexisting physical impairment on December 12, 1985.

The worker filed an amended complaint naming the Fund as an additional defendant on January 11, 1985. The worker and Xerox filed a stipulation of settlement on January 22, 1985. Under the settlement, Xerox paid the worker $35,000 for disability, $6,000 for attorney fees, and $3,000 for medical expenses. The stipulation recited that the parties did not intend to limit any claim they had against the Fund. Xerox then filed a third-party complaint against the Fund.

The district court entered judgment approving the terms of the stipulated settlement and then tried the claims against the Fund. After trial, the court entered judgment in favor of the worker and in favor of Xerox, apportioning liability eighty percent to the Fund and twenty percent to Xerox. It directed that the Fund reimburse Xerox for that portion of Xerox's settlement in excess of the liability allocated to Xerox.

The Fund contends that the trial court erred in failing to dismiss the claims against it, relying on three general claims of error. We address one summarily, then discuss the other two separately. Each claim arises under the Subsequent Injury Act (SIA). *See* NMSA 1978, § 52–2–1. The SIA was amended while this appeal was pending, *see* 1986 N.M.Laws, ch. 22, §§ 45–52 and 102–103, and ch. 57, §§ 1–3; this opinion refers to the SIA as it read prior to amendment.

First, the Fund contends that because the certificate of preexisting physical impairment was not timely, the Fund cannot be held liable. Relying on NMSA 1978, Section 52–2–6(D), the Fund argues that it cannot be liable because the worker's injury occurred prior to the date the certificate was executed. As the Fund acknowledges, however, in *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 650 P.2d 3 (Ct.App. 1982), this court held that Section 52–2–6(D) was inconsistent with Section 52–2–6(A), and construed the former to permit the certificate to be executed and filed after the second injury, as long as the employer had actual knowledge of the worker's preexisting disability.

The Fund asks us to draw a distinction between certificates executed after, as well as filed after, the second injury and certificates executed before, but filed after, the second injury. In view of the fact that the supreme court recently reaffirmed *Vaughn, see Fierro v. Stanley's Hardware,* 104 N.M. 50, 716 P.2d 241 (1986) (*Fierro I*), we are bound by the supreme court's interpretation of *Vaughn.* We believe the distinction the Fund urges is not permitted under that interpretation.

WHETHER THE CLAIMS AGAINST THE FUND ARE TIME-BARRED.

The Fund argues that the claims against it are time-barred, because the worker's amended complaint joining the Fund and Xerox's third-party complaint against the Fund were filed more than a year after the injury. *See* NMSA 1978, § 52–1–31(A); *see also* 1986 N.M.Laws, ch. 22, §§ 8 and 103.

Section 52–1–31(A) states that "if *the workman* fails to file a claim for compensation within the time required by this section, his claim * * * [is] barred." (Emphasis added.) It clearly limits a worker's claim against his or her employer. Our cases have held that this limitation is jurisdictional. *See Armijo v. United States Casualty Co.*, 67 N.M. 470, 357 P.2d 57 (1960).

The Fund cites NMSA 1978, Section 52–2–13 in support of their argument that the limitation also applies to claims against the Fund. Section 52–2–13 provides that "[t]he determination of the rights of an employee * * * under the provisions of this Subsequent Injury Act shall be made in the same manner as in cases arising under the Workmen's Compensation Act * * *." We understand this section to mean at least that procedures involved in claiming benefits under the SIA shall be followed as they

are in workmen's compensation claims; however, this does not mean that every provision that applies to a claim against an employer for workmen's compensation is also applicable to subsequent injury claims. Rather, such a claim requires a comparison of the purposes of the SIA and the provision for which incorporation is urged. *See Fierro v. Stanley's Hardware,* 104 N.M. 411, 722 P.2d 662, 25 SBB 726 (Ct.App. 1986) (*Fierro II*) (construing NMSA 1978, Section 52–2–12 as not incorporating NMSA 1978, Section 52–1–43(D), repealed 1986 N.M.Laws, ch. 22, § 13, into the SIA). In the absence of a clear indication of legislative intent, we have denied similar incorporation arguments. *See Gutierrez v. City of Gallup,* 102 N.M. 647, 699 P.2d 120 (Ct.App.1984) (rejecting the contention that either Section 52–2–12 or NMSA 1978, Section 52–2–13 incorporated NMSA 1978, Section 52–1–56(C), *see* 1986 N.M.Laws, ch. 22, § 103).

The Fund admits that there is no specific period of limitations on an employer's rights against the Fund under the SIA, but urges this court to extend the jurisdictional requirement in Section 52–1–31(A) to claims for reimbursement by the employer against the Fund. Their argument is based on language in Section 52–2–13, which deals with rights of the employee. We are not persuaded that the legislature intended to impose such a condition precedent on the employer's right to recover against the Fund. *Cf. Superintendent of Insurance v. Mountain States Mutual Casualty Co.,* 104 N.M. 605, 725 P.2d 581 (Ct.App.1986) (employer not a "claimant" under NMSA 1978, Section 52–1–54(C), *see* 1986 N.M. Laws, ch. 22, § 103, for whom legislature intended to provide attorney fees).

The legislature has delineated several ways in which the employer may shift some portion of the liability for benefits to the Fund. *See* NMSA 1978, § 52–2–5(A), (B), and (C); *see also* NMSA 1978, § 52–2–11(D), (E), and (F). Under the SIA, the worker may join the Fund in applying for a judicial determination of compensation; the employer, having been sued, may implead the Fund, or the employer, having commenced to pay benefits, may seek declaratory relief.

The legislature has not provided a time bar in describing the employer's right to seek contribution from the Fund after voluntary payments. The Fund's argument, in our judgment, requires that we make a distinction between those situations in which a worker sues his or her employer and the Fund is joined, and the situation in which the employer seeks contribution, although the employer has not been sued. The Fund offers no policy reason for distinguishing these situations.

Further, under our cases, the employer need not raise by answer the issue of whether the worker has complied with the limitation imposed by Section 52–1–31(A). *See Garza v. W.A. Jourdan, Inc.,* 91 N.M. 268, 572 P.2d 1276 (Ct.App.1977). It is not an affirmative defense waived by failure to raise it at an appropriate point. *See id.* Thus, the Fund's argument urges us to incorporate a prerequisite to recovery that is unique to the Workmen's Compensation Act. No policy reason for extending such a principle is obvious.

This court should not add language to statutes that the legislature has seen fit to omit. *State v. Pendley,* 92 N.M. 658, 593 P.2d 755 (Ct.App.1979). Surely it is equally inappropriate to imply jurisdictional limitations. When we consider the other incorporation arguments we have rejected, this one seems indistinguishable. For these reasons, we hold that Xerox did not need to prove its third-party complaint satisfied Section 52–1–31(A).

As to the worker's claim, it would be inconsistent with the overall purpose of workmen's compensation to bar his complaint against the Fund if Xerox is not barred. Public policy demands financial security for the injured worker and his family. Workmen's compensation was enacted to prevent workmen from becoming dependent upon the public welfare. *Wylie Corp. v. Mowrer,* 104 N.M. 751, 726 P.2d 1381 (1986). The Workmen's Compensation Act was adopted for the protection of

the worker, not the employer. *Smith v. Dowell Corp., a Division of Dow Chemical, USA,* 102 N.M. 102, 692 P.2d 27 (1984).

It also does not serve the purposes of a statute of limitations to hold that the worker's claim against the Fund is time-barred. The Fund argues that a one-year statute of limitations is necessary to avoid difficulties in proof. In this case, the worker was required to comply with Section 52–1–31(A), as is every worker whose employer resists the claim. Thus, evidence of the subsequent injury was available and discovery was possible within a reasonable period after the injury.

The Fund's policy arguments actually raise anew the problem posed for the Fund by a certificate executed and filed after the subsequent injury. We are not able to solve those problems by incorporating Section 52–1–31(A) into the SIA. That is the prerogative of the legislature, not this court. Although the SIA contains a number of unfortunate ambiguities, the situation calls for "legislative therapy." *Varos v. Union Oil Co. of California,* 101 N.M. 713, 715, 688 P.2d 31, 33 (Ct.App. 1984). We hold that Section 52–1–31(A) applies only to the worker's claim against his employer or insurance carrier, and not to claims against the Fund by either the worker, the employer, or the insurance carrier.

WHETHER THE WORKER OR EMPLOYER IS BARRED FROM PROCEEDING AGAINST THE FUND BECAUSE OF THEIR SETTLEMENT.

The Fund also contends that the settlement between the employer and the worker bars further proceedings by either against the Fund. The court recently addressed the issue of the worker's right against the Fund. *See Romero v. Cotton Butane Co.,* 105 N.M. 73, 728 P.2d 483 (Ct.App.1986). In that case, the worker had joined his employer and the Fund in his claim. We held that in settling with his employer, the worker did not relinquish the right to continue his claim against the Fund. The agreement in this case is essentially the same; consequently, for the reasons stated in *Romero v. Cotton Butane Co.,* we hold that the trial court did not err in denying the Fund's motion for summary judgment as to the worker.

The Fund also argues that Xerox should not be able to proceed on its claim against the Fund after settling with the worker. We disagree.

The SIA applies when an employee with a permanent physical impairment incurs a subsequent disability as a result of an injury compensable under the Workmen's Compensation Act, which injury results in a permanent disability that is materially and substantially greater than that which would have resulted from the subsequent injury alone. NMSA 1978, § 52–2–9(A). If the SIA is applicable, liability for compensation is apportioned between the employer or its insurance carrier and the Subsequent Injury Fund. *Ballard v. Southwest Potash Corp.,* 80 N.M. 10, 450 P.2d 448 (Ct.App.1969).

Apportioning liability means a judicial determination of the extent of the employer's liability under the Workmen's Compensation Act, and of the amount of compensation due the worker for the combined disability. § 52–2–11(F). "The employer or his insurance carrier * * * *shall be reimbursed by the fund for any payments made in excess of his or its apportioned liability.*" *Id.* (Emphasis added.) The phrase "any payments" broadly covers all payments by the employer in excess of the apportioned liability. The statute does not distinguish the situation in which a sum has been paid pursuant to a lump sum settlement and the situation in which the worker is receiving weekly compensation from the employer. We conclude that the Fund is required to reimburse the employer for all payments made in excess of his apportioned liability.

The SIA in fact provides for settlement between the employer and the worker. *See* NMSA 1978, §§ 52–2–7 and 52–2–11(E). It is the policy of the law to favor compromise and settlement in workmen's compen-

sation cases. *Knippel v. Northern Communications, Inc.*, 97 N.M. 401, 640 P.2d 507 (Ct.App.1982). We believe that permitting an employer to proceed against the Fund after settling with an employee tends to further the purposes of the SIA as well as favoring compromise and settlement.

Prior to passage of the SIA, a worker recovered from his current employer for the full amount of a present, compensable disability, even if much of the total was attributable to a preexisting condition. Thus, an employer might have been liable for a disability that had little connection with the employee's work. *See generally* Note, *Workmen's Compensation in New Mexico: Pre-Existing Conditions and the Subsequent Injury Act,* 7 Nat.Resources J. 632 (Oct.1967). *See, e.g., Reynolds v. Ruidoso Racing Ass'n,* 69 N.M. 248, 365 P.2d 671 (1961) (where there is a direct relationship or causal connection between accidental injury and resulting disability, a worker is entitled to compensation to full extent of disability, even though attributable in part to preexisting condition).

The SIA was designed to encourage employers to hire handicapped persons by equitably adjusting the employer's liability under the Workmen's Compensation Act for injuries to a previously-disabled worker. NMSA 1978, § 52–2–2; *Gutierrez v. City of Gallup.* In an appropriate case, an employer may shift all or part of the liability for a compensable disability to the Fund. The basic thrust of the SIA is to limit an employer's liability to the amount of disability attributable to the second injury. *Romero v. Cotton Butane Co.* The liability of the Fund to a subsequently-injured worker is coexistent with, rather than derivative from, the liability of the employer and its carrier; these liabilities may be addressed separately in settlement. *Id.* By permitting an employer who has settled with a worker to proceed against the Fund, the SIA encourages the employer to pay something initially; subsequent litigation between the employer and the Fund will resolve the issue of primary concern to them.

The supreme court has described the Fund as a custodian or trustee whose main purpose is to insure that the intent of the legislation is implemented. *Fierro I.* We believe a reading of the SIA in light of its purposes, together with the policy favoring settlement of claims, supports the result we reach: an employer may proceed against the Fund after settling with an injured worker, unless the settlement permits an inference that the employer waived that right. In this case, the settlement does not permit that inference. Consequently, Xerox's settlement with the worker did not extinguish the employer's right to apportionment. *Cf. Romero v. Cotton Butane Co.* (each judgment barred further action by the employer and its insurance carrier against the Fund).

The Fund argues that a court is unable to make a true apportionment between the employer and the Fund after a settlement has been reached between the employer and the worker. We disagree. Liability of the Fund is limited to its apportioned liability. *See* NMSA 1978, § 52–2–11. Approval of a prior settlement between the worker and an employer should not result in a total payment by the Fund of amounts in excess of its apportioned liability.

CONCLUSION.

The trial court is affirmed. The worker is awarded $2,500.00 appellate attorney fees to be paid by the Fund. No attorney fees are awarded to Xerox. *See Superintendent of Insurance v. Mountain States Mutual Casualty Co.*

IT IS SO ORDERED.

DONNELLY and GARCIA, JJ., concur.

731 P.2d 979

STATE of New Mexico,
Plaintiff-Appellee,

v.

James I. WEISS, D.D.S.,
Defendant-Appellant.

No. 9496.

Court of Appeals of New Mexico.

Dec. 16, 1986.

Certiorari Denied Jan. 26, 1987.

James K. Gilman, Gilman, Maguire & Martinez, Albuquerque, for defendant-appellant.

Paul G. Bardacke, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BIVINS, Judge.

Defendant applied for an interlocutory appeal from an order denying his motion to quash an eighty-three-count indictment returned by the grand jury on August 8, 1986. We granted the appeal to review the question of whether the grand jury, in conducting its hearing beyond the usual business hours of the court, violated NMSA 1978, Section 31-6-4(A) (Repl.Pamp.1984), thereby requiring dismissal of the indictment. We hold it did not under the circumstances of this case, and affirm.

Dr. James I. Weiss, the target of the grand jury, is an Albuquerque dentist. He was accused by the grand jury of seventy-five counts of making or permitting a false claim for reimbursement for public assistance services, four counts of fraud, three counts of battery and one count of racketeering.

Judge Rebecca Sitterly convened the grand jury at 8:30 a.m. on August 7, 1986. It began considering allegations against Weiss at approximately 2:30 p.m. and returned a true bill at 2:12 a.m. on August 8, 1986.

In opening remarks to the grand jury, the district attorney noted that witness testimony would require a minimum of four hours exclusive of Weiss' testimony. The district attorney reminded the grand jury that this matter need not be indicted at one session, if that were the result, but the decision would be left to the grand jury. At 5:00 p.m., Judge Sitterly went home and was thereafter unavailable because she left on vacation.

At 9:45 p.m., Weiss' counsel protested the late hour of the grand jury's proceedings. He argued that the late proceedings contradicted Section 31-6-4(A) because court business hours had long since ended. Upon advice from the district attorney, defense counsel contacted Judge Rozier Sanchez for a ruling on the matter. Judge Sanchez declined to rule at that time but stated that if a true bill were returned, he would entertain motions in the morning regarding the grand jury's conduct. The foreman of the grand jury contacted District Attorney Steven Schiff and Judge Sanchez at home sometime between 10:30 p.m. and 11:00 p.m. Judge Sanchez told the foreman that the grand jury has the power to decide whether to proceed with its hearing or reconvene at another time. Mr. Schiff agreed with Judge Sanchez and advised the foreman to allow Weiss' counsel to read his objections into the record.

The foreman advised all counsel that the grand jury had considered a continuance three times during the course of the hearing. He stated the grand jurors' position as follows: (1) they unanimously decided not to recess until they returned a no bill or true bill; (2) they believed they could render a proper and fair decision; (3) they realized that if they continued the hearing to a later date, it would be three to four weeks before the required same twelve jurors could reconvene; and (4) the case was too complex to recall testimony and documents at a later date. The grand jury also unanimously decided that it was still within the "usual business day" from the time it convened; that the foreman had the power and authority to convene the grand jury during the regular hours of the court, which he had done; that the foreman had contacted Judge Sanchez for guidance; and, citing NMSA 1978, UJI Crim. 60.00 (Repl.Pamp.1982), that the grand jury was "subject to no other supervision or control from any person, office or body."

Weiss testified from approximately 11:30 p.m. until approximately 1:45 a.m. on August 8, 1986. The grand jury returned a true bill against him at 2:12 a.m. Weiss argues that the extended grand jury session substantially violated his rights, contrary to Section 31-6-4(A).

Section 31-6-4(A) reads in pertinent part: "A grand jury *shall conduct its hearing* during the *usual business hours* of the court *which convened it.*" (Emphasis added.) UJI Crim. 60.00 reads in pertinent part: "*The foreman* of the grand jury *shall convene* the grand jury *during the*

regular hours of this court." (Emphasis added.)

Although the language of Section 31–6–4(A) requires the grand jury to conduct its hearing during the usual business hours of the court, a distinction must be made between the business hours of the judge who convenes the grand jury and the business hours of the court. Because a particular judge is unavailable after 5:00 p.m. does not make access to the court impossible. Judges frequently extend the usual hours of the court to accommodate deliberating juries, and to sign warrants and special orders requiring immediate intervention by the court. Although the circumstances here prevented the grand jury from contacting Judge Sitterly, it had access to Judge Sanchez.

UJI Crim. 60.00 also provides that the court will be available to offer guidance and assistance. Although Judge Sanchez was at home, he assisted the grand jury foreman by telephone. Judge Sanchez did, however, find that UJI Crim. 60.00 conflicted with Section 31–6–4(A).

We need not reach the question of whether particular portions of Section 31–6–4(A) and UJI Crim. 60.00 conflict. Our inquiry focuses on whether the supposed conflict resulted in prejudice to Weiss. Directions in a statute which are not the essence of things to be done are not commonly considered mandatory, particularly where failure to comply does not result in prejudice. *State v. Lindwood,* 79 N.M. 439, 444 P.2d 766 (Ct.App.1968).

Weiss argues that he was denied due process when the grand jury remained in session beyond the usual hours of the court. He claims that while two minutes may not result in a substantial violation, eight hours does. Weiss claims that because a substantial violation of his procedural due process rights occurred, he need not show prejudice. We disagree and conclude that the extended session of the grand jury was not a substantial violation of Weiss' rights and that he must show actual prejudice in order to dismiss the indictment.

Violation of a substantial right guaranteed by the Bill of Rights occurs in such instances as the presence of an unauthorized person in the grand jury room. *Davis v. Traub,* 90 N.M. 498, 565 P.2d 1015 (1977). Such an unauthorized presence requires dismissal of the indictment without the necessity of showing prejudice. *Id.* Thus, the court in *Davis v. Traub* established a per se prejudice rule, which has not been extended beyond the facts of that case. Although Weiss does not contend directly that the per se prejudice rule applies to him, he argues for a proper balance in the "substantial right/mere technicality dichotomy." The gist of his argument suggests that we presume prejudice for substantial violations of rights.

Once we decline to find a substantive violation of rights, the target of a grand jury investigation must show that he was prejudiced by procedural violations of the statute before the indictment against him will be dismissed. *See State v. Martinez,* 97 N.M. 585, 642 P.2d 188 (Ct.App. 1982). The extended grand jury session falls more within the technical requirements and formalities discussed in *State v. Bigler,* 98 N.M. 732, 652 P.2d 754 (Ct.App. 1982). In *State v. Bigler,* this court considered whether to apply the per se prejudice rule to a sixty-five-second gap in the recording of a grand jury proceeding. We determined that per se prejudice did not apply because no violation of a substantial right occurred. Instead, we required a finding of actual prejudice to justify dismissing the indictment. That rule has not changed. Actual prejudice is still the appropriate standard in considering whether a target's constitutional rights before the grand jury have been denied. *State v. Martinez.* If a party shows actual prejudice, then the technical violation rises to the level of a violation of due process, justifying dismissal of the indictment. *Id.; State v. Bigler.*

Here, Weiss failed to show prejudice. In fact, he erroneously contends that no such

showing should be required. We disagree. *See State v. Penner*, 100 N.M. 377, 671 P.2d 38 (Ct.App.1983). While we do not encourage eighteen-hour meetings by a grand jury, we find that the length of the meeting in this case did not deprive defendant of due process of law. Because of the number of counts required to be considered by the grand jury and the complexity of the charges, we find no error in the actions of the grand jury. Absent a showing of prejudice, we hold that the trial court properly denied Weiss' motion to quash the indictment.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

731 P.2d 982

STATE of New Mexico, Plaintiff-Appellant,

v.

Jimmie R. HICKS, Defendant-Appellee.

No. 9449.

Court of Appeals of New Mexico.

Dec. 18, 1986.

Certiorari Denied Jan. 26, 1987.

Paul G. Bardacke, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

GARCIA, Judge.

This appeal by the state concerns the power of district courts to dismiss criminal charges because of a delay in the filing of a criminal complaint. We discuss: (1) whether the district court erred in denying the state a de novo review on appeal from metropolitan court; (2) the considerations that should apply to motions to dismiss for unnecessary delay; and (3) whether the state's motion to amend the docketing statement was untimely.

The relevant facts are undisputed. Defendant was arrested for driving while intoxicated at approximately 10:30 p.m. on Saturday, September 21, 1985. He was

released the following day after posting bail of $100. However, it was not until eight days later, on October 1st, that a criminal complaint was filed. Defendant moved to dismiss the charge on the ground that a criminal complaint was not filed "forthwith" as required by NMSA 1978, Metro.Rule 38(d) (Repl.1985). Rule 38(d) states:

> When a law enforcement officer makes an arrest without warrant he shall take the arrested person to the nearest available metropolitan court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the law enforcement officer and a copy given to the defendant forthwith.

Similar requirements are contained in the rules for municipal and magistrate courts. *See* NMSA 1978, Magis.Crim.R. 4(d) (Repl. 1985) and NMSA 1978, Mun.R. 5(e) (Repl. 1985). The metropolitan court found that the complaint was not filed forthwith and dismissed the charge. The district court affirmed the dismissal, finding that dismissal under Metro.Rule 38(d) is discretionary and that the state had failed to demonstrate an abuse of the metropolitan court's discretion.

DISTRICT COURT REVIEW

The state argues that the district court erred in applying an appellate standard of review to affirm the metropolitan court's dismissal of the complaint. The state contends that the district court was instead required to make an independent determination of whether the "forthwith" requirement in Metro.Rule 38(d) was complied with. We agree.

The New Mexico Constitution grants a right of appeal from the final judgments and decisions of inferior courts to the district courts, providing that, "in all such appeals, trial shall be had de novo unless otherwise provided by law." N.M. Const. art. VI, § 27. *See Smith v. Love,* 101 N.M. 355, 683 P.2d 37 (1984); NMSA 1978, Metro.R. 71(b) (Repl.1985). Defendant claims the district court proceeding in this case was not a "trial" in the ordinary sense and, therefore, a de novo proceeding was not required. This argument is not consistent with the meaning of the word "appeal" in the context of art. VI, Section 27.

In the recent case of *State v. Ball,* 104 N.M. 176, 718 P.2d 686 (1986), the supreme court defined the right of appeal in art. VI, Section 27 as the right to have a cause removed from an inferior to a superior court. Although overruling this court's decision on the merits, the supreme court agreed with our analysis in the appendix to *Ball* that art. VI, Section 27 authorizes legislative changes only in the procedural form of the appeal. As noted in this court's decision in *Ball,* 718 P.2d at 698, the legislature *has* provided for appellate review of civil actions in the district court by making the metropolitan court a court of record in civil cases. *See* NMSA 1978, § 34–8A–6(B) and (D) (Repl.Pamp.1981); NMSA 1978, Metro.R. 76 (Repl.1985).

Because criminal actions in metropolitan court are still not of record, the right of appeal in such actions is the right to a trial or hearing de novo in the district court. *See* § 34–8A–6; Metro.R. 71. In de novo proceedings, the district court is not in any way bound by the proceedings in the lower court. *See City of Farmington v. Sandoval,* 90 N.M. 246, 561 P.2d 945 (Ct.App. 1977). Accordingly, in this case it was incumbent upon the district court to make an independent determination of whether the "forthwith" requirement in Metro.Rule 38(d) was complied with. The cause is remanded to the district court for a determination of the issue consistent with the considerations set forth below.

UNNECESSARY DELAY WARRANTING DISMISSAL

The question on remand is whether the nine-day delay between defendant's arrest and the filing of a criminal complaint constituted an unreasonable delay under Metro.Rule 38(d), justifying dismissal of the complaint.

A trial court's inherent power to dismiss cases for want of prosecution is not unfettered. *See United States v. Hudson,* 545 F.2d 724 (10th Cir.1976). Rather, dismissal

must be just and proper under the circumstances. *Cf. State v. Reyes,* 79 N.M. 632, 447 P.2d 512 (1968).

The procedural rule in question here, Metro.Rule 38(d), requires that a person arrested without a warrant be taken before a judicial officer "without unnecessary delay," and that a complaint be filed "forthwith." Prior New Mexico cases have construed the statutory use of the terms "forthwith" and "immediately" to mean "with reasonable promptness and dispatch." *See State v. Slicker,* 79 N.M. 677, 682, 448 P.2d 478, 483 (Ct.App.1968); *State v. Garcia,* 78 N.M. 777, 779, 438 P.2d 521, 523 (Ct.App.1968); *State v. Montgomery,* 28 N.M. 344, 347, 212 P. 341, 342 (1923).

The court in *State v. Montgomery,* ruled that the term "forthwith" is necessarily elastic in meaning and must vary under the circumstances since "[i]t would be absurd to say than an officer must immediately in all cases go directly to the magistrate with his prisoner, regardless of * * * all other circumstances surrounding the transaction." 28 N.M. at 347, 212 P.2d at 341. Other states apply an equally flexible construction to the "forthwith" requirement. *See State v. Garton,* 2 Kan.App.2d 709, 586 P.2d 1386 (1978); *Hinse v. Burns,* 108 N.H. 58, 226 A.2d 865 (1967); *Gottfried v. People,* 158 Colo. 510, 408 P.2d 431 (1965).

When circumstances are such that the accused has been released from custody, or the delay in filing a complaint is not lengthy, courts in other jurisdictions have held that a dismissal of charges or reversal of the conviction is not justified. *See State v. Garton; Gottfried v. People; see also State in Interest of H.M.T.,* 159 N.J.Super. 104, 387 A.2d 368 (1978). We also find persuasive the interpretation given to Fed. Rule Crim.P. 5(a), which contains language identical to Metro.Rule 38(d). Federal courts hold that the purpose of the rule is to obtain an early determination of probable cause, to prevent unlawful detentions and to reduce the opportunity for secret police interrogation. *See United States v. Carignan,* 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951); *United States v. Fernandez-Guzman,* 577 F.2d 1093 (7th Cir.), *cert. denied,* 439 U.S. 954, 99 S.Ct. 351, 58 L.Ed.2d 345 (1978). Where those dangers are not implicated, a procedural violation provides no basis for dismissal. *See United States v. Jernigan,* 582 F.2d 1211 (9th Cir.), *cert. denied,* 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978).

Under the federal rules, dismissal for untimeliness is pursuant to Fed.Rule Crim.P. 48(b). The federal rule embraces the concept of the court's inherent power of dismissal and was cited by our court in *State v. Lopez,* 99 N.M. 385, 658 P.2d 460 (Ct.App), *cert. denied,* 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 113 (1983). Dismissal for delay under Rule 48(b) is discretionary. In exercising its discretion, the trial court may consider the same factors that are relevant in considering the constitutional right to a speedy trial. *See United States v. DeLuna,* 763 F.2d 897 (8th Cir.1985); *United States v. Becker,* 585 F.2d 703 (4th Cir.1978), *cert. denied,* 439 U.S. 1080, 99 S.Ct. 862, 59 L.Ed.2d 50 (1979); *see also* 3A C. Wright, *Federal Practice and Procedure,* Crim.2d § 814 (1982). The factors to be balanced in ruling on a speedy trial claim are: (1) the length of delay; (2) the reason for delay; (3) whether and how defendant asserts the right; and (4) prejudice to defendant. *See State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.), *cert. denied,* 104 N.M. 378, 721 P.2d 1309 (1986).

We agree with the state that the speedy trial factors provide a useful guide to the courts in evaluating untimeliness claims under Metro.Rule 38(d) and the analogous magistrate and municipal court rules, Magis.Crim.Rule 4(d) and Mun.Rule 5(e). On remand, the district court should rule on defendant's motion in light of these factors and the foregoing discussion of applicable law.

DOCKETING STATEMENT

Defendant contends that the state's motion to amend the docketing statement was untimely. Defendant relies on the rule applicable to cases assigned to the summary calendar in which motions to amend must be filed prior to the expiration

of the time for filing a memorandum in opposition. *See State v. Norush,* 97 N.M. 660, 642 P.2d 1119 (Ct.App.), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982). However, the rule in *Norush* does not apply to cases that are reassigned from a summary to a non-summary calendar. In such cases, a motion to amend is considered timely when filed prior to the expiration of the original briefing time. *See State v. Rael,* 100 N.M. 193, 668 P.2d 309 (Ct.App.), *cert. denied,* 100 N.M. 192, 668 P.2d 308 (1983). Under the *Rael* rule, the state's motion to amend was timely.

Defendant also contends that the state did not comply with other requirements in moving to remand. On the facts of this case, we conclude that the state's motion to amend was a motion to clarify its position. Because the issue as clarified was preserved at trial and because the docketing statement can be viewed as unclear rather than incomplete, the principle that favors resolving an appeal on the merits controls. *See Eller v. State,* 90 N.M. 552, 566 P.2d 101 (1977).

CONCLUSION

The judgment of the district court is reversed and remanded for a redetermination of defendant's motion consistent with this opinion.

IT IS SO ORDERED.

MINZNER and FRUMAN, JJ., concur.

[redacted]

731 P.2d 1335

Bob STOVER, Plaintiff-Appellee,

v.

JOURNAL PUBLISHING COMPANY, Albuquerque Publishing Company, and Thompson H. Lang, Defendants-Appellants.

No. 8503.

Court of Appeals of New Mexico.

Dec. 3, 1985.

Certiorari Quashed Jan. 28, 1987.

William S. Dixon, Jill E. Adams, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, Nathaniel H. Akerman, Pryor, Cashman, Sherman & Flynn, New York City, for defendants-appellants.

Turner W. Branch, Nancy L. Simmons, Branch, Eaton, Keenan & Watson, A.J. Ferrara, Joseph P. Paone, Albuquerque, for plaintiff-appellee.

OPINION

BIVINS, Judge.

This appeal presents the question whether a publisher loses the protection of the "fair report privilege" when statements reported fairly and accurately in a newspaper article originate from a witness located by the publisher in litigation involving the publisher. The parties appear to agree that this precise question has not heretofore been decided in New Mexico or by any other jurisdiction. Based on our own research, we agree, at least in terms of applying a self-reported statement exception to a member of the media who is also a party to a lawsuit.

The present action by plaintiff Bob Stover against Journal Publishing Company, Albuquerque Publishing Company, and Thompson H. Lang for defamation grew out of an earlier lawsuit brought by attorney William Marchiondo against one or more of the defendants in this case. As part of the pretrial discovery in the Marchiondo case, the *Journal* located several federally-protected witnesses, one of whom was Jerome Sternlieb, a self-acknowledged former underworld crime participant and a convicted felon. Because federally-protected witnesses are not available for interviews, the trial court ordered the *Journal* to provide Marchiondo with a pre-deposition affidavit of Sternlieb, disclosing the content of his expected testimony.

In the relevant part of his affidavit, Sternlieb recounted a visit he made to Albuquerque accompanied by James Vincent Napoli, Jr., "Lefty." In his affidavit, Sternlieb identified "Lefty" as the son of an underworld crime figure, James Vincent Napoli, Sr. According to Sternlieb:

> 8. On the morning after our arrival Lefty called an individual by the name of Bob Stover whom Lefty described as the Albuquerque Police Chief. Later this individual came to our room, introduced himself, talked briefly, including asking Lefty how Lefty's father was doing, and offered to drive us around Albuquerque in his automobile.
>
> 9. Bob Stover in fact drove us around Albuquerque that day first driving us past a shopping center which he stated was one of the properties in which James Vincent Napoli, Sr. had an interest, together with William C. Marchiondo and Governor Jerry Apodaca. This shopping center was not quite completed at this time. Stover stated that Governor Jerry Apodaca's wife and James Vincent Napoli's wife were going to operate a boutique type store in the shopping center.

On January 12, 1982, the *Journal* filed the Sternlieb affidavit which the trial court ordered sealed. The trial court, however, permitted Marchiondo's lawyer to provide a copy of the affidavit to Stover and to the former governor because their names were mentioned in the affidavit. At the time, Stover was a candidate for sheriff of Bernalillo County, and Apodaca was a candidate for the United States Senate.

Apodaca's attorney called Judge Traub on April 12, 1982 to advise the court that Apodaca intended to call a press conference on April 14, 1982 to release the Sternlieb affidavit and to rebut its contents as applied to him. The trial court scheduled a hearing to decide whether the affidavit should be unsealed. Stover did not attend

the hearing, and it is disputed whether he received notice of the hearing.

The *Journal* filed an unopposed motion to unseal the affidavit. At the hearing, Marchiondo's lawyer, at Stover's request, filed an affidavit by Stover denying the Sternlieb allegations. Prior to the unsealing of the Sternlieb affidavit, Stover was interviewed by KOAT–TV concerning Sternlieb's claims. On that evening, April 13, 1982, KOAT–TV, KOB–TV, and KGGM–TV each carried accounts of the Sternlieb affidavit as well as Stover's rebuttal.

The following day, April 14, 1982, the *Journal* published an article concerning the affidavit and Stover's denials. The article appeared on the front page of the newspaper. Appearing next to the article were the pictures of Stover, Napoli, Sr., Napoli, Jr., and Apodaca. The article recounted the allegations of the affidavit as well as the rebuttal contained in Stover's affidavit.

In his amended complaint for defamation, Stover sought damages on the basis of the filing of the Sternlieb affidavit and also the publication of the April 14th article. Stover contends that the *Journal* published the article with "a high degree of awareness of the [affidavit's] probable falsity." Stover's second cause of action was against defendant Lang. This cause of action primarily concerned Lang's statements, which appeared in the newspaper article.

Defendants moved for summary judgment on the bases that: (1) the filing of the Sternlieb affidavit was absolutely privileged; (2) the newspaper article reporting the affidavit was protected under the fair report privilege; and (3) defendant Lang's statements in the article were not susceptible of a defamatory meaning, were constitutionally protected opinions, and were true. For the purposes of defendants' motion only, the trial court assumed that the Sternlieb statements, as related to Stover, were defamatory and that defendants had "a high awareness of their probable falsity."

Following a hearing, the trial judge, Judge Sitterly, ruled that the affidavit was generated in a judicial proceeding, was reasonably related to that proceeding, and was, therefore, absolutely privileged. The trial court also ruled that the statements of defendant Lang and the placement of the pictures were not susceptible of defamatory meanings. As a result of these holdings, the trial court granted partial summary judgment in favor of all defendants, regarding the filing of the affidavit, the statements of Lang, and the positioning of the pictures in the news article.

The trial court, however, denied summary judgment as to the publication of the April 14, 1982 news article. While ruling, as a matter of law, that the article was fair and accurate, the trial court held that the fair report privilege "does not apply here due to comment (c) of Section 611, Restatement, Torts 2d," which provides in applicable part, "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated."

After skillfully posturing the issues, the trial court certified this question for interlocutory appeal, pursuant to NMSA 1978, Section 39–3–4, as involving a controlling question of law as to which there is substantial ground for the difference of opinion, and that a resolution would materially advance the ultimate termination of this litigation. In fact, the trial court indicated that a definitive decision "will entirely dispose of this case in light of the court's other rulings."

This court agreed to accept defendants' application for interlocutory appeal to consider the question. Having done so, we now hold that even if comment (c) to Section 611 of the Restatement (Second) were adopted, it has no application to the facts of this case. Accordingly, we hold that the *Journal* did not lose the protection of the fair report privilege when it published an article which fairly and accurately reported the statements of a witness whom the *Journal* had located in the course of pre-

paring for litigation in which the *Journal* was a defendant. For a clearer understanding of the question, we first discuss the fair report privilege. We then shall address the specific question raised.

1. The fair report privilege.

The essence of the fair report privilege is that no liability will attach for the republication of the defamatory statements so long as the republication is a fair and accurate report of an official or public proceeding. The Restatement (Second) of Torts § 611 (1977) articulates the privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

New Mexico first recognized the fair report privilege in 1919 in *Henderson v. Dreyfus,* where the supreme court quoted with approval that " '[e]very impartial and accurate report of any proceeding in a public law court is privileged.' " 26 N.M. 541, 566, 191 P. 442, 452 (1919), *quoting from* Newell on Slander and Libel § 646 (3d ed.). *See also Del Rico Co. v. New Mexican, Inc.,* 56 N.M. 538, 246 P.2d 206 (1952), *overruled on other grounds, Marchiondo v. Brown,* 98 N.M. 394, 404, 649 P.2d 462, 472 (1982); *Rockafellow v. New Mexico State Tribune Co.,* 74 N.M. 652, 397 P.2d 303 (1964); *Hubbard v. Journal Publishing Co.,* 69 N.M. 473, 368 P.2d 147 (1962).

Three reasons have been advanced for subordinating the defamed person's interest in his reputation to the interests of the public. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report,* 54 N.Y.U. L.Rev. 469, 483 (1979). The first is the agency theory. The rationale of the agency theory is that the reporter serves as the agent of the citizen who was absent at the public proceeding. The New Mexico Supreme Court recognized this function in *Del Rico Co. v. New Mexican, Inc.,* acknowledging that "[o]nly a small fraction of the population ... would be able to attend meetings of this kind personally. Consequently, it was but natural that they should look to the press for information concerning them." 56 N.M. at 545, 246 P.2d at 211.

The second theory involves the public's supervisory function. This theory embodies recognition of the public's duty to scrutinize official conduct and to determine whether public policies and institutions serve public needs. Sowle, *supra* at 484–86; *see also Hughes v. Washington Daily News Co.,* 193 F.2d 922 (D.D.C.1952).

Finally, the fair report privilege is justified on the basis of its information function. The need of a self-governing society to be apprised fully of public concerns and controversies has been deemed to outweigh an individual's reputational concerns. Sowle, *supra* at 487.

Because the fair report privilege has the public interest as its foundation, the truth or falsity of statements made in the proceedings and reported to the public does not merit inquiry. *Ricci v. Venture Magazine, Inc.,* 574 F.Supp. 1563 (D.Mass. 1983). The fact that statements made in the proceedings were false will not upset the privilege, not even when the reporter knew that the statements were false and reported them anyway. *Id.;* Restatement, *supra,* § 611, comment (a). There is a two-pronged justification for the lack of relevance concerning the truth or falsity of the statements and the reporter's knowledge thereof. First, the public is best served by exposure to the actual content of the official proceedings, regardless of whether all of the statements were true or false. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Even if the reporter knows of the falsity of a statement, he is not restrained from reporting the information. The public has a right to access to a full account of a proceeding, not only to satisfy its informational concerns but to fulfill its supervisory duties. *Bell v. Associated Press,* 584 F.Supp. 128 (D.D.C.1984). Second, to require a reporter to ascertain

the truth or falsity of every statement uttered or published in an official or public proceeding would impose an intolerable burden on the press. *See,* 52 A.L.I. Proc. 186 (1975). If the press faced possible civil liability for every falsity published, coverage would be reduced and, as a result, the public's needs would suffer.

Thus, the fair report privilege protects against liability "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false." Restatement, *supra,* § 611, comment (a).

Abuse of the privilege takes place, however, when the publisher does not give a fair and accurate report of the proceeding. As stated in *Henderson v. Dreyfus:*

> While a person may publish a correct account of the proceedings in a court of justice, yet, if he discolors or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous, and not privileged.

26 N.M. at 566, 191 P. at 452 (citation omitted).

The trial court held as a matter of law that the *Journal's* April 14, 1982 news article fairly and accurately reported the contents of the Sternlieb affidavit, a component of the judicial proceedings in the Marchiondo case. Therefore, unless the privilege is unavailable to defendants, as Stover claims, the privilege applies and insulates defendants from liability. Stover relies on comment (c) to Section 611 of the Restatement (Second) to support his claim. We now turn our attention to the pivotal question.

2. Whether defendants may exercise the privilege.

Comment (c) to Section 611 of the Restatement (Second) provides in pertinent part: "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated." Restatement, *supra,* § 611, comment (c).

The parties sharply disagree as to whether comment (c), which purports to create a self-reported statement exception to the fair report privilege, was ever presented to or voted on by the American Law Institute (A.L.I.), publishers of the Restatement. We need not enter this debate or attempt to resolve the dispute, if, in fact, one exists. For the purposes of this appeal, we assume that the self-reported statement exception was adopted, and further assume that it expresses the common law. We make these assumptions because even if the exception represents the law, it does not apply, in any event, to the facts of the present case.

The self-reported statement exception does not apply for at least two reasons. First, the original defamatory publication was made by Sternlieb, not the *Journal* defendants. Stover attempts to overcome this distinction by arguing that John S. Donahue, an investigator for the *Journal* and an original defendant in this action, met with Sternlieb and provided Sternlieb false information which was incorporated in the affidavit. This argument fails for want of factual support. The record reflects that Sternlieb made substantially the same allegations to the Federal Bureau of Investigation more than a year before Donahue's alleged meeting with him. Moreover, Stover's original claim of conspiracy, based in part on allegations that defendants joined with Sternlieb to create the affidavit, was dismissed with prejudice.

Second, the exception, by its own terms, was obviously intended to prevent the abuse of the fair report privilege. For example, a person might bring a suit or hold a public meeting not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience.

Although decided on the basis of a New York statute, not comment (c), the case of *Williams v. Williams,* 23 N.Y.2d 592, 298

N.Y.S.2d 473, 246 N.E.2d 333 (1969), is helpful in understanding the exception. In that case, the defendants, through their corporation, had initiated an action against plaintiff alleging that plaintiff had conspired with others to misappropriate and to misuse the company's trade secrets and assets. Defendant then circulated copies of the complaint to members of plaintiff's trade. Plaintiff brought suit against defendants claiming, among other things, that the action against him was totally without basis in fact, and was begun for the purpose of ruining his business reputation. Defendants asserted the fair report privilege as a defense and asked that plaintiff's complaint be dismissed. *Williams* affirmed denial of that motion, holding that the fair report privilege, as found in Section 74 of the New York Civil Rights Law, Consol.Laws, c. 6, was never intended to permit a person maliciously to institute a judicial proceeding, alleging false and defamatory charges, then to circulate a press release or other communication based thereon, and, ultimately to escape liability by invoking the fair report privilege statute. Thus, the court grafted on to the fair report privilege statute, which otherwise provided an absolute privilege as long as the publication fairly and truly reported the judicial proceeding, an implied exception to meet the circumstances of that case.

In the case before us, the *Journal* defendants did not instigate the judicial proceedings in which the Sternlieb affidavit was filed; they were unwilling defendants. Further, the unrefuted evidence before us reflects that the *Journal's* newsgathering activities were executed completely independent of and separate from its defense of the Marchiondo case. Thus, the exception to the fair report privilege, as presented in comment (c), has no application to the facts of this case. The decision of whether that exception should be adopted at all will have to await a proper case.

Defendants argue, and we agree, that to apply the comment (c) exception to this case would undermine an important purpose of the fair report privilege, which is to allow the report of that which the public could have independently heard or read. The Sternlieb affidavit was unsealed and, therefore, available for public examination. As noted, it had already been reported by several television stations before the *Journal* published its article.

We also agree that to apply the exception under the circumstances of this case could lead to "inaccurate and unintelligible reporting." To relegate the *Journal* to publishing only rebuttal testimony, while denying it the right to report fairly and accurately the contents of the testimony in question, would result in skewed, garbled reporting, defeating the purpose of the privilege.

Stover argues that the *Journal* defendants lost their agency roles, that is, to act as the agents of the citizen who was absent at the proceeding. Because defendants were parties to the *Marchiondo* case, Stover would place a burden on them to ascertain the truth of witnesses' statements before republishing them. Quite aside from the fact that the *Journal* defendants were unwilling defendants to that case and such burden would not be imposed on other members of the press, we reject as unsound a requirement that the media mix its responsibilities as an independent newsgatherer with its role in the defense of litigation in which it may be involved. To do so would not only be administratively impractical but likely would lead to violations of the ethical standards of the newspaper and legal professions.

Finally, it would bring about a strange result, indeed, to accord Sternlieb absolute immunity for making defamatory statements under the judicial privilege, *see Stryker v. Barbers Super Markets Inc.*, 81 N.M. 44, 462 P.2d 629 (Ct.App.1969), while making defendants liable for having fairly and accurately reported the statements. The fair report privilege protects against such a result.

The parties have also argued the certified question on the basis of the First Amendment's guarantees of freedom of

speech and freedom of the press. Because the question can be answered under the common law, we need not reach the constitutional issue. Courts will not decide constitutional questions unless necessary to the disposition of the case. *State v. Campbell,* 75 N.M. 86, 400 P.2d 956 (1965); *In re Bunnell,* 100 N.M. 242, 668 P.2d 1119 (Ct. App.1983).

The case is remanded to district court for further proceedings in accordance with this opinion. Defendants shall recover costs of appeal.

IT IS SO ORDERED.

DONNELLY, C.J., and WOOD, J., concur.

731 P.2d 1341

Delora DURAN, Plaintiff-Appellant,

v.

ALBUQUERQUE PUBLIC SCHOOLS, self-insured employer, Defendant-Appellee.

No. 9354.

Court of Appeals of New Mexico.

Nov. 12, 1986.

Certiorari Denied Jan. 26, 1987.

J. Michele Guttmann, Freedman, Boyd & Daniels, P.A., Albuquerque, for plaintiff-appellant.

John S. Campbell, Johnson and Lanphere, P.C., Albuquerque, for defendant-appellee.

OPINION

ALARID, Judge.

In this case, the worker, Ms. Delora Duran, appeals from the district court's determination that the amount of her maximum weekly worker's compensation benefits should be calculated on the basis of a fifty-two-week work year rather than on the basis of the forty-week work year which she actually works under the terms of her contract with Albuquerque Public Schools. On appeal, only one issue is raised: whether the trial court correctly calculated the worker's compensation rate under NMSA 1978, Section 52–1–20. For the reasons stated in this opinion, we affirm the trial court.

FACTS

Appellant Delora Duran suffered an accidental back injury on December 17, 1982, in the course and scope of her employment as an educational aide with appellee Albuquerque Public Schools (APS). Ms. Duran had been employed by APS for eighteen years and was being paid an annual salary of $8,661 for her work during the 1982–83 school year. The parties have stipulated that Ms. Duran was 100% disabled from her employment, as a result of her injury, for a total of thirty-eight weeks and was otherwise 20% disabled through the date of judgment.

Ms. Duran received a total of $2,506.30 in worker's compensation benefits to compensate her from the date of her injury through the end of the 1982–83 school year. APS paid those benefits at a weekly compensation rate of $111.04 and a daily rate of $15.86. Ms. Duran's weekly wage basis was derived by dividing her salary for the school year by fifty-two weeks; her daily wage basis was calculated by further dividing that weekly amount by seven days.

Ms. Duran's employment with APS was governed by regulations promulgated by the New Mexico State Board of Education and various state statutes, as well as a written collective bargaining agreement. The collective bargaining agreement directed that her salary of $8,661 for the 1982–83 school year be distributed in twelve equal installments. Although she was paid on a year-round basis, her paychecks compensated her only for her services during the approximately forty-week period encompassing the 182 work days during the school year. The collective bargaining agreement did not provide any other options regarding the schedule of salary distribution.

Ms. Duran brought this action against APS to recover worker's compensation benefits for past, present and future disability; medical benefits; and attorneys' fees and costs. The complaint was filed on February 15, 1984.

On December 6, 1985, the parties entered into a stipulation of facts narrowing their dispute to a single issue concerning the proper compensation rate, which they agreed could be decided by the court as a matter of law. Ms. Duran argued that APS had unlawfully and arbitrarily calculated her weekly wage at an artificially low level based upon a twelve-month, 365–day work year and that her benefits should properly have been figured according to her actual employment term covering only the forty-week school year. If Ms. Duran's worker's compensation benefits were to have been calculated on that basis, her maximum weekly benefits would have been $144.35, in contrast to APS's maximum payments of $111.04.

Pursuant to the stipulation, the district court decided the rate issue on the basis of the pleadings and written submissions of the parties. On May 28, 1986, the district court entered judgment in favor of APS on the rate calculation, and otherwise in accordance with the stipulation of facts already entered. Ms. Duran filed her appeal from that decision on June 9, 1986.

On appeal, Ms. Duran challenges the district court's conclusion that the amount of her maximum weekly worker's compensation benefits is $111.04. Ms. Duran con-

tends that her maximum weekly worker's compensation benefits should instead be $144.35, which represents her legal compensation rate figured according to legal principles and which more fairly reflects her actual salary level.

DISCUSSION

In New Mexico, the "average weekly wage" for the purpose of computing compensation payments is determined by statute. Section 52–1–20 provides in pertinent part:

A. [W]henever the term "wages" is used, it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, either express or implied * * * *

B. [A]verage weekly wages for the purpose of computing benefits provided in the Workmen's Compensation Act shall, except as hereinafter provided, be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or killed employee was receiving at the time of the injury, and in the following manner, to wit:

(1) [W]here the employee is being paid by the month for his services under a contract of hire, the weekly wage shall be determined by multiplying the monthly wage or salary at the time of the accident by twelve and dividing by fifty-two * * * *

C. [P]rovided, further, however, that in any case where the foregoing methods of computing the average weekly wage of the employee by reason of the nature of the employment ... or where for any other reason said methods will not fairly compute the average weekly wage; in each particular case, computation of the average weekly wage of said employee [shall be made] in such other manner and by such other method as will be based upon the facts presented [to] fairly determine such employee's average weekly wage * * * *

We hold that the language of Section 52–1–20(A) and (B) is clear. The average weekly wage of an injured employee is based on the salary which the injured employee is receiving at the time of the injury pursuant to his or her contract for hire. In Duran's case, this requires that her compensation be based on a fifty-two week work year.

The New Mexico Workmen's Compensation Act creates rights, remedies and procedures which are exclusive. *Anaya v. City of Santa Fe,* 80 N.M. 54, 451 P.2d 303 (1969); *see Taylor v. Delgarno Transportation, Inc.,* 100 N.M. 138, 667 P.2d 445 (1983). It is the duty of both the trial court and this court to see the fulfillment of the statutory purpose within the framework of the facts presented and the law. *See Livingston v. Loffland Brothers Co.,* 86 N.M. 375, 524 P.2d 991 (Ct.App.), *cert. denied,* 86 N.M. 372, 524 P.2d 988 (1974). In *Eberline Instrument Corp. v. Felix,* 103 N.M. 422, 424, 708 P.2d 334, 336 (1985), the supreme court of New Mexico held:

> * * * Section 52–1–20(A) and (B) is plain and clear and dictates that benefits should be computed on the basis of the wages the worker was earning under the contract for hire in effect at the time of the accident. Where such wages are easily calculable and fairly compute the worker's average weekly salary, then the methods for calculating benefits under Section 52–1–20(B) control * * * *

In *Eberline Instrument Corp. v. Felix,* the supreme court indicated that Section 52–1–20(C) should be reserved for "the unusual case where the workman's average weekly rate is not easily determinable." *Id.* at 425, 708 P.2d at 337. This is not such a case.

The facts and law are undisputed. Duran was paid monthly, pursuant to her

contract of hire in effect on the date of her injury. Duran's weekly wage was determined by APS by multiplying her monthly wage by twelve and dividing by fifty-two. The trial court upheld APS's computational method and determined Duran's average weekly wage by applying the same method. The trial court thus correctly computed Duran's average weekly wage based on the clear language of Section 52–1–20(A) and (B).

Duran also asserts that in determining her average weekly wage, the trial court should have exercised its discretion under Section 52–1–20(C) and used a computation method other than those set forth in Section 52–1–20(A) and (B). To do otherwise, Duran argues, results in a computation that is neither fair nor equitable. We do not agree.

To compute her average weekly wage as Duran suggests would result in the payment of compensation in excess of that to which she is entitled under New Mexico's statutory scheme. We agree that it would be fundamentally unfair to APS to compute Duran's weekly wage by dividing her annual salary by forty, thereby compensating her under the Workmen's Compensation Act based upon a greater weekly rate than she actually enjoyed when not disabled. Duran was compensated for the full term of her disability, through the months that she would normally not have worked, based upon the weekly wage she actually enjoyed. No unfairness results, therefore, from the application of Section 52–1–20(A) and (B).

Duran also argues that because APS normally docks pay for unexcused absences based on a nine-month work period, that it is unfair and inequitable for her workmen's compensation to be based on a fifty-two week year. We agree that APS's docking procedure is not relevant to the issue before us. What is relevant is the manner in which Duran is compensated when not disabled, and referring to that standard, Duran has been treated fairly.

The district court's judgment is affirmed.

IT IS SO ORDERED.

MINZNER and FRUMAN, JJ., concur.

731 P.2d 1344

STATE of New Mexico, Plaintiff-Appellee,

v.

Grant Louis DORAN, Defendant-Appellant.

No. 9341.

Court of Appeals of New Mexico.

Dec. 11, 1986.

Certiorari Denied Jan. 26, 1987.

Paul G. Bardacke, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

John L. Walker, Albuquerque, for defendant-appellant.

OPINION

DONNELLY, Judge.

The previous opinion is withdrawn and the following is substituted.

Defendant appeals from multiple convictions for armed robbery, aggravated burglary, false imprisonment, commercial burglary, and larceny over $100. Six issues are presented on appeal: (1) whether the indictment should have been dismissed; (2) whether the search warrant affidavit should have been invalidated; (3) whether the witness-advocate rule required disqualification of the district attorney's office: (4) whether defendant was entitled to review the prosecutor's case notes; (5) whether the court erred in limiting cross-examination; and (6) whether defendant was entitled to a new trial. Issues not briefed are abandoned. *State v. Romero,* 103 N.M. 532, 710 P.2d 99 (Ct.App.), *cert. denied,* 103 N.M. 525, 710 P.2d 92 (1985). We affirm.

FACTS

Defendant was employed as an assistant manager of a Walgreens store in Albuquerque. In August of 1983, he failed to return from vacation. Shortly thereafter, on August 11, the store was burglarized and a large amount of currency and merchandise was taken. On September 17, 1983, a second burglary occurred and currency and large amounts of controlled substances were taken. Police investigation revealed indicia that the burglaries may have been an "inside" job, accomplished by use of either interior or exterior keys to the store. A third incident occurred four days after the second burglary. On September 21, after the store had been locked for the night, two masked men forced an employee to open the store and the business safe and took a large amount of money. According to the employee, one of the robbers showed a detailed knowledge of the store's security system.

The police investigation focused on defendant and Roger Robinson, both former Walgreens employees. A search of Robinson's home and car produced a knife, which police believed to be the knife used in the armed robbery, and two packets of money found hidden under the mattress in Robinson's bedroom. Robinson was arrested and thereafter gave police a written confession, implicating both himself and defendant in the three crimes. Robinson also directed police to a motel room where defendant was staying. Although defendant was not at the motel, another person in the motel room gave police permission to seize three suitcases belonging to the defendant. A warrant was subsequently obtained to search the contents of the suitcases. Inside the bags police found three driver's licenses issued to the defendant, approximately $800 in cash, a savings deposit book belonging to defendant, and a deposit receipt showing a deposit to defendant's savings account.

Following a jury trial, defendant was convicted of five felony offenses. The trial court directed a verdict of not guilty on two other charges of commercial burglary and larceny of property over $2,500.

I. INDICTMENT

Defendant sought to have his indictment dismissed on the ground that it had been allegedly obtained through the false testimony of Kenneth Berlint, the manager of the Walgreens store where the crimes had occurred. Berlint testified that the locks to the store had been changed following the first burglary. In fact, according to documents submitted in support of defendant's motion to dismiss, the locks had been changed on August 8, 1983, three days prior to the first burglary. Defendant argues that the prosecutor's failure to correct this testimony denied him due process of law. We disagree. The alleged false testimony related only to counts 6 and 7 of the indictment, charges on which the defendant was acquitted. We agree with the state that defendant's acquittal on these charges negates his claim of denial of due process. The supreme court has ruled that due process claims which are predicated upon false or perjured evidence before a grand jury require a showing of actual prejudice. *See Maldonado v. State,* 93 N.M. 670, 604 P.2d 363 (1979); *see also Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981). At trial, Berlint was questioned extensively concerning the change of locks, and defendant was acquitted of the two charges relating to the first burglary. In both *Maldonado* and *Buzbee* the supreme court also required a showing of prosecutorial misconduct. *See also* NMSA 1978, § 31-6-11(A) (Repl.Pamp.1984). Here, there was no showing that prosecutor Cox knew the testimony was false. Thus, *State v. Reese,* 91 N.M. 76, 570 P.2d 614 (Ct.App.1977), relied upon by defendant, is distinguishable from the facts herein: In *Reese* the parties stipulated that the prosecutor knew the testimony was false.

Finally, defendant has not shown that the allegedly false grand jury testimony tainted or was otherwise material to the grand jury or trial proceedings on the remaining five counts for which he was in-

dicted and convicted. He cites no authority in support of his contention that false testimony relative to counts 6 and 7 necessarily invalidated the entire grand jury proceedings. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984). Defendant's reliance on *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) is misplaced because that case did not involve grand jury testimony, but instead dealt with a prosecutor's knowing failure to correct false testimony at trial. Thus, in *Napue* both elements of the relevant test—actual prejudice and prosecutorial misconduct—were present. Here, neither element has been shown.

II. SEARCH WARRANT AFFIDAVIT

Defendant filed a motion to suppress the evidence seized from his suitcases, claiming that the affidavit for the search warrant sworn to by Assistant District Attorney Michael Cox contained material misrepresentations. Defendant contends the affidavit contained "intentionally false statements" made by Berlint, which were accepted by prosecutor Cox, and which allegedly were made with a reckless disregard for the truth.

The affidavit recited that Berlint believed "the only former employee in possession of the necessary keys and information to perpetrate the above crimes [was] Grant Doran, a former Assistant Manager who left under mysterious circumstances only a week before the first burglary...." Defendant argues that this statement was intentionally false because the store's exterior locks had been shown to have been changed prior to the time of the first burglary.

The trial court denied the motion to suppress, and ruled that even without the objectionable statement, the affidavit indicated a factual basis to find probable cause for the issuance of the search warrant. *See State v. Copeland,* 105 N.M. 27, 727 P.2d 1342 (Ct.App.1986). We find no error in this ruling.

The focus of our concern is whether the affidavit, apart from the challenged portion, contains facts constituting probable cause. The facts set forth in a search warrant affidavit must establish probable cause for the issuance of the warrant. *State v. Herrera,* 102 N.M. 254, 694 P.2d 510 (1985); *State v. Van de Valde,* 97 N.M. 680, 642 P.2d 1139 (Ct.App.1982). "Probable cause" which will authorize a judge or magistrate to issue a search warrant requires a showing of a state of facts which leads the issuing judge, acting in a neutral capacity and as a prudent person, to reasonably believe that an accused, at the time of the application for warrant, is in possession of illegal property or the fruits of a crime, or that evidence relating to the commission of a crime exists in the place or property sought to be searched. *State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.), *cert. denied,* 100 N.M. 53, 665 P.2d 809 (1983).

The affidavit for the search warrant contained additional information indicating that all three crimes were apparently committed by someone familiar with the store's operation; that defendant had severed his employment under mysterious circumstances shortly before the first burglary occurred and had never returned to work; that a close friend of the defendant, Roger Robinson, had been arrested in connection with the crimes and had confessed to committing the crimes with defendant; and that Robinson had directed officers to defendant's motel room where the three suitcases had been seized. These facts provided sufficient probable cause for the issuance of the search warrant. The present case falls within the canopy of our decisions in *Donaldson* and *Copeland.*

Defendant also contends that, as the affiant, Cox should not have presented the affidavit to the trial court. Defendant relies on the "witness-advocate rule," which he also argues as a reason why the prosecutor should have been generally disqualified. This aspect of defendant's argument is addressed under point III, infra; but because we hold that the affidavit, apart from the challenged section, contained facts constituting probable cause for the

issuance of the warrant, we find no error in the trial court's denial of the motion to suppress.

III. DISQUALIFICATION OF PROSECUTOR

Defendant filed a pretrial motion seeking to disqualify the prosecutor and his staff and requesting the appointment of a special prosecutor. Defendant's motion was based on his request to call prosecutor Cox as a defense witness at the suppression hearing and possibly at trial.

Defendant's motion relied on the "witness-advocate rule," which prohibits an attorney from appearing as both a witness and an advocate in the same litigation. *See* NMSA 1978, Code of Prof.Resp.R. 5–102(B) (Repl.1985). The trial court denied this motion but ordered that the prosecutor refrain from personally conducting matters for the state at the suppression hearing where he testified. At the hearing, Assistant District Attorney Frank Gentry represented the state. At trial, both Cox and Gentry prosecuted the case.

A prosecuting attorney is competent to testify in criminal proceedings in which he serves as an advocate, although that practice is disfavored. *See State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct.App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977). New Mexico adheres to the rule that a prosecuting attorney who finds it necessary to testify on behalf of the prosecution should withdraw from the case. *State v. McCuistion,* 88 N.M. 94, 537 P.2d 702 (Ct.App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975). This rule is intended to prevent the prosecutor from adding to the weight or credibility of the evidence by acting as both a witness and an officer of the court. *See United States v. Johnston,* 690 F.2d 638 (7th Cir.1982).

The rule announced in *Hogervorst* that a prosecutor who testifies for the state must withdraw from the case does not squarely address the question presented here. Defendant urges adoption of a broader rule holding that a prosecutor who is called as a witness for the defense in a pretrial hearing must withdraw from further participation in the case, and that the entire staff of the prosecuting attorney also be disqualified. A majority of courts that have considered this issue have held that the witness-advocate rule does not apply under these circumstances. *See* Annot., 54 A.L.R.3d 100 (1973). The Colorado Supreme Court addressed this issue and noted the countervailing interests which apply in such situations:

> Every prosecutor who participates directly in interviewing and otherwise investigating his cases subjects himself to the risk of being called as a witness. But to allow opposing counsel the unfettered option of removing any prosecutor who has personal knowledge of any material fact in the case might well result in restricting the prosecution function to the ill-prepared.

Riboni v. District Court, 196 Colo. 272, 274, 586 P.2d 9, 11 (1978) (*en banc*). *See also People v. Cannon,* 25 Ill.App.3d 737, 323 N.E.2d 846 (1975); *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984); *People v. Arabadjis,* 93 Misc.2d 826, 403 N.Y.S.2d 674 (1978); *State v. Browning,* 666 S.W.2d 80 (Tenn.Cr.App.1983).

The trial court has broad discretion in determining whether the defense will be allowed to call a prosecuting attorney to the witness stand and whether the prosecutor will be permitted to continue trying the case after testifying. *Cf. Hogervorst. See also United States v. Birdman,* 602 F.2d 547 (3d Cir.1979); *United States v. Maloney* 241 F.Supp. 49 (W.D.Penn.1965); *People v. Cannon.* When an abuse of the trial court's discretion is alleged, the defendant has the burden of demonstrating that the court's ruling denied him due process. *Maloney.*

Here, we find that the trial court did not abuse its discretion in resolving this issue. When prosecutor Cox testified at the suppression hearing, he appeared strictly as a witness; as a prosecutor at trial he was not called to testify. Under these facts, separation of the witness and prosecutorial functions was not violated. *See*

State v. Mercer, 625 P.2d 44 (Mont.1981). Moreover, there is no showing that the trial court gave unwarranted credibility to Cox's testimony at the suppression hearing. To the contrary, the court's ruling appears to assume the falsity of the objectionable statements in the affidavit for the search warrant.

We find no merit in defendant's contention that the entire staff of the district attorney should have been disqualified by virtue of the participation by prosecutor Cox in the investigative phase of the case and his appearance as a witness at the suppression hearing. In an analogous case, *United States v. Badalamenti*, 794 F.2d 821 (2nd Cir.1986), the federal court ruled that the appearance of some members of the United States Attorney's Office as witnesses at a suppression hearing did not require the "unprecedented disqualification" of the entire office from the suppression hearing or from further proceeding in the prosecution. *See also Browning. Cf. State v. Martinez*, 89 N.M. 729, 557 P.2d 578 (Ct.App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976), *cert. denied*, 430 U.S. 973, 97 S.Ct. 1663, 52 L.Ed.2d 367 (1977).

IV. PROSECUTOR'S CASE NOTES

Defendant claims error in the trial court's refusal to permit him to review prosecutor Cox's notes of his interview of Berlint. Cox referred to the notes while testifying at the suppression hearing. Defendant relies on NMSA 1978, Evid.Rule 612 (Repl.Pamp.1983), which requires the production of a writing used by a witness to refresh his memory while testifying. However, the Rules of Evidence do not apply to pretrial suppression hearings. *See* NMSA 1978, Evid.R. 104 and 1101(d)(1) (Repl.Pamp.1983). In addition, we disagree that defendant was prejudiced by being unable to cross-examine Cox regarding the notes. As indicated above, the trial court's denial of the motion to dismiss was not because the search warrant affidavit contained no misstatements, but rather, because the affidavit, with the misstatements deleted, still contained probable cause for issuance of the search warrant. *Donaldson. See also Copeland.*

V. CROSS-EXAMINATION

Defendant claims a violation of his confrontation rights because the trial court limited his cross-examination of Cynthia Hernansky, an employee of Walgreens. Defendant sought to cross-examine Hernansky concerning an accusation that she had stolen money from another Walgreens store. Defendant conceded, however, that Hernansky had been cleared of the accusation after passing a polygraph test administered by Walgreens.

This issue is controlled by *Herrera* and *State v. Robinson*, 99 N.M. 674, 662 P.2d 1341 (1983). In both cases the supreme court emphasized that the test for admission of evidence under NMSA 1978, Evid. Rule 608(b) (Repl.Pamp.1983) is whether the witness actually engaged in the misconduct alleged. The test applies equally to the impeachment of an accused and to other witnesses before the court. *Id.* Since, by defendant's own admission, Hernansky was merely accused of misconduct, the trial court properly denied the proposed cross-examination. A trial court is invested with discretion as to whether to allow evidence of alleged prior bad acts concerning a witness's character for truthfulness or untruthfulness to be inquired into on cross-examination, and the trial court's ruling will not be overturned on appeal, absent a showing of a clear abuse of discretion. *Herrera.*

Defendant claims he sought to demonstrate that Hernansky had a special motive to testify falsely. Because the trial court was not alerted to this theory of admissibility, the issue will not be considered on appeal. *See State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982).

VI. MOTION FOR NEW TRIAL

Following trial, Robinson retracted his testimony concerning defendant's involvement in the crimes. Defendant moved for a new trial, claiming that Robinson's re-

traction satisfied the requirements for the granting of a new trial on grounds of newly-discovered evidence. *See State v. Volpato,* 102 N.M. 383, 696 P.2d 471 (1985). We disagree.

At the time of trial, Robinson was serving a prison sentence for his own involvement in the crimes. He initially refused to testify against the defendant, claiming he feared being labeled a "snitch," and that he would be subjected to harassment from other inmates. He agreed to testify only after the trial court threatened to find him in contempt of court. On cross-examination, Robinson said he felt his testimony had been "forced" and "compelled." He also claimed that "ninety percent" of the information contained in his written confession to the crimes was incorrect. However, on redirect examination at trial, he acknowledged his own participation in the second burglary and the armed robbery, and he remained positive of defendant's involvement in the crimes. In his subsequent taped retraction, Robinson said he "believed" that his trial testimony had "likely" been "inaccurate."

[redacted] We find no abuse of discretion in the trial court's denial of the motion. Robinson's retraction was clearly contradictory in nature. *State v. Smith,* 104 N.M. 329, 721 P.2d 397 (1986). In considering this motion, the trial court was entitled to weigh the credibility of the witnesses, to determine whether Robinson's statement was credible, and whether defendant's claim of newly-discovered evidence was likely to change the result of a new trial.

Defendant's convictions and sentences are affirmed.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

[redacted]

731 P.2d 1350

In the Matter of the Application of Joseph A. JANUSKIEWICZ, individually, and Joseph A. Januskiewicz as parent and next friend of Andrea Januskiewicz and Joseph T. Januskiewicz, minor children, for change of name, Petitioner-Appellant.

No. 8361.

Court of Appeals of New Mexico.

Dec. 18, 1986.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Harold Worland, Albuquerque, for petitioner-appellant.

OPINION

GARCIA, Judge.

This is an appeal from the trial court's denial of a name change for petitioner's minor children. The first impression issue presented for our consideration is whether NMSA 1978, Section 40–8–1 (Repl.Pamp. 1986) authorizes a parent to petition the court for a name change for a child under age fourteen.

FACTS

Petitioner Joseph A. Januskiewicz is the non-custodial parent of Andrea and Joseph T. He petitioned the trial court to change his name and that of his minor children to Janski. The natural mother of the minor children filed an affidavit of consent to the name change. However, the trial court found that under Section 40–8–1 only residents of the State of New Mexico who are over the age of fourteen may petition for a change of name. Consequently, the trial court granted the request as to petitioner-father but denied the request as to the minor children. The trial court also found that it was in the best interests and welfare of all parties that the change of name be granted and that but for the statute, the trial court would grant the application as to the minor children. The trial court was correct in its analysis and we affirm.

ANALYSIS

Section 40–8–1 provides:

> Any resident of this state over the age of fourteen years, may, upon petition to the district court of the district in which the petitioner resides, and upon filing the notice required with proof of publication thereof, if no sufficient cause be shown to the contrary have his name changed or established by order of the court[.]

Petitioner argues that we should consider legislative intent. We resort to consideration of legislative intent only where there is ambiguity in a statute. Here, the language of the statute is plain; it is clear and unambiguous. We are precluded from considering legislative intent in the absence of ambiguity. What is not provided for in the statutes is not possible. *Carter v. Mountain Bell,* 105 N.M. 17, 727 P.2d 956 (Ct.App.1986).

Petitioners further argue that Section 40–8–1 does not prohibit a parent of a child under fourteen from filing a petition in district court as parent and next friend pursuant to NMSA 1978, Civ.P.R. 17(c) (Repl.Pamp.1980). We disagree. Although it is in the province of this court to interpret legislation, we cannot depart from the express language of an act, *Bills v. All-Western Bowling Corp.,* 74 N.M. 430, 394 P.2d 274 (1964), nor can we add language to the statute simply because we believe the addition would be appropriate. Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction. *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977); *State v. McHorse,* 85 N.M. 753, 517 P.2d 75 (Ct.App. 1973). New Mexico's name change statute makes no provision for the relief petitioner seeks and we may not create any.

The vast majority of states would permit petitioner's action. *See* Annot., 92 A.L. R.3d 1091 (1979). In fact, most states provide specifically for changes of name for minors. *See e.g., In re Morehead,* 10 Kan. App.2d 625, 706 P.2d 480 (1985); Neb.Rev. Stat. § 61–101 (1981); Ark.Stat.Ann. § 34–801 (1985 Supp.). Some of these statutes

provide that the consent of both parents is a necessary prerequisite to the change, while others merely provide that a single parent give proper notice to the other. 92 A.L.R.3d at 1095. Our legislature, however, has clearly fixed a maximum age requirement, except when incident to an adoption proceeding, restricting the right of children under such age to legally change their name.

Iowa's name change statute is similar to our own. In an analogous factual situation, the Iowa Supreme Court upheld the dismissal of a mother's petition to change her minor child's name. The court noted that Iowa and New Mexico, comprise a distinct minority:

> We are cognizant that only one other jurisdiction, New Mexico (N.M.Stat.Ann. § 40–8–1) does not allow a minor to obtain a change of name regardless of whether the action is brought by the minor's guardian or next friend, and that the overwhelming majority of states would permit such an action.

In re Staros, 280 N.W.2d 409, 411 (Iowa 1979).

We agree with petitioners and the trial court that under the facts in this case, application of Section 40–8–1 renders an unsatisfactory result. That result, however, is compelled by the statute. In *Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 203 (1957), the supreme court said:

> A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.... Courts must take the act as they find it and construe it according to the plain meaning of the language employed.

If a change in the statute is necessary or proper, that task is for the legislature. *Perea v. Baca,* 94 N.M. 624, 614 P.2d 541 (1980).

The trial court is affirmed.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

731 P.2d 1352

STATE of New Mexico, Plaintiff-Appellee,

v.

Angus R. ORTIZ, Defendant-Appellant.

No. 9377.

Court of Appeals of New Mexico.

Dec. 23, 1986.

Jacquelyn Robins, Chief Public Defender, Deborah A. Moll, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Paul G. Bardacke, Atty. Gen., Patricia Frieder, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

MINZNER, Judge.

Defendant, an Indian, was arrested and subsequently charged with burglary and larceny, crimes which stemmed from the unauthorized entry of a motor vehicle belonging to a non-Indian. The incident occurred within the corporate limits of Espanola. However, the area where the incident occurred is also within the exterior boundaries of the San Juan Pueblo (Pueblo). The incident occurred either on privately-held land of a non-Indian, or upon a public thoroughfare which runs through the area, in a residential area used and occupied primarily by non-Indians.

It is not disputed that the Espanola municipal government provides essential governmental services, including police services, to the area. Defendant pled guilty in district court to one count of burglary, expressly reserving his right to appeal the court's jurisdiction. The court denied defendant's motion to dismiss, ruling that it had jurisdiction over the crimes and over defendant.

Defendant filed his notice of appeal prior to entry of judgment and sentence but after a sentencing hearing, at the end of which the district court announced its disposition. Under these circumstances, we conclude defendant perfected a timely appeal from a final judgment. *See* NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 202(a) (Repl.Pamp.1983); *cf. State v. Garcia,* 99 N.M. 466, 659 P.2d 918 (Ct. App.1983) (trial court was without jurisdiction to enter judgment and sentence during pendency of appeal); *see also State v. Harris,* 101 N.M. 12, 677 P.2d 625 (Ct.App. 1984).

The issue on appeal is whether the state district court had subject matter jurisdiction to try defendant for the charge of burglary. Pivotal to the issue raised by defendant is whether the situs of the alleged offense, involving lands lying within the exterior boundaries of San Juan Pueblo, is "Indian country" within the meaning of 18 U.S.C. Section 1151 (1982), thus depriving the state of jurisdiction to prosecute defendant. Other issues, raised in the docketing statement but not briefed, are deemed abandoned. *State v. Maes,* 100 N.M. 78, 665 P.2d 1169 (Ct.App.1983). We reverse and remand with instructions to dismiss the indictment against defendant and discharge him.

DISCUSSION.

Generally, New Mexico lacks jurisdiction to prosecute criminal charges against Indians for offenses committed within the boundaries of an Indian reservation except where such jurisdiction has been specifically granted by Congress or sanctioned by a decision of the United States Supreme Court. *See State v. Warner,* 71 N.M. 418, 379 P.2d 66 (1963); *see generally* Crosse, *Criminal and Civil Jurisdiction in Indian Country,* 4 Ariz.L. Rev. 57 (1962–63). The underlying rationale for this principle is non-interference with Indian sovereignty. *See Ryder v. State,* 98 N.M. 316, 648 P.2d 774 (1982). Although the principle sometimes results in deference to tribal jurisdiction, on these facts the problem is whether Congress has provided exclusive federal jurisdiction. We conclude that it has.

Pursuant to its constitutional authority, Congress has enacted the Major Crimes Act, which provides that the United States has exclusive jurisdiction over certain enumerated crimes committed within "Indian country" by an Indian against another Indian or any other person. 18 U.S.C. § 1153 (Supp.III 1985). The crime of burglary is included as a major crime in the federal Act. *Id.*

18 U.S.C. Section 1151 defines "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The principal test for determining whether a tract of land is "Indian country" within the meaning of Subsection 1151(a) for the purposes of the Major Crimes Act is whether the land in question has been validly set apart for the use of Indians as such, under the superintendence of the United States government. *See United States v. John,* 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978). By its terms the test has several parts: (1) the federal government must have recognized an area as subject to Congressional authority for the use of Indians; (2) the authority must be a valid exercise of Congressional power; and (3) the area must be subject to Congressional authority at the present time. In applying the test, the Supreme Court has examined legislative history, and the past and present relationship of the United States government to the Indian tribe, in order to reach an appropriate conclusion about the land in question. *Id.; see also United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); *United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914).

Our supreme court has observed that the terms of Section 1151(a) largely overlap with the terms of Section 1151(b). *See Blatchford v. Gonzales,* 100 N.M. 333, 670 P.2d 944 (1983), *cert. denied,* 464 U.S. 1033–34, 104 S.Ct. 691, 79 L.Ed.2d 158 (1984). "[I]t is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap." *Id.* at 335, 670 P.2d at 946. On the facts, we apply the

principal test in resolving the appellate issue. The answer brief filed by the state concedes that, "[t]aken as a whole, congressional action as well as case law largely supports defendant's position in the case at bar."

The lands of the Pueblo, like those of other New Mexico pueblos, are held and occupied pursuant to a grant made by the Spanish government during the time when New Mexico was a Spanish possession. That grant subsequently was confirmed by the Mexican government after it declared independence from Spain, and then by Congress after the territorial cessions made by the Treaty of Guadalupe Hidalgo. *See United States v. Chavez,* 290 U.S. 357, 54 S.Ct. 217, 78 L.Ed. 360 (1933); Pueblo Indian Land Grants Act of 1924, ch. 331, 43 Stat. 636.

The terms upon which New Mexico was admitted to the Union recognized the lands owned or occupied by Pueblo Indians as "Indian country." *See generally Your Food Stores, Inc. (NSL) v. Village of Espanola,* 68 N.M. 327, 361 P.2d 950 (1961). Lands owned or occupied by Pueblo Indians are subject to the legislation of Congress, *see United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), and the Pueblo Indians have a relationship to the United States government that is comparable to the relationship between that government and any other recognized tribe of Indians. *See Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 105 S.Ct. 2587, 86 L.Ed.2d 168 (1985); *United States v. Candelaria,* 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023 (1926).

The state argues that in *United States v. Sandoval* the Supreme Court established what has been referred to as the "functional approach" test, *see United States v. Martine,* 442 F.2d 1022 (10th Cir.1971), to determine that the Santa Clara Pueblo was a dependent Indian community, and therefore "Indian country." In *United States v. Martine,* the court approved the trial court's inquiry " 'as to the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area.' " *United States v. Mound,* 477 F.Supp. 156, at 158 (D.S.D.1979) (quoting *United States v. Martine,* 442 F.2d at 1023). The state suggests that the same test is relevant in determining the status of the area within the San Juan Pueblo where the offenses charged in this case occurred. We disagree, for the following reasons.

The definition of "Indian country" did not include land within the boundaries of a reservation at the time *United States v. Sandoval* was decided. Congress did not include the term "reservation" in the definition of "Indian country" until 1948. *See United States v. John.* Thus, the *Sandoval* Court identified the pueblo in question as a distinctive Indian community in order to conclude that Congress had jurisdiction to legislate with respect to the lands then held or occupied by Pueblo members. The approach employed in *United States v. Sandoval* extended Congressional authority over Pueblo lands by construing the relevant constitutional provision to include the Pueblo Indians. *See generally State v. Dana,* 404 A.2d 551 (Me.1979), *cert. denied,* 444 U.S. 1098, 100 S.Ct. 1064, 62 L.Ed.2d 785 (1980). It would be anomalous to apply the "functional approach" test in this case, because the result would be to expand state court jurisdiction. Under the relevant rule of construction, "doubtful expressions" should be resolved in favor of limiting state jurisdiction. *See Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962).

For purposes of Section 1153, we see no reason why the Pueblo should not enjoy the same sovereignty over its formally designated land as an Indian tribe occupying lands formally designated as a reservation. *See Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma,* 618 F.2d 665 (10th Cir.1980). Our cases have equated the sovereignty of the Pueblo Indians over lands owned or occupied by them with that of Indians living on a reservation over land

within the boundaries of the reservation. *See State v. Warner; Your Food Stores, Inc. (NSL) v. Village of Espanola.* Thus, the underlying rationale for limiting state jurisdiction supports our conclusion that, for purposes of Section 1153, land within the exterior boundaries of a Pueblo is indistinguishable from land lying within the exterior boundaries of an Indian reservation. *See United States v. Pueblo of San Ildefonso,* 513 F.2d 1383 (Ct.Cl.1975).

While it is not possible in New Mexico to avoid occasional jurisdictional confusion and competition, the result sought by the state would exacerbate the present difficulties. If an extensive factual inquiry is necessary to make a jurisdictional determination, *see City of Sault Ste. Marie, Michigan v. Andrus,* 532 F.Supp. 157 (D.D.C. 1980), criminal trials will be delayed. In addition, by adopting the state's argument, we would encourage a more extensive pattern of "checkerboard jurisdiction." This result is inconsistent with Congressional intent. *See Seymour.*

■ Although earlier U.S. Supreme Court cases have described the communities located on pueblos as dependent Indian communities, *see United States v. Martine,* in those cases the court in fact applied the principal test as stated in *United States v. John.* We do the same. Based on the relationship between the United States government and the Pueblo Indians, the Congressional action taken to confirm and hold in trust for the Pueblo Indians land granted them by the prior governments, and the unquestioned authority of Congress to enact legislation which affects that land, we are constrained to conclude that land lying within the exterior boundaries of an Indian Pueblo, such as the San Juan Pueblo, is "Indian country" within the meaning of Section 1151. *See United States v. John.*

■ The particular facts of this case do not require a conclusion that the area in question has lost its status as "Indian country." *See Beardslee v. United States,* 541 F.2d 705 (8th Cir.1976); *State ex rel. Irvine v. District Court of Fourth Judicial District in and for Lake County,* 125 Mont. 398, 239 P.2d 272 (1951). Because there is no evidence of any relevant change in status, the controlling fact is that the offense occurred within the exterior boundaries of the Pueblo. *See People v. Luna,* 683 P.2d 362 (Colo.App.1984). On these facts, the district court lacked jurisdiction to try defendant for burglary. 18 U.S.C. §§ 1151(a) and 1153; *United States v. John. Cf. Blatchford v. Gonzales* (Yah-Tah-Hey area near Navajo Indian reservation is not a "dependent Indian community" and not within "Indian country").

■ The state argues that, even if crimes were committed in "Indian country," it has jurisdiction to try defendant because it has elected to assume jurisdiction over "Indian country" in accordance with 25 U.S.C. Section 1324 (1982). The state acknowledges that our supreme court has addressed this argument, in the context of a similar federal statute, in several opinions. *See Blatchford v. Gonzales; Chino v. Chino,* 90 N.M. 203, 561 P.2d 476 (1977); *Your Food Stores, Inc. (NSL) v. Village of Espanola.* The state does not draw our attention to any law of this state which has been enacted since Section 1324 was enacted, and we are not aware of any law. The New Mexico Constitution expressly waived jurisdiction over "Indian country," *see Your Food Stores, Inc. (NSL) v. Village of Espanola,* and in the absence of any affirmative steps taken by the New Mexico legislature pursuant to Section 1324, we cannot agree that the state has elected to assume such jurisdiction under the federal statute. *Id.* NMSA 1978, Section 31-10-3 (Repl.Pamp.1984), relied on by the state, was enacted in 1889 prior to statehood and does not constitute an assumption of jurisdiction over "Indian country" within the contemplation of 25 U.S.C. Sections 1321-1326 (1982).

CONCLUSION.

The charge of larceny having been dismissed pursuant to the plea agreement, the district court erred in denying defendant's motion to dismiss for lack of jurisdiction

over the crimes charged against him. We reverse and remand with instructions to dismiss the indictment against defendant. Our decision concluding on these facts that Congress has divested the state of criminal jurisdiction over an Indian defendant, charged with a major crime occurring within the exterior boundaries of an Indian pueblo, does not abrogate defendant's responsibility for his alleged criminal act; defendant is subject to prosecution in the federal courts.

IT IS SO ORDERED.

DONNELLY and FRUMAN, JJ., concur.

731 P.2d 1357

Ramona ORTIZ, Mary Torivio and Elizabeth Garcia, Petitioners-Appellants,

v.

NEW MEXICO EMPLOYMENT SECURITY DEPARTMENT and Sky City Community School, Bureau of Indian Affairs, Department of the Interior, Respondents-Appellees.

No. 9071.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Joel Jasperse, Northern New Mexico Legal Services, Inc., Gallup, for petitioners-appellants.

Paul G. Bardacke, Atty. Gen., Richard Baumgartner, Sp. Asst. Atty. Gen. for the New Mexico Employment Sec. Dept., Albuquerque, for respondents-appellees.

OPINION

SANDRA A. GRISHAM, District Judge, by Order of Designation.

Ramona Ortiz, Mary Torivio, and Elizabeth Garcia (claimants) appeal from the district court's affirmance of the denial of unemployment compensation benefits by the New Mexico Employment Security Department (ESD). Claimants were employed by the Bureau of Indian Affairs as educational aides at the Sky City Community School for the 1983–1984 school year, and had been similarly employed since the early 1970's.

In prior years, claimants had been "furloughed" in the summer from approximately one week after school let out to one week before it reconvened, and had established a practice of collecting unemployment compensation for the ten weeks they were off in the summer.

In June of 1984, claimants were laid off earlier than usual and were told to report back October 1, 1984, the reason given for the longer furloughs being budget cuts.

The Federal Unemployment Tax Act, 26 U.S.C. Sections 3301 to 3311 (1976) provides that employees of educational institutions are ineligible for unemployment benefits for:

> [A]ny week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms * * *.

26 U.S.C. 3304(a)(6)(A)(ii).

Congress mandated that this language is to be included in state law (26 U.S.C. Section 3304(a)(6)(A)), and it is found substantially unchanged at NMSA 1978, Section 51–1–5(C)(2) (Cum.Supp.1986). The state administers federal employees' claims for unemployment benefits. 5 U.S.C. § 8502(b) (1976).

Relying on Section 51–1–5(C)(2) and (4), ESD denied the claims in this case on the ground that the "between terms" section applied, and the district court affirmed that decision.

Claimants raise three issues: first, granting benefits would accomplish New Mexico public policy; second, there was no

"reasonable assurance of reemployment"; and third, the period of unemployment was not "between two successive academic years or terms." These are matters of first impression under New Mexico law.

In appeals from administrative decisions, the reviewing court must decide whether the decision is supported by substantial evidence in the record as a whole. *Duke City Lumber Co. v. New Mexico Environmental Improvement Board,* 101 N.M. 291, 681 P.2d 717 (1984). The appellate court must make the same review of the determination as the district court. *Groendyke Transport, Inc. v. New Mexico State Corporation Commission,* 101 N.M. 470, 684 P.2d 1135 (1984). Although the reviewing court generally may not substitute its judgment for that of the administrative decision-maker, it may correct a misapplication of the law. *Conwell v. City of Albuquerque,* 97 N.M. 136, 637 P.2d 567 (1981).

I. PUBLIC POLICY.

Claimants argue public policy requires a liberal construction, and indeed, the supreme court "is clearly committed to a liberal interpretation of our unemployment compensation act, so as to provide sustenance to those who are unemployed through no fault of their own and who are willing and ready to work if given the opportunity." *Wilson v. Employment Security Commission,* 74 N.M. 3, 14, 389 P.2d 855, 862–63 (1963). This policy, however, has been refined by the limitations of Section 51–1–5(C)(2), and as enunciated by another jurisdiction, "the intent of the limited disqualification * * * is to prevent subsidized summer vacations for those teachers who are employed during one academic year and who are reasonably assured of resuming their employment the following year." *Leissring v. Department of Industry, Labor & Human Relations,* 115 Wis.2d 475, 488–89, 340 N.W.2d 533, 539 (1983).

Denying claimants' benefits for between-term unemployment with reasonable assurance of reemployment is consistent with public policy.

II. REASONABLE ASSURANCE OF REEMPLOYMENT.

Claimants first argue that as a matter of law there was no reasonable assurance because they were told to report back to work on October 1, 1984, which was not when the next academic school year *began.* The statute reads that the reemployment must be *in* the second of such academic years or terms, not that it must commence at the beginning of the term. October 1, 1984 was *in* the second year, and claimants' argument here fails under the clear language of the statute.

Claimants next argue that they were not given a reasonable assurance that they were going to be reemployed on October 1, 1984. "Reasonable assurance" is defined in Section 51–1–5(C)(5) to mean:

> [A] reasonable expectation of employment in a similar capacity in the second of such academic years or terms based upon a consideration of all relevant factors, including the historical pattern of reemployment in such capacity, a reasonable anticipation that such employment will be available and a reasonable notice or understanding that the individual will be eligible for and offered employment in a similar capacity.

Claimants allege that reasonable assurance was lacking because of the uncertainty of funding; however, another jurisdiction has found that " 'an assurance of public employment is reasonable even if it is subject to the availability of funds * * *.' " *Friedlander v. Employment Division,* 66 Or.App. 546, 553, 676 P.2d 314, 318 (1984) (quoting *Zeek v. Employment Division,* 65 Or.App. 515, 519, 672 P.2d 349, 351 (1983)).

Reviewing the record as a whole, it is clear that claimants fully anticipated reemployment on October 1, 1984, and in fact were so reemployed. Their expectation, based upon their historical pattern of reemployment and the fact that they were told to return to work on October 1, was reasonable. The complaints below were cen-

tered on the past availability of unemployment benefits and the hardships created by the unexpected decision to apply the law limiting those benefits; claimants did not express genuine concerns below that they were not going to be rehired October 1. This point also fails.

III. CLAIMANTS' PERIOD OF UNEMPLOYMENT.

Claimants finally, and much more compellingly, argue that they were not unemployed "between two successive academic years or terms." Although the record is not totally clear, there is substantial evidence to support the district court's finding that the claimants were laid off work between June 1, 1984 and October 1, 1984. However, the record as a whole does *not* support that portion of the finding classifying this period as "the summer period." In our view, a portion of the period must be deemed a time of unemployment within the meaning of state law, because Congress did not intend to exclude such a period from benefits. *See Chicago Teachers Union v. Johnson,* 639 F.2d 353 (7th Cir.1980).

Again, there is no New Mexico case law on point, but other jurisdictions have given "academic year" its usual and normal meaning of fall through spring, even where the teachers and students did not report for school. *McKeesport Area School District v. Commonwealth, Unemployment Compensation Board of Review,* 40 Pa. Commw. 334, 397 A.2d 458 (1979); *Chicago Teachers Union v. Johnson.*

In the instant case, school itself closed and opened as usual, but the claimants, accustomed to furloughs of ten weeks between a week after students left to a week after they returned, were instead furloughed for seventeen weeks. It would take a tortured interpretation of "between terms" to include those extra seven weeks.

Chicago Teachers Union and *McKeesport* are specifically on point. They both involve situations where the school district claimed its "academic year" was simply shortened due to lack of funds in the former and to labor problems in the latter. The courts in both instances allowed the limitation of benefits for the usual summer break only, and granted unemployment benefits for the remaining weeks.

Here, we can do no less, especially in light of the fact that the 1984–1985 school year commenced as usual. Claimants are entitled to benefits for the weeks of unemployment that did not fall between the ordinary terms of employment. To conclude otherwise would result in any school district being able to avoid payment of unemployment compensation to any employee, so long as that employee was hired and paid even for one day of work in the succeeding school year.

CONCLUSION.

The decision of the district court is affirmed as to denial of benefits for ten weeks, and is reversed as to denial of benefits for the extra weeks. The cause is remanded with instructions to the district court to determine the amount of weekly benefits due to claimants for the weeks in question and to enter judgment consistent herewith.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

731 P.2d 1360

E.M. STOLL (Successor to Western States Collection Company), Plaintiff-Appellant,

v.

Alfred M. (Red) DOW, Sheriff of Bernalillo County, and Maryland Casualty Company of Baltimore, Defendants-Appellees.

No. 8053.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Dale B. Dilts, Albuquerque, for plaintiff-appellant.

Matthew P. Holt, Edward T. Curran, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Chief Judge.

This tort appeal has been pending on our docket and ready for submission since January of 1985. In August of 1986, upon the recommendation of and with the assistance of the State Bar of New Mexico, which assistance is greatly appreciated, this Court adopted an experimental plan pursuant to which cases would be assigned to advisory committees of experienced attorneys. Pursuant to our order adopting the plan, once the advisory committee rendered an opinion, that opinion would be served on the parties with an order to show cause

why the opinion should not be adopted as the opinion of the Court. The parties would then have the opportunity to submit response memoranda to the Court.

This case was submitted to an advisory committee and the parties were so notified. That committee rendered a unanimous opinion. The parties were notified of the opinion and of their right to submit response memoranda. No response memoranda have been filed and the time for such filing has expired. This Court has considered the transcript and briefs in this case, together with the opinion of the advisory committee. It is the decision of this Court that the opinion of the advisory committee should be adopted, as modified, as follows.

This is an appeal from a dismissal with prejudice of plaintiff's complaint pursuant to NMSA 1978, Civ.P.Rule 41(e) (Repl. Pamp.1980).

Suit was originally filed on October 1, 1969. Subsequently, all then sitting district court judges in the Second Judicial District either recused themselves or were disqualified. On January 13, 1972, the parties stipulated that Judge Edwin Felter of the First Judicial District could hear the case. The Supreme Court entered an order, pursuant to the stipulation, designating Judge Felter to "hear and try" the case. Judge Felter set the case for trial to commence March 9, 1972, and again on June 12, 1972. There is record evidence that a number of subpoenas were issued for trial. In his brief in chief in this Court, plaintiff states: "Plaintiff's attorneys withdrew on this [sic] day of trial in open court." The record contains a withdrawal of plaintiff's attorneys which bears a stamped filing date of June 12, 1972. There is a handwritten note on the withdrawal, over what purports to be Judge Felter's signature, that the withdrawal was filed in open court on the same day. On October 9, 1973, new counsel for plaintiff entered his appearance, and on the same day a motion for trial setting was filed by plaintiff.

On May 13, 1976, Judge Felter signed an order reviving the action against the estate of Defendant Dow, who had died in January 1976. On January 11, 1984, present counsel for Maryland Casualty Company (Maryland Casualty) entered their appearance, and on January 12, 1984, filed a motion to dismiss pursuant to Civ.P. Rule 41(e).

In order to get a hearing on the motion to dismiss, Maryland Casualty had to obtain a writ of superintending control from the New Mexico Supreme Court directing the presiding judge of the Second Judicial District to designate a judge of that district to hear the motion.

The hearing on the motion was held before Judge Sitterly on June 11, 1984. In response to plaintiff's counsel's statements at the hearing that plaintiff could not get a judge to try the case, Judge Sitterly said, "But it's the plaintiff's responsibility [to get a judge]. The plaintiff should have filed something a long time ago and gotten a judge. Anybody can get a judge from the Supreme Court."

Plaintiff appeals from the dismissal of his complaint with prejudice pursuant to Civ.P.Rule 41(e). Plaintiff basically makes two arguments. First, plaintiff argues that the motion for trial setting filed on October 9, 1973, indefinitely tolled the Civ. P.Rule 41(e) time period. Second, plaintiff makes the following argument: "The Plaintiff submits that it was impossible for him to get this case to trial and this is demonstrated by the lengths to which opposing counsel had to go to get his motion heard."

We affirm.

■ In applicable part, Civ.P.Rule 41(e) provides:

(e) Dismissal of action with prejudice.

(1) In any civil action * * * when it shall be made to appear to the court that the plaintiff therein * * * has failed to take any action to bring such action or proceeding to its final determination for a period of at least three years after the filing of said action or proceeding ...

unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond three years, any party to such action or proceeding may have the same dismissed with prejudice * * *.

In *State ex rel. Reynolds v. Molybdenum Corp. of America,* 83 N.M. 690, 496 P.2d 1086 (1972), the Supreme Court stated:

The trial court should determine, upon the basis of the court record and the matters presented at the hearing, whether such action has been timely taken by the plaintiff * * * and, if not, whether he has been excusably prevented from taking such action. In making this determination, the discretion of the trial court will be upheld on appeal except for a clear abuse thereof.

In *Reynolds,* the Supreme Court cited *Martin v. Leonard Motor-El Paso,* 75 N.M. 219, 402 P.2d 954 (1965): "[W]e make no attempt to fix a standard of what action is sufficient to satisfy the requirement of the rule, for each case must be determined upon its own particular facts and circumstances." Just as in *Martin,* the Supreme Court declined to attempt to fix a standard of what is sufficient to satisfy the requirement of the rule, so in this case we decline to establish such a standard; however, we have absolutely no difficulty in saying that what was done in this case clearly does not meet any reasonable standard for bringing a case "to its final determination" pursuant to Civ.P.Rule 41(e).

This Court has previously held that a request for a trial setting which has been filed after the filing of a Civ.P.Rule 41(e) motion is entitled to be considered. *Sewell v. Wilson,* 97 N.M. 523, 641 P.2d 1070 (Ct.App.1982). By the same token, however, the fact that plaintiff had filed a request for trial setting in this case in 1973 is no obstacle to the granting of a Civ.P. Rule 41(e) motion to dismiss in 1984. Clearly, plaintiff should not be permitted to file a motion for trial setting and then, especially when it becomes obvious that such a request has not been effective in producing a trial setting, to sit and do nothing for a period of eleven years. The language of the rule is clear that the duty of bringing a case to trial is plaintiff's. Plaintiff may not, as he attempts to do here, shift the burden of bringing a case to trial to the court if it becomes obvious that his request for a trial setting is unavailing.

It has long been the law in this state that the existence of a good cause excuse for failure to prosecute constitutes grounds to prevent dismissal under Civ.P. Rule 41(e). *Reynolds; Ringle Development Corp. v. Chavez,* 51 N.M. 156, 180 P.2d 790 (1947). Presumably, it is such a good cause excuse which plaintiff attempts to establish in this case by arguing that it was impossible to obtain a judge to try the case. This argument is completely answered by Judge Sitterly's comment quoted above. The fact that it was possible, contrary to plaintiff's assertion, to obtain a judge to hear this case is demonstrated by the fact that defendants were able to obtain a judge to hear their motion to dismiss.

There is another basis for affirming the trial court in this instance which completely avoids the necessity of ruling on the effect of the request for trial setting under Civ.P. Rule 41(e).

Trial courts have "inherent power to dismiss a cause of action for failure of prosecution." *Smith v. Walcott,* 85 N.M. 351, 512 P.2d 679 (1973). For the reasons hereinabove stated, the trial court would not have abused its discretion in dismissing this case for lack of prosecution through the use of its inherent power. Further, since plaintiff was given notice and an opportunity to be heard on the dismissal, a dismissal under the trial court's inherent power would have operated as an adjudication on the merits. *Otero v. Sandoval,* 60 N.M. 444, 292 P.2d 319 (1956).

The order appealed from is affirmed.

IT IS SO ORDERED.

This Court acknowledges the aid of Attorneys Thomas J. McBride, Mario E. Occhialino, and Carl J. Butkus in the preparation of this opinion. These attorneys con-

stituted an advisory committee selected by the Chief Judge of this Court and this Court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of work submitted.

ALARID and MINZNER, JJ., concur.

731 P.2d 1364

Stan PATTERSON and Sue Patterson, his wife, Appellants,

v.

ENVIRONMENTAL IMPROVEMENT DIVISION of the State of New Mexico, Appellee.

No. 8143.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Kathleen M. Haynes, Clovis, for appellants.

Weldon L. Merritt, Div. Atty., Sp. Asst. Atty. Gen., Environmental Impr. Div., Santa Fe, for appellee.

OPINION

HENDLEY, Chief Judge.

This administrative appeal has been pending on our docket and ready for submission since April of 1985. In August of 1986, upon the recommendation of, and with the assistance of the State Bar of New Mexico, which assistance is greatly appreciated, this Court adopted an experimental plan pursuant to which cases would be assigned to advisory committees of experienced attorneys. Pursuant to our order adopting the plan, once the advisory committee rendered an opinion, that opinion would be served on the parties with an order to show cause why the opinion should not be adopted as the opinion of the Court. The parties would then have the opportunity to submit response memoranda to the Court.

This case was submitted to an advisory committee and the parties were so notified. That committee rendered a unanimous opinion. The parties were notified of the opinion and of their right to submit response memoranda. No response memoranda have been filed and the time for such filing has expired. This Court has considered the transcript and briefs in this case, together with the opinion of the advisory committee. It is the decision of this Court that oral argument is unnecessary in this case and that the opinion of the advisory committee should be adopted in full as follows.

Stan and Sue Patterson (Pattersons), owners of the Snazzy Pig Restaurant in Clovis, New Mexico, appeal from a decision of the Environmental Improvement Division (EID) suspending the Pattersons' permit to operate a food service establishment. The decision of the EID is hereby affirmed.

The essential facts are not in dispute. The Pattersons have operated the Snazzy Pig Restaurant for several years. At least since 1981, the restaurant has been inspected periodically by EID employees pursuant to statutory authority empowering the EID to conduct inspections of food service establishments to determine compliance with applicable statutes and regulations designed to protect the public health. *See* NMSA 1978, § 25–1–8. On March 30, 1984, an inspection of the Snazzy Pig Restaurant occurred, and five violations of EID regulations governing food service establishments were discovered. The Pattersons have never challenged the validity of those findings. The next inspection of the restaurant occurred on September 12, 1984. At that inspection, twelve violations of EID regulations governing food service establishments were discovered, including repeat violations of each of the five regulations found to have been violated during the immediately preceding inspection of March 30, 1984.

On September 14, 1984, the EID duly notified the Pattersons that a hearing would be held on September 26, 1984, to determine whether cause existed to suspend the Pattersons' permit to operate the Snazzy Pig Restaurant. Prior to the scheduled date of the hearing, the Pattersons requested that the EID reinspect the restaurant. On September 17, 1984, the EID did conduct the requested reinspection and concluded that no violations of EID regulations then existed and that all violations discovered on September 12, 1984, had been corrected by September 17, 1984.

At the hearing on September 26, 1984, the Pattersons did not dispute the charge that the September 12, 1984, inspection of the Snazzy Pig Restaurant uncovered numerous violations of EID regulations. On September 29, 1984, the EID notified the Pattersons of the decision of the EID to suspend the Pattersons' permit until they submitted an acceptable written schedule of compliance efforts. The Pattersons suspended operation of the restaurant on October 1, 1984. By October 3, 1984, however, the Pattersons had submitted the required compliance schedule, a reinspection of the restaurant revealed no violations of regulations, and the EID notified the Pattersons that the suspension had been lifted.

On appeal, the Pattersons do not dispute the sufficiency of the evidence to support the hearing officer's findings that

numerous violations of EID regulations were discovered during the course of the EID inspection of September 12, 1984. Instead, they argue that the decision to suspend was not in accordance with law. *See* NMSA 1978, § 25–1–11(B)(2). The Pattersons assert that the suspension decision violated a then-applicable statute which provided that the Environmental Improvement Board should promulgate regulations for the revocation or suspension of permits for establishments that fail to comply with applicable statutes and regulations, but mandated that "[t]hese regulations would apply only when a violation has been discovered on an initial inspection and found to be uncorrected on a second inspection." NMSA 1978, § 25–1–7(C).[1]

The EID concedes that the statute precluded suspension unless there were two successive inspections disclosing a violation of the same regulation. The position of the EID is that the successive inspections of March 30, 1984, and September 12, 1984, satisfy the statutory criterion.

The Pattersons argue that the statutory requirement could only be met if the two inspections closest in time to the date set for the suspension hearing disclosed repeat violations of an applicable regulation. From this premise, the Pattersons argue that the only relevant inspections were the September 12, 1984, inspection and the inspection of September 17, 1984, at which the EID reported a score of 100 and found that all violations presented on September 12, 1984, had been corrected by the time of the September 17, 1984, inspection.

We hold that the statutory language is met whenever two successive inspections reveal repeat violations and, thus, that the suspension order issued on September 29, 1984, was valid. This Court ruled in *Chalamidas v. Environmental Improvement Division,* 102 N.M. 63, 691 P.2d 64 (Ct.App. 1984), that the statutory language reflected a legislative intent "to require, prior to revocation, a finding that a violation has continued, uncorrected, on a second, consecutive inspection." We conclude that the Legislature did not intend to bar the EID from continuing with a suspension hearing and ruling merely because the permit holder requests, obtains, and passes a reinspection after notice of the suspension hearing is received, but prior to the date of the hearing.[2]

The purpose of the Food Service Sanitation Act is to protect the public health by enforcing regulations established "to assure that consumers are not exposed to adverse environmental health conditions arising out of the operations of food service establishments." NMSA 1978, § 25–1–3. It is in the public interest for the EID to agree to conduct an inspection of a restaurant which remains open during the interim between the inspections, giving rise to the notification of the hearing to suspend and the date of the hearing.[3] If the

1. The statute was amended in 1985. The statute now reads: "The board shall promulgate regulations for the revocation or suspension of permits for those food service establishments which fail to come into compliance with a provision of the Food Service Sanitation Act or regulation promulgated under it. *No permit shall be suspended or revoked under the provisions of this subsection unless there have been repeated violations of the same standard* and without first providing the operator of a food service establishment an opportunity for an agency hearing." N.M.Laws 1985, ch. 38, § 1(C); NMSA 1978, § 25–1–7(C) (Cum.Supp. 1985) (emphasis added).

2. The issue of whether the EID could institute suspension or revocation proceedings based on repeat violations that occurred in the distant past but which were followed by regularly scheduled inspections in which no violations were found is not before us. We do not, therefore, have occasion to address the issue of whether, under circumstances not here present, the application of the doctrine of laches might preclude the EID from instituting suspension or revocation proceedings. *See Weinberg v. Commonwealth State Board of Examiners of Public Accountants,* 509 Pa. 143, 501 A.2d 239 (Pa. 1985). *See generally, City of Raton v. Vermejo Conservancy District,* 101 N.M. 95, 678 P.2d 1170 (1984).

3. The EID has the power to suspend a permit immediately, without a hearing, if an inspection demonstrates "a substantial danger of illness, serious physical harm or death to consumers." NMSA 1978, § 25–1–9. Such ex parte suspensions cannot continue beyond the time that a reinspection at the request of the food service

EID could grant a request for reinspection only at the risk that the suspension or revocation hearing must be dismissed if the restaurant passed the reinspection, the EID might be tempted to decline to grant requests for reinspection or to defer them until after the suspension hearing.[4] This Court declines to construe the statute in a manner which would be counterproductive to its stated purpose. *See, e.g., State v. Shafer,* 102 N.M. 629, 698 P.2d 902 (Ct. App.1985).

The order of the EID of September 29, 1984, suspending the permit issued to Stan and Sue Patterson for operation of the Snazzy Pig Restaurant is affirmed.

IT IS SO ORDERED.

operator discloses that the dangerous conditions no longer exist. In this case, the EID did not use the power provided by Section 9 to close the Snazzy Pig Restaurant prior to the hearing. Therefore, the provision requiring the EID to conduct a reinspection at the request of the food service operator was not applicable.

This Court acknowledges the aid of Attorneys Mario E. Occhialino, Carl J. Butkus, and Thomas J. McBride in the preparation of this opinion. These attorneys constituted an advisory committee selected by the Chief Judge of this Court and this Court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of work submitted.

ALARID and MINZNER, JJ., concur.

4. No statute or regulation compels the EID to conduct a reinspection of a restaurant pending a suspension hearing if the restaurant was not closed down without a hearing pursuant to NMSA 1978, § 25-1-9.

732 P.2d 426

Robert ARMIJO, Plaintiff-Appellee,

v.

CEBOLLETA LAND GRANT, dba Board of Directors of the Cebolleta Land Grant, Defendant-Appellant.

Robert ARMIJO, Plaintiff-Appellant,

v.

CEBOLETTA LAND GRANT, Defendant-Appellee.

Nos. 16052, 16048.

Supreme Court of New Mexico.

Jan. 30, 1987.

Reginald J. Garcia, Simms & Garcia, Albuquerque, for defendant-appellee.

Reggie C. Chavez, Belen, for plaintiff-appellant.

OPINION

WALTERS, Justice.

Two interlocutory appeals are brought by plaintiff Armijo and defendant Cebolleta Land Grant, respectively, to challenge the lower court's orders on motions for summary judgment. The appeals are consolidated for our decision.

Armijo served as president of the Cebolleta Land Grant Board of Trustees from April, 1981 until April, 1983. In July, 1983, Armijo submitted a statement to a new board which sought reimbursement for the sum of $52,000, alleged to be the rental value of a front-end loader used by the land grant for a period of fifteen months. He also requested reimbursement of $9,500 for business trips taken on behalf of the land grant during his tenure as board president. He relied on the actions of the Board of Trustees which, at a public meeting, had approved payment of expenses for business trips taken on behalf of the grant in the

amount of $100 per trip, plus allowance of an additional $50 to the board member furnishing transportation for such trips.

The new board refused to pay, and Armijo filed suit. The district court granted the land grant's motion for summary judgment with respect to Armijo's claims for reimbursement of travel expenses, but denied it with respect to Armijo's claims for reimbursement for the use of the front-end loader. We are asked to resolve the following issues:

> I. Does NMSA 1978, Section 49–1–14, bar Armijo from recovering reimbursement authorized by the Board of Trustees for expenses incurred in the administration of the land grant?
>
> II. Is Armijo barred from recovering $52,000 for use of his equipment on a construction project within the land grant during the period he was a member of the Board of Trustees?

We affirm.

I.

The land grant bases its refusal to pay Armijo for travel expenses on NMSA 1978, Section 49–1–14 (Cum.Supp.1986), which provides in relevant part:

> [The Board of Trustees] may fix and pay to its members a salary not to exceed two hundred dollars ($200) to any member in any one month, which salary as fixed shall be in full as compensation for the duties performed by such board or the individual members thereof within the exterior boundaries of the grant.

Armijo argues that this section addresses only the question of salary and, because it is silent on the issue of reimbursement for expenses incurred in the administration of a trust, it does not apply. For instance, Armijo points out that among the board's enumerated powers is the right to "sue and be sued." NMSA 1978, § 49–1–3(B) (Cum. Supp.1986). This power, he contends, implies that the board may hire legal counsel, pay legal fees and, presumably, pay for trips of board members to pursue law suits or to defend against them. It is a fact that many of the itemized trips taken by Armijo were to discuss pending litigation. We can agree that reimbursement for expenses incurred by a trustee while in the performance of his duties is widely recognized. *See* Bogart, *Trusts and Trustees,* § 975, pp. 16–21 (2d ed. 1983). Here, however, Armijo is not seeking reimbursement for expenses incurred as a trustee; rather, he is seeking compensation for services he himself performed as a lawyer. His entitlement to legal fees for legal services rendered to the board while he was a member of that board presents a question of the propriety of such self-dealing.

In *Kavanaugh v. Delgado,* 35 N.M. 141, 290 P. 798 (1930), this Court recognized that a community land grant is a quasi-municipal corporation. During the time period covered by this lawsuit, Armijo was an elected member of quasi-municipal Cebolleta Land Grant Board of Trustees for a fixed term, with duties affecting the public. NMSA 1978, §§ 49–1–3, –4; *see also State ex rel. Gilbert v. Board of Comm'rs,* 29 N.M. 209, 218, 222 P. 654, 657 (1924). Accordingly, he should be held to standards and rules similar to those governing other public officials.

In *Merrifield v. Buckner,* 41 N.M. 442, 70 P.2d 896 (1937), it was said that, "[a]s a practical matter the Legislature has assumed the function of exercising control over [community land grants] through statutes providing for their administration by boards of trustees." *Id.* at 451, 70 P.2d at 901. As such, "[t]he governing body of a grant is a creature of the Legislature, and has only such powers as are conferred by the particular act creating it." *Board of Trustees of Las Vegas v. Montano,* 82 N.M. 340, 343, 481 P.2d 702, 705 (1971). The legislative enactment of Section 49–1–14 reserved to the legislature the power to set the amount of compensation for community land grant board members. A salary specified by law for the discharge of official duties impliedly excludes the allowance of any other compensation. *See, e.g., DeSilva v. Brown,* 38 Haw. 166, 173 (1948) (question of compensation is dependent upon the terms of the law which creates

the office and prescribes its duties); *Bayless v. Knox County*, 199 Tenn. 268, 286, 286 S.W.2d 579, 587 (1956) (officer may not recover compensation additional to the compensation fixed by statute for expenses); *State ex rel. Cromwell v. Myers*, 80 Ohio App. 357, 362, 73 N.E.2d 218, 220 (1947) ("legislative intent to allow compensation in addition to that allowed under the salary law must clearly appear").

Underlying these decisions is the recognition that, by its very nature, holding public office creates opportunities for an officer to take advantage of or profit from his position. A statutorily fixed compensation limits the likelihood that public officials will be tempted to participate in activities involving potential conflicts of interest. In this case, then, the board's authorization for travel reimbursement was an impermissible attempt to circumvent action taken by the legislature designed to prevent the very situation confronted here. If the board felt that its members should receive some form of expense reimbursement incident to administration by the board, authorization should have been sought from the legislature. *See Merrifield.* Armijo cannot legitimately claim unjust enrichment to the board, or quasi-contract for trip payments, because the statutory compensation is "in full as compensation for the duties performed by such board or the individual members thereof within the exterior boundaries of the grant." NMSA 1978, § 49–1–14 (Cum.Supp.1986). The trial court's grant of summary judgment in favor of the land grant on this issue was proper.

II.

For similar reasons, the law does not permit Armijo to recover on his contract with the land grant for use of his front-end loader. Armijo's complaint alleges that he had an agreement as of approximately May, 1981, to furnish his front-end loader to land grant purposes for $3,500 per month. As we have already noted, Armijo was an elected member of the board at that time. The delicacy of that relationship was addressed in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), where Justice Cardozo wrote:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place.

In more recent years, the validity of contracts between officers and the governing bodies of which they are members have generally involved construing one or more "conflict of interest" statutes. Some of those cases are discussed hereafter. If land grants were "true" municipalities, Armijo would have been statutorily proscribed from "acquir[ing] a financial interest in any new or existing business venture or business property of any kind when such officer or employee believes or has reason to believe that the new financial interest will be directly affected by his official act." NMSA 1978, § 3–10–4(A) (Repl.Pamp.1985). However, because such "conflict of interest" statutes are penal in nature, they must be strictly construed. The land grant being only a quasi-municipal corporation, we are enjoined by that rule of construction to hold that Section 3–10–4(A) does not apply to Armijo.

Nevertheless, we take notice that "conflict of interest" statutes represent a codification of the common law principle which voided certain contracts as violative of public policy. *Moody v. Shuffleton*, 203 Cal. 100, 262 P. 1095 (1928). For instance, an Arkansas court held that a contract between a commissioner of a sewer improvement district and the other commissioners was invalid because the commissioner "could not make a contract with himself." *Sloss v. Turner*, 175 Ark. 994, 1000, 1 S.W.2d 993, 995 (1928). Such contracts are "contrary to public policy and are void for that reason." *Id.* A Georgia court voided a contract for the sale of a truck to the city by the mayor, even though there was no statute or charter provisions prohibiting the contract, because the "rule invalidating such contracts is based upon public policy." *Trainer v. City of Covington*, 183 Ga. 759, 760, 189 S.E. 842 (1937). This Court has

recognized that "contracts opposed to public policy cannot be enforced." *Davis v. Savage,* 50 N.M. 30, 43, 168 P.2d 851, 859 (1946); *accord DiGesu v. Weingardt,* 91 N.M. 441, 575 P.2d 950 (1978); *City of Artesia v. Carter,* 94 N.M. 311, 610 P.2d 198 (Ct.App.1980). Consequently, under common law principles, the contract in question is void as against public policy, and Armijo is precluded from recovering on the contract.

The land grant further argues that Armijo should also be barred from recovering in quantum meruit, but relies for this proposition on cases where the contract in question was expressly prohibited by a conflict of interest statute. *See, e.g., Town of Boca Raton v. Raulerson,* 108 Fla. 376, 146 So. 576 (1933); *Arthur v. Trindel,* 168 Neb. 429, 96 N.W.2d 208 (1959). Here, there is no statute applicable to quasi-municipal corporations. Thus, we are persuaded by those cases distinguishing between contracts expressly prohibited by statute and those held void as against public policy, *see, e.g., Town of Boca Raton v. Raulerson; Miller v. City of Martinez,* 28 Cal.App.2d 364, 82 P.2d 519 (1938), to hold that although contracts may be voided solely because they are against public policy, the claimant may still recover in quantum meruit. *Lainhart v. Burr,* 49 Fla. 315, 38 So. 711 (1905).

We affirm the lower court's denial of summary judgment on the issue of plaintiff's claim for the contract rental value of his equipment and remand for a determination of the value of the services rendered by Armijo to the land grant for use of his front-end loader.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and SOSA, Senior Justice, concur.

[redacted]

732 P.2d 431

STATE of New Mexico,
Plaintiff-Appellee,

v.

Kenneth CRENSHAW,
Defendant-Appellant.

No. 9069.

Court of Appeals of New Mexico.

Dec. 23, 1986.

Martha A. Daly, Rothstein, Bailey, Bennett, Daly & Donatelli, Santa Fe, for defendant-appellant.

Paul G. Bardacke, Atty. Gen., Patricia Frieder, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

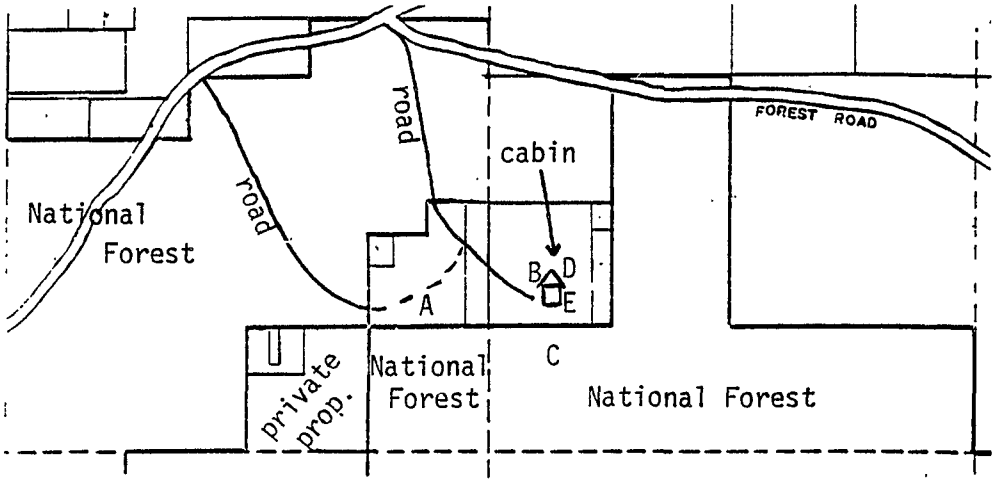
OPINION

BIVINS, Judge.

Defendant appeals his conviction for possession of marijuana with intent to distribute, contending that: (1) the evidence obtained pursuant to the search warrant was inadmissible as the product of an illegal search and seizure; (2) there was insufficient evidence of defendant's possession of marijuana; and (3) there was insufficient evidence of defendant's intent to distribute the marijuana. Other issues raised in the docketing statement but not briefed are deemed waived. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We hold that portions of the evidence obtained were inadmissible as the products of an illegal search and seizure and, therefore, reverse and remand for a new trial.

The affidavit which formed the basis for issuing the search warrant states that the affiant, a police officer, and another officer went on a foot patrol into the Lincoln National Forest in search of marijuana. The accompanying officer, who lived in the area, had observed defendant going into and coming out of the forest "in an area to be described in this affidavit." During their patrol, the officers saw a stand of

what appeared to be approximately thirty-seven marijuana plants growing on the south side of a dirt road. A not-to-scale diagram of the areas involved will clarify the facts of this case:



The first stand of approximately thirty-seven marijuana plants is labeled "A" on the diagram. At point A, the officers believed initially that they were on national forest land. They proceeded further into the forest and "unexpectedly noted a cabin with black paper on the wall and a tin roof, with other outbuildings nearby." The affidavit states that "[i]n close proximity of this cabin, in plain view, numerous suspected marijuana plants were observed." One officer also noted defendant's vehicle at the cabin. Testimony revealed that the officers observed ten to twelve suspected marijuana seedlings in three flower pots under a clothesline in an area near the house. ("B" on diagram.) While on the property, the officers photographed the cabin and stands of marijuana growing in the woods surrounding the cabin. The officers then retreated to obtain a search warrant. After leaving the vicinity of the cabin, the officers discovered approximately seventy-four suspected marijuana plants. ("C" on diagram.)

The officers executed an affidavit for a search warrant, which contained an incorrect description of the property to be searched. The same officers returned to the property with the warrant and seized evidence from points A, B, and C. The officers also discovered and seized approximately forty-one plants at point "D" on the diagram and additional marijuana seedlings at point "E." Also seized at or near point B were four buckets of sand, forty-six empty small black cans, one sack of fertilizer, one gallon plastic "jerry" can, three green water hoses, several plastic sacks containing buckets, and numerous one-gallon plastic water jugs. Finally, the officers seized one dried marijuana plant in a wine bottle in the kitchen of the cabin. The cabin, and points A, B, D and E, are located on property leased by defendant.

In determining the admissibility of the evidence seized, we will consider several issues. We consider the reasonableness of the initial search, which provided the basis for probable cause for issuance of the search warrant, and will examine possible exceptions that would validate the search. If the initial search was unreasonable, then portions of the affidavit supporting the search warrant must be excluded. If the remaining information does not constitute probable cause, the search warrant will be invalid. If the search warrant is invalid, evidence seized pursuant to the warrant will be inadmissible unless an exception

eliminates the need for a warrant. We also consider whether any exception applies.

INITIAL SEARCH

To determine the admissibility of evidence seized pursuant to the search warrant, we first consider the reasonableness of the initial search. Defendant contends that the initial search that formed the basis for probable cause to issue the warrant was illegal because the officers intruded onto the curtilage of the cabin that defendant leased, an area protected by the fourth amendment. We agree.

The state argues that the cabin was not a dwelling house and the area surrounding it was not curtilage to which fourth amendment protections would attach. The state bases this argument on the fact that the cabin was not defendant's home or principal residence. There was evidence, however, that defendant was frequently on the leased property and would occasionally stay overnight at the cabin. Friends often visited for cookouts. In fact, defendant had stayed at the cabin the night preceding the search. Defendant had worked to repair the cistern and mend the fences. A clothesline was set up and there was a trash can on the premises. Inside the cabin were beds, a stove and other furniture.

Defendant's use of the cabin was in keeping with that of a vacation home. It was not abandoned or vacant. *Cf. State v. Clark,* 105 N.M. 10, 727 P.2d 949 (Ct.App. 1986). The cabin was a dwelling house to which fourth amendment protections attach. *See Steeber v. United States,* 198 F.2d 615 (10th Cir.1952) (unoccupied leased premises protected by fourth amendment); *Roberson v. United States,* 165 F.2d 752 (6th Cir.1948) (house which was not legal domicile protected by fourth amendment); *State v. Ervin,* 96 N.M. 366, 630 P.2d 765 (Ct.App.1981) (house unoccupied for over one year with no gas, water or electricity was a dwelling house within meaning of burglary statute). *See also* Annot., 33 A.L. R.2d 1430 (1954).

Furthermore, the area surrounding the house constitutes curtilage protected by the fourth amendment. Generally, the curtilage is "the enclosed space of grounds and buildings immediately surrounding a dwelling house." *State v. Aragon,* 89 N.M. 91, 94, 547 P.2d 574, 577 (Ct.App. 1976), *rev'd on other grounds, State v. Rickerson,* 95 N.M. 666, 625 P.2d 1183 (1981). Evidence in the present case indicated that the cabin was situated in a clearing enclosed by dense woods. The clearing contained several outbuildings, a cookout grill and clothesline, all in close proximity to the cabin. The officers saw marijuana when they were thirty to seventy-five feet from the cabin. Some marijuana was under the clothesline. The curtilage in the present case included the area from which the officers observed the marijuana plants under the clothesline. *See, e.g., United States v. Van Dyke,* 643 F.2d 992 (4th Cir.1981) (area occupied by officers in honeysuckle patch one hundred fifty feet from house was within curtilage). *Cf. State v. Aragon.* Defendant had a legitimate expectation of privacy in this area. The intrusion onto the curtilage of defendant's property violated his fourth amendment rights.

FOURTH AMENDMENT WARRANT REQUIREMENTS

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The fourth amendment guarantees that people will not be subject to unreasonable searches and seizures. *State v. Foreman,* 97 N.M. 583, 642 P.2d 186 (Ct.App.1982). The proscription against unreasonable searches protects expectations of privacy. *Id.* Warrantless searches are per se unreasonable unless they fall within certain well-defined exceptions to the warrant requirement. *State v. Manus,* 93 N.M. 95, 597 P.2d 280 (1979). Exceptions to the warrant requirement in-

clude probable cause with exigent circumstances, a search incident to an arrest, an inventory search, consent, hot pursuit, open fields, and plain view. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Chort,* 91 N.M. 584, 577 P.2d 892 (Ct.App.1978); *State v. Ledbetter,* 88 N.M. 344, 540 P.2d 824 (Ct.App.1975). Absent an exception, the government must obtain a warrant to search a person's home.

POSSIBLE EXCEPTIONS TO WARRANTLESS INTRUSION ONTO DEFENDANT'S CURTILAGE

We discuss and apply the following exceptions to a warrantless search in the context of the officers' warrantless intrusion onto defendant's curtilage. We apply these same exceptions later in this opinion in the context of the seizure of evidence from both defendant's curtilage and other nearby areas.

1. Open Fields

The "open fields" doctrine permits police officers to enter and search a field without a warrant. *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). In *Oliver v. United States,* the police had no warrant authorizing a search, no probable cause for the search, and no exception to the warrant requirement was applicable. However, the Court allowed into evidence marijuana plants found in a field on defendant's property, a mile from the house. In applying the "open fields" exception, the Court concluded that an individual has no legitimate expectation of privacy for activities conducted out-of-doors in fields, except in the area immediately surrounding the home. *Id.* The Court reiterated that an open field may be a heavily wooded area for purposes of the fourth amendment. *Id.* at 180, n. 11, 104 S.Ct. at 1742, n. 11. Here, defendant had a legitimate expectation of privacy in the area surrounding his cabin. The open fields exception cannot excuse the officers' lack of a search warrant.

2. Plain View

The officer states in the affidavit for the search warrant that some of the items were "in plain view." This misses the point. Plain view alone does not justify an exception to the requirement of a warrant. *Coolidge v. New Hampshire; State v. Luna,* 93 N.M. 773, 606 P.2d 183 (1980). To come within the plain view doctrine, three things are required: 1) a prior valid intrusion (the officers are lawfully in the position from which they observe the evidence); 2) the discovery of evidence in plain view must be inadvertent; and 3) the incriminating nature of the things to be seized must be immediately apparent to the officers. *State v. Luna; State v. Dobbs,* 100 N.M. 60, 665 P.2d 1151 (Ct.App.1983). Here, the police had no right to be on the curtilage when they observed marijuana growing in close proximity to the cabin. The plain view exception cannot justify the intrusion onto the curtilage of defendant's cabin in violation of defendant's fourth amendment rights. *State v. Luna.*

3. Good Faith

The state also urges us to apply the good faith exception to the exclusionary rule adopted by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *United States v. Leon,* the Court concluded "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922, 104 S.Ct. at 3421. In *United States v. Leon,* however, a magistrate issued a search warrant based on information from an unreliable, third-party informant; thus, no probable cause supported the warrant. Police officers used the warrant to obtain evidence. The Court declined to exclude the evidence, even though it was seized pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge. The Court reasoned that the exclusionary rule was designed to deter police misconduct rather than punish the errors of

judges and magistrates. When an officer exhibits objectively reasonable reliance on such a warrant, suppression of the evidence is inappropriate. *Id.*

In asking this court to apply the good faith exception to the case before us, the state argues that the technical misdescription of the property in the warrant should not bar the admission of evidence. In our case, the police officers first violated defendant's fourth amendment rights by trespassing onto the curtilage. Then a search warrant was issued. The Supreme Court leaves to the state courts' discretion whether to resolve a fourth amendment question before turning to the good faith issue or whether to turn immediately to consider the officers' good faith. *Id.*, 468 U.S. at 924–25, 104 S.Ct. at 3422–23. We choose to examine first the fourth amendment violation. Since we have already determined that the search warrant fails based on a pre-warrant trespass onto defendant's curtilage, and not on a technical misdescription of the property to be searched, we will not apply the good faith exception.

If we were to apply the good faith exception here, we would be allowing the exception to cure the violation of the fourth amendment by the police. Despite numerous limitations placed recently on the exclusionary rule by the United States Supreme Court, the purpose of the exclusionary rule remains to deter unlawful searches by the police. *Massachusetts v. Sheppard,* 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). We cannot at once deem the officers' trespass an "unreasonable search," then purport to apply an "objectively reasonable" good faith test to overcome the trespass. Doing so would force us to declare a constitutionally unreasonable search as reasonable and would virtually eliminate the exclusionary rule. This we decline to do.

Having examined the three exceptions discussed above, we determine that none of the exceptions excused the officers from obtaining a search warrant before intruding onto the curtilage of defendant's cabin. Evidence observed pursuant to a warrantless search must be excluded. *United States v. Sporleder,* 635 F.2d 809 (10th Cir.1980). We now examine the affidavit, excluding evidence viewed on the curtilage.

AFFIDAVIT AND VALIDITY OF SEARCH WARRANT

When a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, evidence seized pursuant to the warrant is admissible if the lawfully obtained information amounts to probable cause and would have justified the issuance of the warrant apart from the tainted information. *State v. Copeland,* 727 P.2d 1342 (Ct.App.1986); *see also United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). The proper inquiry, therefore, is whether the affidavit contained any tainted information and, if so, whether any remaining, untainted information established probable cause for the issuance of a search warrant. Any statements made in the affidavit that are based on information gained in violation of defendant's rights may not be used to establish probable cause. *State v. Copeland.* The observation of the marijuana seedlings under the clothesline and of defendant's vehicle at the cabin cannot be used to establish probable cause. Without these statements, the affidavit states: 1) the officers were assigned to patrol forest land to detect marijuana; 2) defendant had been seen going into and coming out of the forest; 3) while on foot patrol the officers saw thirty-seven marijuana plants; 4) defendant usually travelled down the dirt road next to the stand of marijuana; and 5) the officers proceeded further into the forest. These facts are insufficient to establish probable cause to search defendant's property. *State v. Baca,* 97 N.M. 379, 640 P.2d 485 (1982); *see State v. Herrera,* 102 N.M. 254, 694 P.2d 510 (1985). The search warrant is, therefore, invalid, and evidence seized pursuant to the warrant must be excluded.

Because we find the search warrant invalid based on the lack of probable cause for issuance, we do not reach defendant's contention concerning the warrant's incorrect description of the premises. We now examine all of the evidence seized, apply

any exceptions discussed above, and determine if any of the evidence is admissible.

EVIDENCE FROM POINT A

Point A revealed approximately thirty-seven marijuana plants. The officers first thought these plants were growing on forest land. After more careful analysis of local maps, the officers concluded that the plants were growing on property leased exclusively to defendant. These plants were approximately one-quarter mile from the cabin and were not within the curtilage protected by the fourth amendment. We conclude that the "open fields" exception to the fourth amendment allows into evidence the plants seized at point A.

Applying *Oliver v. United States* to our case, we find that defendant had no legitimate expectation of privacy to the area outside the curtilage of his cabin. Defendant exhibited no expectation of privacy, such as a fence around the plants. *Cf. State v. Chort* (five-foot fence around marijuana garden exhibited actual expectation of privacy; "open fields" doctrine did not apply). Therefore, evidence of the thirty-seven plants is admissible under the "open fields" doctrine.

EVIDENCE FROM POINTS B, D, AND E

All of the items seized from points B, D, and E were seized pursuant to a search warrant, invalidated because of an unreasonable search of defendant's curtilage. None of the exceptions discussed above justified the initial search, and the evidence of the search could not be used to establish probable cause for the search warrant. Neither can the fruits of the unreasonable search and invalidated warrant be admitted into evidence. *State v. Everitt,* 80 N.M. 41, 450 P.2d 927 (Ct.App. 1969). Under the "fruit of the poisonous tree" doctrine, evidence seized from points B, D, and E must be excluded.

We note that the United States Supreme Court has stated clearly that the curtilage exception does not bar police observation from a public vantage point where they have a right to be. *California v. Ciraolo,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). Thus, in *California v. Ciraolo,* aerial observation of the curtilage of the home did not require a warrant. *See also State v. Rogers,* 100 N.M. 517, 673 P.2d 142 (Ct.App.1983) (aerial surveillance with binoculars not unconstitutionally intrusive). We note also that the officers could have placed the marijuana stand at point A under surveillance to determine who was cultivating the plants. Such an observation might have provided sufficient probable cause for an arrest or a search warrant.

EVIDENCE FROM POINT C

The plants at point C were located on national forest land. Seizure of these plants could have occurred with or without a search warrant. Defendant's reasonable expectation of privacy and fourth amendment rights were not violated when officers seized these plants. Therefore, evidence seized from point C is admissible.

A possible problem of commingling of evidence taken from defendant's property and from forest property now arises. One officer testified that it was impossible to tell which marijuana plants came from the different locations. All of the plants were put together in trucks, the stems were mixed in with leaves, and a commingled sample was sent to the laboratory for evaluation. The trial court did not reach this issue, since it admitted all of the evidence. Upon remand, the trial court must determine if there are any means of distinguishing the admissible evidence from the inadmissible.

We note that if all of the evidence in this case had been admissible, it would have been sufficient to support defendant's conviction on both possession and intent to distribute. *State v. Bowers,* 87 N.M. 74, 529 P.2d 300 (Ct.App.1974); *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App.1974).

We reverse defendant's conviction and remand for a new trial in accordance with this opinion.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

732 P.2d 863

Steve VERCHINSKI, d/b/a Solar Electric Co. of New Mexico, Plaintiff-Appellant,

v.

Richard L. KLEIN and Jane Klein, his wife, Defendants-Appellees.

No. 16035.

Supreme Court of New Mexico.

Jan. 21, 1987.

Rehearing Denied Feb. 27, 1987.

Roehl & Henkel, Ronald W. Henkel, Albuquerque, for plaintiff-appellant.

Richard L. Klein, Jane Klein, pro se.

OPINION

SOSA, Senior Justice.

This appeal arises from the trial court's dismissal of the amended complaint of plaintiff Steve Verchinski, d/b/a Solar Electric Company of New Mexico (Verchinski), against defendants Richard and Jane Klein (Kleins) for damages from a breach of contract and for foreclosure of a materialmen's lien. Kleins filed an answer affirmatively pleading that Verchinski was barred from recovering under the contract and under the materialmen's lien because he did not have a contractor's license as required under the provisions of the New Mexico Construction Industries Licensing Act (the Act), NMSA 1978, Sections 60–13–1 to—58 (Repl.Pamp.1984). On April 15, 16, and 17, the trial court heard evidence on whether Verchinski was acting as a contractor when he entered into an agreement with the Kleins to provide three photovoltaic irrigation systems. At the conclusion of the hearings, Kleins filed a motion for dismissal of this suit. The trial court granted the motion and dismissed Verchinski's complaint with prejudice. We reverse.

The question on appeal is whether Verchinski's activities under his contract with Kleins brought him within the licensing provisions of the Act, thus barring him from maintaining an action to recover money due under his contract.

FACTS

In 1982, Verchinski established his business and became a dealer for WEBA Solar, Incorporated, a solar thermal and photovol-

taic systems distributor. In December 1982, WEBA informed Verchinski that Kleins might be interested in a solar irrigation system to water Christmas trees, which would be planted on land they owned in Tijeras Canyon, New Mexico.[1]

Verchinski, as WEBA's dealer, entered into design agreements with Kleins for three photovoltaic irrigation systems. WEBA engineers actually designed the systems in accordance with the specifications of Kleins' property provided by Verchinski. In accordance with NMSA 1978, Section 7–2–17(B)(1) (Repl.Pamp.1986), the designs were submitted to the Energy and Minerals Department of the State of New Mexico and were approved. Subsequently, because the pump unit supplied by WEBA was inappropriate for the irrigation systems, the systems were redesigned using components manufactured and designed by Photocom, another distributor of photovoltaic systems. These redesigns were submitted to the State and approved.

On June 3, 1983, the Kleins and Verchinski entered into a "Quotation" contract. That contract provided that Verchinski would furnish materials for three photovoltaic irrigation systems at a total cost of $55,960.97. The contract further provided that 50% payment was due upon delivery of the materials to the site and the remaining 50% was due upon state approval and acceptance. Within a few weeks, the materials were delivered and Kleins paid 50% of the total cost as required under the contract.

The equipment and materials were installed by various licensed contractors. Verchinski and the Kleins signed a "work contract" with Mike LaVine and John Taylor. The agreement provided that LaVine and Taylor, as contractors-subcontractors, would "[i]nstall [the] photovoltaic base and array as per specifications [of the approved] design." That contract stipulated that $1680 was the total cost for installation. LaVine, a licensed electrician, did the electrical wiring and Taylor prepared the base for the pumps, which were installed by Don Miller, a licensed contractor. The preparatory work for the irrigation systems admittedly was the responsibility of the Kleins. For example, the Kleins hired a licensed well driller, Earl Taute, to drill a third well, and the Kleins did all the trenching, including running the pipe from the tanks to the trees. After the equipment and materials were installed, the State approved the three systems, thereby making the systems eligible for a tax credit refund. Kleins received a refund of $55,960.97, plus $3000 in interest, but they failed to pay the remaining 50% due under the terms of the contract. On September 26, 1983, Verchinski filed a claim of lien in the amount of $30,453.34 against certain lots where the solar irrigation systems, including the collector panels, were situated. In February 1984, certain liens were released and a new claim of lien was executed. This lawsuit followed.

In his amended complaint, Verchinski claimed that he entered into an agreement with Kleins to sell materials for three photovoltaic irrigation systems and that Kleins refused to make payment on the outstanding balance due on the contract. In their defense to Verchinski's complaint, Kleins alleged that Verchinski was an unlicensed contractor who could not maintain this action. It is undisputed that Verchinski was not a licensed contractor when he entered into the agreement with the Kleins in the Summer of 1983.

The Act provides that "[n]o person shall engage in the business of [a] contractor within the state without a license issued by the division classified to cover the type of work to be undertaken." NMSA 1978, § 60–13–12(A) (Repl.Pamp.1984). The purpose of the Act is to protect the public from incompetent and irresponsible builders. *Olivas v. Sibco, Inc.*, 87 N.M. 488, 490, 535 P.2d 1339, 1341 (1975); *Peck v. Ives*, 84 N.M. 62, 66, 499 P.2d 684, 688

1. In 1982 the Legislature enacted a tax credit refund for the cost of equipment installed as part of a solar energy system for irrigation purposes. *See* NMSA 1978, § 7–2–17(A) (Repl. Pamp.1986).

(1972). In effectuating this purpose, the Act provides for sanctions against those engaging in "contracting" who fail to comply with the statute. *See e.g., Kaiser v. Thomson,* 55 N.M. 270, 232 P.2d 142 (1951); *Fleming v. Phelps-Dodge Corp.,* 83 N.M. 715, 496 P.2d 1111 (Ct.App.1972). The express statutory provision precluding an unlicensed contractor from maintaining an action under a contract which constitutes "contracting" within the meaning of the Act provides:

> No contractor shall act as agent or bring or maintain any action in any court of the state for the collection of compensation *for the performance of any act for which a license is required by the Construction Industries Licensing Act* without alleging and proving that such contractor was a duly licensed contractor at the time the alleged cause of action arose.

NMSA 1978, § 60-13-30(A) (Repl.Pamp. 1984) (emphasis added).

Verchinski contends that his cause of action is based on breach of contract for materials supplied to the Kleins and that he did not engage in any "contracting" for which a license was required by the Act. Quite simply, Verchinski maintains that a contractor's license is unnecessary for a supplier of materials. Verchinski concedes that he acted as an agent for the Kleins when he arranged for the installation of the tanks, pumps, base preparation, and electrical work, but he argues that he had no underlying contract or responsibility for the installation of the systems. Verchinski asserts that the Kleins were ultimately responsible and in control of the installation work as evidenced by their separate contract with LaVine and Taylor. We find merit in Verchinski's contentions.

The Act under Section 60-13-3(A) defines contractor as "any person who undertakes, offers to undertake, or purports to have the capacity to undertake, by himself or through others, contracting." Subsection (C)(1), however, excludes from the definition of contractor "any person who merely furnishes materials or supplies at the site without fabricating them into, or consuming them in the performance of, the work of a contractor." The language in Subsection (C)(1) is identical in form to the California statute which exempts application of the contractor's licensing laws to persons who only furnish or supply materials. *See* Cal.Bus. & Prof.Code § 7052 (West 1975). The court in *Steinbrenner v. J.A. Waterbury Constr. Co.,* 212 Cal. App.2d 661, 28 Cal.Rptr. 204 (1963), held that Section 7052 excluded from the requirements of the licensing law any person who furnished materials or supplies without fabricating them into, or consuming them in the performance of the work of a contractor. We agree and would construe our Subsection (C)(1) accordingly.

In the instant case, however, the trial court also found that Verchinski entered into an agreement to install the three irrigation systems, and that Verchinski constructed and installed the systems on Kleins' property by ordering and delivering equipment and by arranging for the installation of pumps, piping, storage tanks, electrical wiring, cement pillars, and platforms. The trial court concluded that these activities required a contractor's license.

Verchinski challenges the judge's finding that he contracted to install the three irrigation systems and that his activities constituted "contracting" as defined by the Act. As stated above, Verchinski maintains that Kleins had a separate contract for the installation work. We agree.

■ Whether Verchinski contracted to install the three irrigation systems is an issue determined by the documentary evidence. Where the issue to be determined rests upon interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions. *See Brooks v. Tanner,* 101 N.M. 203, 205, 680 P.2d 343, 345 (1984).

■ In reviewing the contract dated June 3, 1983, we find that this was a contract for materials only. The agreement provided that Verchinski would furnish "materials" for irrigation systems 1, 2, and

3 for the sum total of $55,960.97. Kleins argue that this contract provided for the installation of the equipment and materials by the language stating that Verchinski was authorized "to to do the work specified." It is axiomatic that in construing the provision of a written contract the instrument must be considered as a whole. *Manuel Lujan Ins., Inc. v. Jordan,* 100 N.M. 573, 575, 673 P.2d 1306, 1308 (1983). In applying this principle, it becomes clear that the "work specified" in the contract was not for the installation work, but rather for the delivery of materials. Verchinski had no installation responsibility under this contract. The ordering and delivering of materials or the mere arranging for their installation does not bring suppliers of materials into the realm of the definition of "contractor" under Section 60–13–3(A) where they are not, and their contracts do not place them, in control of the installation. *See Industrial Power v. Western Modular Corp.,* 623 P.2d 291, 295 (Alaska 1981).

Verchinski's firm, which was acting as a dealer for photovoltaic systems distributors, entered into an agreement with Kleins to furnish materials for three solar irrigation systems. Verchinski entered into design agreements with Kleins. All materials were manufactured by Photocom and delivered to Kleins on the site. Verchinski was not in control of the installation work. The materials were ultimately fabricated or consumed, but this occurred under a separate work contract with licensed contractors.

Under these circumstances, it appears that the Kleins are attempting to escape their obligation under their contract, even though they have received full protection contemplated by the statute, and have received a refund far in excess of any payments made for design and installation of the systems. As we stated in *Peck v. Ives,* 84 N.M. at 66, 499 P.2d at 688:

> In view of the severity of the sanctions and the forfeitures which could be involved, we are reluctant to construe the statute more broadly than necessary for the achievements of its purpose. The statute should not be transformed into an "unwarranted shield for the avoidance of a just obligation."

Verchinski had no installation responsibilities under the contract of June 3, 1983. Therefore, he was not required to obtain a contractor's license in order to obtain payment in compensation for his performance of that contract.

We hold therefore that Verchinski should be allowed to pursue his claim. The case is reversed and the district court is instructed to vacate its dismissal of Verchinski's complaint and to reinstate the matter on its trial docket.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and WALTERS, J., concur.

732 P.2d 866

STATE of New Mexico, Plaintiff-Appellee,

v.

O.C. "Chick" FERO, Defendant-Appellant.

No. 16088.

Supreme Court of New Mexico.

Feb. 10, 1987.

Rehearing Denied Feb. 27, 1987.

Leon Taylor, Philip C. Gaddy, Tina Sibbitt, Albuquerque, for defendant-appellant.

Hal Stratton, Atty. Gen., Patricia Frieder, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Senior Justice.

Convicted by a jury of murder in the first degree and sentenced to life imprisonment, O.C. "Chick" Fero (Fero) appeals to this Court. We affirm the judgment and sentence of the trial court.

Fero raises five issues on appeal, which we will address in order. They are:

I. Whether the trial judge committed reversible error by failing to disqualify himself;

II. Whether the trial judge committed reversible error by refusing to instruct the jury on voluntary and involuntary manslaughter;

III. Whether the trial judge committed reversible error by refusing to declare a mistrial, or suppress testimony, when the State had "lost" potentially exculpatory evidence;

IV. Whether the trial judge should have granted a mistrial for prosecutorial misconduct; and

V. Whether the trial judge should have instructed the jury that the State was seeking life imprisonment.

FACTS

Fero was the principal of Tohatchi High School. The Superintendent of Schools for the Gallup-McKinley school system, which included Tohatchi, was Paul Hansen. Both men resided in the Tohatchi Teacherage, whose administration was also Fero's responsibility as principal. This arrangement evidently caused friction between the two men. By all accounts, Fero was extremely conscientious and hard working, a perfectionist. To some he even seemed obsessed with his duties, a man for whom his "job was his life and his life was his job."

After several postponements and cancellations, Hansen scheduled an evaluation of Fero's employment for the morning of February 22, 1985, at Hansen's office in Gallup. Witnesses testified that the day before the evaluation, Fero seemed to be depressed, disturbed, even suicidal. He had drafted a will, boxed his personal belongings and left his life insurance policy prominently on a chair in his office. That night Fero called a close friend and read to her several "goodbye" letters he had written to his parents and his daughter.

On the morning of the evaluation, Fero stopped by his school and told his assistant, Carl Montoya, "I won't be seeing you again." Then he drove into Gallup for his 9:00 a.m. appointment. Carrying his customary files and a portfolio, he appeared calm in casual conversation with witnesses in the central offices, before entering Hansen's office just after 9:00. At approximately 10:00 a.m., five shots rang out. Soon afterward, Fero came out calmly, in-

structed the secretary to call the police and told two other employees that everything was okay. These two men testified that he appeared "normal."

Proceeding down the hall, Fero entered the office of Hansen's assistant, Bud Hendrickson, and handed him his school keys. He then called Montoya, told him that he had shot Hansen, and referred to some papers he had left for Montoya. Next he went into Hendrickson's inner office and sat down, calmly informing Hendrickson that he had shot Hansen because of his insistence on negative criticism and his refusal to appreciate the positive aspects of Fero's performance as principal. Fero handed Hendrickson his portfolio with the gun in it. He was arrested and gave a statement to the police.

In it, Fero stated that Hansen ridiculed and threatened him, fired him, and then offered a handshake with the words, "This is not personal." Fero started to stand up to leave, he recounted, at which point the gun fell out of his portfolio onto his lap. The next thing he remembered was seeing Hansen lying on the floor, then bending down to touch him. Fero explained how the gun had ended up in his portfolio after he and a teacher had been searching for a prowler around the Teacherage a few days earlier.

At trial, the defense requested and received an instruction on second degree murder based on mental illness. The court, however, denied defense requests for instructions on voluntary and involuntary manslaughter. The jury found Fero guilty of first degree murder, for which the court imposed a sentence of life imprisonment. This appeal followed.

I. Disqualification of the Trial Judge

Fero cites constitutional and ethical concerns which, he argues, should have mandated the disqualification of Judge DePauli. These concerns are predicated upon two[1] sets of factual circumstances: First, just before this trial began, the Hansen estate and family filed a wrongful death action against Fero. That case was also assigned to Judge DePauli. The plaintiffs were represented by Joseph L. Rich, Esq., the judge's brother-in-law. Second, during trial the district attorney employed as a law clerk a young man named Louis, who turned out to be the judge's son. Upon discovering these relationships, the defense moved to disqualify the judge and for a mistrial. The court denied the motions. The defense raised the issue again in connection with its motion for a new trial, which the court also denied.

Fero contends, quite correctly, that the New Mexico Constitution, Article VI, Section 18, requires recusal in any case in which the judge is related to "either of the parties ... or in which he has an interest." As this Court held in *Tharp v. Massengill,* 38 N.M. 58, 70, 28 P.2d 502, 509 (1933), the term "parties" can include an attorney who has an interest in a contingent fee. We agree, therefore, that it would be improper for Judge DePauli to hear a civil case where plaintiffs are represented by his brother-in-law. Indeed, the judge had disqualified himself from the civil case prior to the hearing on Fero's motions.

We cannot follow Fero, though, in the further leap he would have us make, namely that the judge had an "interest" in the civil case because he would have liked to see his brother-in-law succeed. Nor can we impute such an "interest" to the criminal proceeding on appeal here.

As for the judge's son, there is no evidence on the record to indicate that the son ever acted as a lawyer or appeared before the court, only that he did some legal research. In no way can his employment status as a law clerk be stretched to make him a "party" in the constitutional sense. *Id.* at 71, 28 P.2d at 509. Nevertheless, Fero argues that due process of law was denied him by the possibility of bias created by the filial relationship with an

1. Fero further adds that the judge's wife was a nurse in the Gallup school system, superintended by Hansen. Fero does not explain, and we fail to see the significance of this fact.

employee of one party, citing *State ex rel. Hannah v. Armijo,* 38 N.M. 73, 28 P.2d 511 (1933). This argument also implicates the "appearance of impropriety" standard found in the Code of Judicial Conduct. *See* SCRA 1986, 21–200.

While we are mindful of the importance of protecting the right of every litigant to a fair and impartial tribunal, we nonetheless conclude that the circumstances and relationships surrounding this trial did not warrant the disqualification of Judge DePauli. Defense counsel explored this issue at the hearing on their motion for a new trial. The facts adduced at the hearing were that Louis, Jr. was never at counsel table and seldom even in the courtroom during the trial. He did not live with his father and no evidence emerged that he had any private conversations with his father or any meetings more frequent than had the defense or prosecution teams, all of whom were staying at the same inn as the judge. Fero fails to suggest any means, other than the mere fact of the son's employment, by which he might have influenced his father. Indeed, the fact that defense counsel did not recognize that the law student assisting the district attorney was the judge's son, until the jury had retired, tends to negate even the appearance of bias.

Neither the judge's son nor his brother-in-law were "parties" to this case, nor did either possess an "interest" in the outcome as this Court has elucidated that term in *State ex rel. Anaya v. Scarborough,* 75 N.M. 702, 705, 410 P.2d 732, 734 (1966). *See also State ex rel. Gesswein v. Galvan,* 100 N.M. 769, 770, 676 P.2d 1334, 1335 (1984). We hold, therefore, that the trial judge did not abuse his discretion by declining to disqualify himself. *See Martinez v. Carmona,* 95 N.M. 545, 550, 624 P.2d 54, 59 (Ct.App.), *cert. quashed* 95 N.M. 593, 624 P.2d 535 (1981).

II. Manslaughter Instructions

On this point, Fero first contends that the trial court committed reversible error by failing to instruct the jury on voluntary manslaughter as a lesser included offense. There is no doubt that a defendant is entitled to such an instruction "if there is evidence to support, or tending to support, such an instruction." *Jackson v. State,* 100 N.M. 487, 490, 672 P.2d 660, 663 (1983) (citing *Sells v. State,* 98 N.M. 786, 653 P.2d 162 (1982)).

The instruction defendant requested explains that "[t]he difference between second degree murder and voluntary manslaughter is sufficient provocation." NMSA 1978, UJI Crim. 2.20 (Repl.Pamp. 1982). This instruction leads to another which defines "sufficient provocation": "The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." NMSA 1978, UJI Crim. 2.22 (Repl.Pamp. 1982). *Sells v. State,* upon which Fero so heavily relies, does not alter this requirement, although it does hold that informational words can constitute sufficient provocation, in some factual contexts.

Fero does not offer evidentiary support for his assertion that it should have been for the jury to decide whether Hansen's conduct during the evaluation would have provoked "an ordinary person of average disposition." [2] Because Fero might have been, subjectively, out of control, he was entitled to, and received, an instruction on inability to form a deliberate intention to kill. NMSA 1978, UJI Crim. 41.10 (Repl. Pamp.1982). In fact, Fero's expert testified that Fero's reaction to criticism and stress was out of proportion and exaggerated. The record, however, indicates that, objectively, the provocation was not sufficient.

Finally, the general rule is that "[t]he exercise of a legal right, no matter how offensive, is no such provocation as

2. We note that the only account of Hansen's words and actions comes from the statement of Fero himself. Yet, that statement yields not a single specific fact from which provocation could be inferred.

lowers the grade of homicide." *State v. Manus,* 93 N.M. 95, 100, 597 P.2d 280, 285 (1979) (citations omitted), *overruled on other grounds in Sells v. State,* 98 N.M. 786, 653 P.2d 162. Hansen had, not just a legal right, but a public duty to evaluate Fero's employment; in the exercise of that duty he was privileged to criticize and to fire Fero. Fero furnishes no facts or circumstances to indicate how Hansen's performance of his public duty was so egregious that this Court should abandon the rule laid down in *State v. Manus.*

From the foregoing, we conclude that Fero failed to demonstrate the existence of evidence which would support the giving of an instruction on voluntary manslaughter.

Second, Fero claims that the jury should have been instructed on involuntary manslaughter, because he introduced evidence that the killing was committed without "knowledge" of what he was doing. This argument rests on a misreading of our opinion in *State v. Beach,* 102 N.M. 642, 699 P.2d 115 (1985). That case simply clarified the concept that the crime of second degree murder does not require "specific intent" as an element, though it does require a mental state of "specific knowledge." Indeed, this Court expressly held that the instruction on diminished capacity could not extend to reduce a charge of second degree murder. *Id.* at 645, 699 P.2d at 118. There are two further flaws in Fero's position, moreover.

The first is that the evidence does not support Fero's contention that he did not "know" that his acts created a strong probability of death or great bodily harm, which knowledge is required for second degree murder. If such evidence had existed, Fero would have been entitled to an instruction on insanity, not on manslaughter. *See* NMSA 1978 UJI Crim. 41.01 (Repl. Pamp.1982). Second, the instruction Fero did request was for involuntary manslaughter resulting from an unlawful act, not a felony. NMSA 1978, UJI Crim. 2.30 (Repl.Pamp.1982). The facts simply do not appear to fit this definition, nor does Fero convince this Court that they might fit.

We conclude that the trial court correctly refused Fero's requested instructions on manslaughter.

III. Loss of Evidence

At trial the State called as a witness Dr. John Smialeck, who testified to the cause of death. Over objection, Dr. Smialeck gave his opinion that Fero first fired four non-fatal shots, then walked around Hansen's prone body and fired a fatal shot to the back of Hansen's head. The doctor's opinion rested on a comparison of bullet trajectories in the body with the position of the recovered bullets and on a photograph of the body lying on the floor with a pool of blood beneath the head.

At some point, the police removed pieces ["the size of a medium pizza"] of the carpet on which they had found the body. These pieces were "lost" a few days before trial and "found" again after the motion for a new trial.[3] The defense had seen the carpet and had made informal requests for its production, but "decided not to press the issue" when apprised of the loss.

Dr. Smialeck himself never saw the samples of carpet and did not refer to them in his testimony. Nevertheless, Fero contends that the loss of the carpet deprived him of the opportunity for effective cross-examination. When the trial court denied the defense motion to suppress Smialeck's testimony, the resulting prejudice to Fero's constitutional right of confrontation required a mistrial, the argument concludes.

We reject this argument as meritless. Fero correctly cites this Court to the standards we established in *State v. Chouinard,* 96 N.M. 658, 634 P.2d 680 (1981) *cert. denied,* 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1982). There we held that reversible error only results when the "lost" evidence is material and its absence

3. These same pieces of carpet provided the occasion for Fero to move for a new trial on the basis of newly discovered evidence, while this appeal was pending. We denied the motion to remand to the district court for an evidentiary hearing on the question at that time.

prejudicial to the defendant. *Id.* at 662, 634 P.2d at 684. The determination of materiality and prejudice is, like other evidentiary rulings, discretionary with the trial court, and the importance of the lost evidence depends on many factors, including the weight of the other evidence and the opportunity to cross-examine. *Id.* at 663, 634 P.2d at 685.

In the case at bar, the defense declined the option of putting the witness back on the stand to explore the relevance of the missing evidence through cross-examination. Even now Fero has failed to suggest how he might have used the carpet pieces convincingly, since Smialeck spoke only of the wounds themselves and of the final resting position of the body, all of which testimony was uncontroverted. In light of all the evidence, we hold that the trial court did not err in refusing to suppress the testimony of Dr. Smialeck and in denying the motion for mistrial.

IV. Prosecutorial Misconduct

Fero directs our attention to three acts by the prosecution, each and all of which, he asserts, require reversal. The first was an exhortation during closing argument to "give justice to Mrs. Paul Hansen and her young son who have stayed in the courtroom the past four days." Defense counsel objected, but did not then ask for a curative admonition, much less a mistrial.

The remark was clearly improper, but by itself does not rise to the level of due process violation claimed by Fero. Our case law countenances a reasonable latitude on both sides during closing arguments. *State v. Pace,* 80 N.M. 364, 371, 456 P.2d 197, 204 (1969). Ultimately, the question is whether the prosecutorial excess deprived defendant of a fair trial. *State v. White,* 101 N.M. 310, 314, 681 P.2d 736, 740 (Ct.App.), *cert. denied,* 101 N.M. 189, 679 P.2d 1287 (1984). We conclude that this one remark by the prosecutor did not deprive the defendant of a fair trial.

The second act challenged by Fero concerns the conduct of the prosecutor in cross-examining Carol Shiffley, Fero's friend and co-worker. The witness was asked to read silently a transcript of a statement prepared by a defense investigator after he had interviewed her. Although she agreed with most of the statement, she disputed some portions of it. The prosecutor asked her to read aloud the portions with which she disagreed. Over objection, she recited a damaging anecdote. Defense counsel requested a mistrial, which was denied. He then asked for an admonition, which the trial court gave, instructing the jury to disregard the statement because the witness had denied ever making it. We disagree with Fero that the prosecutor acted in bad faith by asking the witness to explain how she disagreed with the transcript of a statement previously made to an investigator for the defense. The prosecutor did not use the discrepancy to impeach the credibility of the witness. Moreover, any possible prejudice to defendant was cured by the court's admonition. *See State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983).

Finally, Fero raises again the issue of Judge DePauli's son, asserting that the district attorney acted improperly by assigning the son to this case and attempting to conceal from the defense his relationship to the judge. As discussed above, if young DePauli had been acting as a lawyer, prejudice would be presumed. We take judicial notice of the facts that clerking for a district attorney provides practical and honorable learning for a law student and that there is only one judge sitting in McKinley County. Nothing in the nature of the legal research performed by the son was impermissible or suggestive of undue influence. Furthermore, Fero furnishes no facts of record which prove that the prosecutor consciously or deliberately concealed the son's identity.

We conclude that neither individually nor collectively do the acts of the prosecutor amount to the kind of misconduct that mandates a mistrial.

V. Jury Instruction on Life Imprisonment

On voir dire the court properly responded to a venireman's remark by informing the jury panel that the State was not seeking the death penalty. This Court expressly endorsed giving such information in *State v. Martin*, 101 N.M. 595, 605, 686 P.2d 937, 947 (1984). As the 1982 Use Note indicates, this is the only exception to the standard rule that the jury is not to concern itself with the consequences of its verdict. NMSA 1978, UJI Crim. 50.06 (Repl.Pamp.1982).

Fero suggests that it would have been "fair" to inform the jury that the State was seeking a sentence of life imprisonment. If such "fairness" were extended, the exception above would swallow the rule. Consequently, we reject Fero's suggestion.

For the foregoing reasons, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and STOWERS, J., concur.

732 P.2d 873

WESTERN COMMERCE BANK, formerly Commerce Bank and Trust, Plaintiff-Appellant,

v.

RELIANCE INSURANCE CO., Defendant-Appellee.

No. 16337.

Supreme Court of New Mexico.

Feb. 10, 1987.

McCormick, Forbes, Caraway & Tabor, Don G. McCormick, Michael Dargel, Carlsbad, for plaintiff-appellant.

Butt, Thornton & Baehr, Paul L. Butt, Albuquerque, for defendant-appellee.

OPINION

SOSA, Senior Justice.

This case involves a controversy between plaintiff Western Commerce Bank (Bank), an insured, and its insurer defendant Reliance Insurance Company (Reliance) concerning whether the insurance contract required Reliance to defend a counterclaim against the Bank. The Bank brought an action against Reliance for breach of contract and failure to defend. Reliance filed an answer and motion for judgment on the pleadings. After considering the pleadings and the respective arguments of counsel, the trial court found that the third party's allegations against the Bank did not fall within the policy coverage. The court entered judgment on the pleadings in favor of Reliance and dismissed the Bank's complaint with prejudice. The Bank appeals. We affirm.

The sole issue on appeal is whether judgment on the pleadings was proper in that the third party's allegations against the Bank failed to state a claim within the terms of the policy.

As a preliminary matter, we hold that under these circumstances, the court did not err in considering the motion for judgment on the pleadings. Reliance in its answer admitted the essential facts in this case, only disputing the legal conclusions to be drawn from the facts. Where the answer raises issues of law only, and the essential facts in the case are uncontroverted, a motion for judgment on the pleadings is properly considered. *See Ollman v. Huddleston,* 41 N.M. 75, 76, 64 P.2d 97, 98 (1937).

The instant dispute was predicated on the following events: In 1981, the Bank filed a suit against Spurlin Properties, Inc. (Spurlin) to recover judgment on a promissory note. On June 18, 1982, Spurlin filed a first amended counterclaim, alleging that: "[the Bank] has, on repeated occasions, exercised its influence as a lending institution to discourage and interfere with third party's business and contractual relations with one or more of the Defendants." At this point, the Bank furnished Reliance with a copy of this amended counterclaim and requested Reliance to defend the counterclaim. Reliance refused to defend, maintaining that the claim alleged against the Bank was not provided for in the insurance coverage and therefore the allegations did not give rise to a duty to defend.

On appeal, the Bank relies on *Foundation Reserve Ins. Co. v. Mullenix,* 97 N.M. 618, 642 P.2d 604 (1982) for its position that Reliance had a duty to defend the Bank throughout the primary action because there was a possibility that the claim was covered under the policy. The Bank argues that Reliance may refuse to defend only when the allegations are completely outside the insurance policy coverage. We have no dispute with the Bank's interpretation of New Mexico law regarding an insurer's duty to defend an insured. The Bank's reliance on *Foundation Reserve,* however, is not helpful. In *Foundation Reserve,* the facts alleged tended to show an occurrence within the coverage and the insurer's only refusal to defend was because an exclusionary provision limited the coverage. By contrast, here Reliance maintains that there was no occurrence or potential coverage because the allegations in the third party's complaint failed to state a claim within the terms of the policy. Whether an insurer has a duty to defend a suit filed by a third party against the insured depends on whether the allegations of the petition are sufficient to state a claim within the terms of the policy. *American Employers' Ins. Co. v. Continental Casualty Co.,* 85 N.M. 346, 348, 512 P.2d 674, 676 (1973). Because the Bank contends that Reliance was obligated to conduct a defense on its

behalf under the policy coverage for personal injury, we will compare the coverage afforded under that provision with the allegations in the third party's counterclaim.

The underlying Comprehensive Insurance Policy defined "personal injury" in pertinent part: "Group B—the publication or utterance of libel or slander or other defamatory or disparaging material." Reliance also issued to the Bank an "Excess Umbrella Policy." Under this policy, Reliance agreed, subject to the limitations in the agreement, to indemnify the insured for all sums which the insured would be obligated to pay for personal injury liability. The insurance agreement also provided that when the underlying insurance did not apply to an occurrence, but was covered by the Excess Umbrella Policy, Reliance would defend a suit against the insured by parties seeking damages on account of personal injury. The Excess Umbrella Policy defined "personal injury" in pertinent part: "(c) the publication or utterance of a libel or slander or of other defamatory material, including disparaging statements concerning the condition, value, quality or use of real or personal property. * * *" By contrast, Spurlin's counterclaim alleges that the Bank has exercised its influence as a lending institution to discourage and interfere with its third party business and contractual relations.

The Bank argues that in construing an insurance policy, the test is what a reasonable person would understand the words in the policy to mean, citing *Cincinnati Ins. Co. v. Davis,* 153 Ga.App. 291, 265 S.E.2d 102 (1980). The Bank further contends that the policy should be strictly construed against Reliance because the umbrella policy is ambiguous and misleading; its very title connoting "full coverage," "multiperil coverage," "hold harmless coverage," or "all risk insurance."

In New Mexico, unambiguous insurance contracts must be construed in their usual and ordinary sense unless the language in the policy requires something different. *Wesco Ins. Co. v. Velasquez,* 88 N.M. 273, 275, 540 P.2d 203, 205 (1975); *Safeco Ins. Co. of America, Inc. v. McKenna,* 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977). When there is ambiguity, however, the test is not what the insurer intended its words to mean, but what a reasonable person in the insured's position would have understood them to mean. *Williams v. Herrera,* 83 N.M. 680, 685, 496 P.2d 740, 745 (Ct.App.1972). We find no ambiguity under the definition of "personal injury." The policy provides coverage for personal injury in the form of a "publication or utterance of libel or slander," including other defamatory material such as disparagement of property and slander of title. The Bank urges us to conclude that Spurlin's counterclaim is within this definition of personal injury because the claim implies that some misdeeds by the Bank contained written or spoken words constituting libel or slander. We disagree.

The allegations in the third party's counterclaim do not establish a claim in libel or slander. In order to state a cause of action for libel or slander, the plaintiff's allegation "shall * * * state generally that the same was published or spoken concerning the plaintiff." NMSA 1978, § 38-2-8 (Orig.Pamp.). In the instant case, the allegations pleaded do not state that any defamatory material was published or spoken, nor can we so imply. *See Armijo v. Albuquerque Anesthesia Services,* 101 N.M. 129, 135, 679 P.2d 271, 277 (Ct.App. 1984).

The Bank alternatively argues that the language in the policy pertaining to "other defamatory material" is a catch-all phrase, covering anything not included in libel or slander. But by definition, "defamatory material" must include a publication or utterance. The law of defamation is comprised of the twin torts libel and slander. Libel is defamation which is written, while slander is defamation that is spoken. The tort of defamation must take either form. The Bank's argument is without merit.

The Bank next argues that the trial court erred because it failed to consider whether the counterclaim's allegations included "disparaging statements concerning the condition, value, quality or use of real or personal property." Disparagement of title, slander of title, defamation of title, or in other contexts, slander of goods, trade

libel or injurious falsehood, is the false and malicious representation of the title or quality of another's interest in goods or property. *Triester v. 191 Tenants Ass'n.*, 272 Pa.Super. 271, 415 A.2d 698 (1979). The trial court found that Spurlin's counterclaim failed to state a claim for libel, slander, or defamation. This finding is sufficiently broad to infer that the court also found that the allegation did not include statements disparaging property. The allegations in the counterclaim do not state a claim for disparagement of property or slander of title. Under either theory, the plaintiff must allege that oral or written statements were made about the quality of property or about the ownership of property.

It is clear that the allegations as stated in the third party's counterclaim were based on interference with contractual relations. In its brief, the Bank conceded that a claim based on tortious interference with a contract would not be covered by the insurance policy. On appeal, however, the Bank maintained that even an allegation based on interference with contractual relations is provided for under the insurance policy. The Bank's position is that disparagement of property, which is undoubtedly covered by the policy, is not only defined as the publication or utterance of derogatory matter concerning the title or quality of property, but also includes dealings that interfere with the contractual relations with others. *See* W. Prosser & W. Keeton, *The Law of Torts*, § 128, at 967 (5th ed. 1984).

We recognize that the intentional interference with negotiations or inducing the breach of an existing contract is often accomplished by the use of unflattering words or statements disparaging property. Thus, it is not uncommon for a claim for defamation or disparagement of title to be combined with a claim for intentional interference with a contract. Here, however, the allegation does not include a claim for defamation or disparagement of title. The pleadings as filed do not give notice of facts potentially within the terms of the personal injury coverage provision of the policy. There were no allegations that the Bank published or uttered anything involving Spurlin's reputation or disparaging Spurlin's property, *see Chicago Title & Trust v. Hartford Fire Ins. Co.*, 424 F.Supp. 830 (1976), and we decline to adopt the Bank's position that the third party's counterclaim of interference with contractual relations necessarily implies such allegations. The allegations in the counterclaim did not show, or tend to show, an occurrence within the coverage. *Cf. American Employers' Ins. Co.*, 85 N.M. at 348, 512 P.2d at 676 (third party complaint allegation stated a claim within the policy coverage); *Foundation Reserve Ins. Co.*, 97 N.M. at 620, 642 P.2d at 606 (the complaint tended to show an occurrence within the coverage of the policy).

For the foregoing reasons, we hold that the trial court was correct in granting judgment on the pleadings in favor of Reliance.

The trial court is affirmed.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and STOWERS, J., concur.

732 P.2d 876

Albert J. PADILLA, Plaintiff-Appellee,

v.

George CHAVEZ, d/b/a McDonald's of Las Vegas, and Pacific Employers Insurance Company, Defendants and Third-Party Plaintiffs-Appellants,

v.

Vicente B. JASSO, Superintendent of Insurance of the State of New Mexico, and the New Mexico Subsequent Injury Fund, Third-Party Defendants-Appellees.

No. 9475.

Court of Appeals of New Mexico.

Jan. 6, 1987.

Scott P. Hatcher, Felker & Ish, P.A., Santa Fe, for defendants and third-party plaintiffs-appellants.

Marshall G. Martin, Mel E. Yost, Christopher M. Moody, Poole, Tinnin & Martin, P.C., Santa Fe, for third-party defendants-appellees.

Patrick A. Casey, Frank Bachicha, Santa Fe, for plaintiff-appellee.

OPINION

BIVINS, Judge.

After finding claimant fifty percent permanently, partially disabled and apportioning that disability eighty percent to the 1982 subsequent accidental injury for which claim was made and twenty percent to a prior work-related accidental injury, the trial court concluded that the Subsequent Injury Fund (Fund) was not liable for any portion of the worker's compensation benefits awarded claimant. This determination was based on the fact that the employer did not have actual knowledge of claimant's pre-existing physical impairment and the certificate of pre-existing impairment was not executed or filed until after the subsequent injury. *Fierro v. Stanley's Hardware,* 104 N.M. 50, 716 P.2d 241 (1986). The employer, McDonald's of Las Vegas, and its carrier (employer) appeal only from that portion of the judgment holding that the Fund is not liable. Employer argues that the Fund should be liable for its apportioned share of the benefits where employer has made diligent efforts to ascertain the existence of a pre-existing injury, even though employer does not gain any actual knowledge of a pre-existing injury. We affirm the trial court.

In the present case, claimant had suffered a work-related accidental injury approximately twelve years before he was hired by employer. In the intervening years, claimant had returned to strenuous labor with no apparent disability. The "diligent effort" made by employer to ascertain claimant's pre-existing impairment consisted of questions on the written application and during the interview as to whether claimant had any prior health problems or physical defects which could affect his employment. Claimant responded in the negative. Employer did not learn of the previous accident and injury until it undertook discovery in the present case. It then joined the Fund as a third-party defendant. NMSA 1978, § 52-2-5(B).

Employer argues that the policies of the Subsequent Injury Act (Act), NMSA 1978, Sections 52-2-1 to -13, would be frustrated if the trial court is affirmed. The Act is intended to encourage the hiring and retention of handicapped persons and to make logical and equitable adjustments of the

employer's liability. § 52–2–2; *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 650 P.2d 3 (Ct.App.1982), reaffirmed in *Fierro.* The purpose of filing a certificate is to provide notice to the employer of any pre-existing disability and to document the nature and extent of the disability. *Vaughn.* In *Vaughn,* this court determined that there was substantial compliance with the filing requirements of the Act when the employer had actual knowledge of the pre-existing injury even though the certificate was filed after the subsequent injury.

We decline to extend the rationale of *Vaughn* to the present situation. To permit an employer's efforts in ascertaining knowledge to substitute for actual knowledge when the certificate is filed after the subsequent injury would effectively nullify the certificate requirements of Section 52–2–6 (Cum.Supp.1986). Considering that actual knowledge serves the legislative purpose of providing the employer with notice of a pre-existing injury, *Vaughn* and *Fierro,* a lack of knowledge or notice, for whatever reason, does not serve that purpose.

Although the Act is to be construed liberally, any construction must give effect to its stated purposes and announced legislative intent. *Vaughn.* The legislature has determined that the most appropriate means of insuring notice of a pre-existing injury or disability is the filing of a certificate. To determine that an employer may ask a few questions concerning prior health problems which might affect a potential employee's work as substantially complying with the filing requirements of the Act would not give effect to either the stated purposes of the Act or the legislature's intent. Moreover, where an employer hires a worker without knowing of any pre-existing physical impairment, the legislative purpose of not discriminating against the handicapped is served since an employer cannot discriminate on the basis of something it does not know.

We note that the distinction employer attempts to draw regarding the necessity of actual knowledge at the time of hiring, compared to actual knowledge after hiring but before the subsequent injury, ignores the purpose of the Act in encouraging the hiring and *retention* of handicapped workers. *Vaughn.* Requiring actual knowledge any time before the subsequent injury occurs is consistent with this purpose. *Fierro.*

Employer argues that upholding the trial court's decision will impose an undue burden on employers in ascertaining the existence of a pre-existing injury. This need not be the case. If the employer in the present case had asked more precise questions, it might have easily ascertained the existence of the previous injury. The out-of-state cases cited by employer are distinguishable on their facts and the applicable law. *See, e.g., Royce v. Southwest Pipe of Idaho,* 103 Idaho 290, 647 P.2d 746 (1982) (actual knowledge not required by statute or case law).

We note that employer, given false information at the time of hiring, may have a defense to the claim for compensation. In *Martinez v. Driver Mechenbier, Inc.,* 90 N.M. 282, 562 P.2d 843 (Ct.App.1977), this court held that a claim for worker's compensation may be barred where (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied on the false representation and the reliance was a substantial factor in the hiring; and (3) there exists a causal connection between the false representation and the injury. Thus, the employer is not without recourse.

In light of the foregoing, we need not determine, as urged by the Fund, whether claimant reasonably responded to employer's questions regarding prior health problems or physical defects.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

732 P.2d 879

STATE of New Mexico,
Plaintiff-Appellee,

v.

Edward MUZIO, Defendant-Appellant.

No. 9200.

Court of Appeals of New Mexico.

Jan. 13, 1987.

Certiorari Denied Feb. 18, 1987.

Paul G. Bardacke, Atty. Gen., Reginald J. Storment, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Paul J. Kennedy, Albuquerque, for defendant-appellant.

OPINION

DONNELLY, Chief Judge.

Defendant appeals his conviction on three counts of issuing worthless checks, contrary to NMSA 1978, Section 30–36–4 (Repl.Pamp.1980). On appeal, defendant claims: (1) that the trial court erred in allowing the criminal prosecution because it was barred by the federal Supremacy Clause and Bankruptcy Code; (2) that the trial court used the statutory presumption of intent to defraud, NMSA 1978, Section 30–36–7(B) (Repl.Pamp.1980), thus violating the Supremacy Clause and defendant's due process rights; (3) that the trial court erroneously assumed it lacked power to order restitution; (4) that defendant's conviction of issuing worthless checks is not a fourth-degree felony offense under the Criminal Sentencing Act; (5) that the trial court abused its discretion in denying defendant's motion for a new trial; and (6) that there was insufficient evidence to uphold defendant's conviction.

We affirm as to each of the issues, except as to the designation of the degree of the crime charged for the offenses of issuing worthless checks; as to the latter issue, we remand for correction of the judgment and resentencing.

FACTS

Defendant operated a restaurant in Coronado Shopping Center in Albuquerque. In May 1985, defendant began experiencing financial problems stemming in part from a civil judgment obtained against him in excess of $53,000. In June 1985, defendant closed his business and moved his equipment to other locations. Defendant issued a number of checks drawn on his business account in excess of the funds on deposit, including a check on June 4, 1985, to Sears in the amount of $177.82, for the purchase of tools (Count II); a check dated May 31, 1985, to the Price Club in the amount of $2,114.26, for TV sets, VCR's, radios, gourmet food, alcohol and other items (Count V); and a check to the Price Club dated June 1, 1985, in the sum of $5,141.96, for other miscellaneous merchandise (Count VI).

The three checks listed above were dishonored and defendant failed to return the merchandise or to pay the victims the amounts due. Defendant then filed for bankruptcy. The district attorney sought and obtained a grand jury indictment charging defendant with six counts of issuing worthless checks. Following a bench trial, defendant was convicted on Counts II, V and VI. Defendant was acquitted on the remaining charges.

I. APPLICABILITY OF SUPREMACY CLAUSE

Defendant argues that the district attorney initiated the criminal proceeding for the purpose of collecting the debts incurred by defendant due to the issuance and dishonor of the checks, and that the debts represented by the dishonored checks had been discharged in bankruptcy. Defendant asserts that the federal Bankruptcy Code, 11 U.S.C. § 362 (1978), provides for an automatic stay of collection proceedings for discharged debts and that, because the debts were subsequently discharged in bankruptcy, the state prosecution was improper.

Defendant also contends that the state criminal prosecution against him was improper under the Supremacy Clause of the federal constitution. U.S. Const. art. VI, cl. 2. In advancing this contention, defendant also cites 11 U.S.C. Section 524(a)(2) (1978), which specifies that a discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt * * * of the debtor * * * whether or not discharge of such debt is waived."

The issue of whether a criminal proceeding initiated against defendant under the state Worthless Check Act, NMSA 1978, Sections 30–36–1 to –10 (Repl.Pamp.1980 and Cum.Supp.1985), is void and without effect under the federal Supremacy Clause, due to the accused's prior discharge in bankruptcy, is one of first impression in New Mexico. On appeal, defendant, although acknowledging that he failed to

raise this issue below, argues that his prosecution was barred by law, hence we interpret his argument to raise a jurisdictional issue. *See Williams v. Public Service Commission of Wyoming,* 626 P.2d 564 (Wyo.1981) (court held that appellant's Supremacy Clause challenges raised question of the public service commission's subject matter jurisdiction and must be addressed on merits even though issue was never raised below).

The purpose of the federal bankruptcy law is to " 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' " *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934) (*citing Williams v. United States Fidelity & Guaranty Co.,* 236 U.S. 549, 554–55, 35 S.Ct. 289, 290, 59 L.Ed. 713 (1915)). The purpose of the Worthless Check Act is to remedy the evil of giving checks on a bank or depository without providing funds to pay or satisfy them. NMSA 1978, § 30–36–3 (Cum.Supp.1986). To be convicted under the Act requires an express finding of an intent to defraud. NMSA 1978, § 30–36–4 (Repl.Pamp.1980). Thus, this is not a statute for debt collection but, rather, a statute created to punish an evil intent and an evil action. Defendant's prosecution centered around his issuing of worthless checks with intent to defraud Sears and Price Club, not his inability to pay his bills.

A debtor's filing of a petition for bankruptcy or obtaining of a discharge under the Bankruptcy Code does not prevent the institution and prosecution of criminal proceedings against a debtor for criminal acts. 11 U.S.C. § 362(b)(1) (1978). *See Barnette v. Evans,* 673 F.2d 1250 (11th Cir.1982); *Parker v. United States,* 153 F.2d 66 (1st Cir.1946); *People v. Washburn,* 97 Cal. App.3d 621, 158 Cal.Rptr. 822 (1979); *State v. Bontz,* 192 Kan. 158, 386 P.2d 201 (1963); *see also* Hensley & Smith, *Preemption Effect on Younger v. Harris Abstention: May a Bankruptcy Court Enjoin a State Criminal Prosecution?,* 35 Mercer L.R. 1345 (1984). The Bankruptcy Code only prohibits the commencement of a criminal action to "collect, recover or offset" a debt. 11 U.S.C. § 524(a)(2). Here, defendant was tried for issuing worthless checks with intent to defraud. Substantial evidence was presented to support the inference that defendant knew the checks were worthless when he issued them. The conclusion by the trier of fact that defendant acted with the intent to defraud is a question of the sufficiency of the evidence, and sufficiency of the evidence questions are viewed in the light most favorable to the verdict, indulging all inferences and resolving all conflicts in favor of that verdict. *State v. Brown,* 100 N.M. 726, 676 P.2d 253 (1984). Consequently, we need not, as defendant suggests, look to the prosecutor's motives in commencing criminal proceedings. On its face, the Worthless Check Act addresses the passing of worthless checks with the intent to defraud and a defendant's prosecution for violation of such law is not precluded by filing for or obtaining a discharge in bankruptcy. The provisions of the Bankruptcy Act are not so intrusive so as to pardon a bankrupt from the consequences of a criminal offense. *Parker.* The federal Bankruptcy Act is meant to protect those in economic distress, not to shelter a party from liability for criminal conduct. *Barnette v. Evans; In re Moore,* 111 Fed. 145 (W.D.Ky.1901); *State v. Eyre,* 39 Wash.App. 141, 692 P.2d 853 (1984).

Defendant's assertion of fundamental error or bar of criminal prosecution under the Supremacy Clause does not apply to the case before us.

II. PRESUMPTION OF FRAUD

Defendant argues that the trial court relied on the statutory presumption of intent to defraud in reaching its decision that he was guilty of three counts of issuing worthless checks. Under Section 30–36–7(B), a person notified of the dishonor of one or more checks must pay the checks in full within three business days in order to avoid the presumption of fraud. Defendant claims that when he filed for bankruptcy he was precluded from paying off the

checks because the bankruptcy court would void the repayment as an improper preference to certain creditors. Thus, defendant contends that this issue involves fundamental error and that the state court was deprived of jurisdiction to proceed with the prosecution against him. We disagree.

The alleged misuse of the statutory presumption was not raised at trial and there is no evidence in the record to support defendant's contention that the trial court applied the presumption. Defendant did not ask the trial court for a factual finding concerning the statutory presumption nor did defendant enter a specific objection. New issues may not be raised on appeal, whether they are listed in the docketing statement or not. *Melon v. State,* 90 N.M. 787, 568 P.2d 1233 (1977). Defendant's claim of fundamental or jurisdictional error is without merit. Moreover, at the trial on the merits, the court did not mention the statutory presumption of fraud in its findings of fact or conclusions of law. The trial court correctly stated that defendant's intent at the time of *issuing* the checks was determinative as opposed to his supposed failure to honor the checks. Consequently there is no factual basis that the trial court relied on the presumption in reaching its decision. Additionally, other substantial evidence exists in the record upon which to infer defendant's intent to defraud. Based on the record, therefore, we cannot say that the trial court abused its discretion by inferring defendant's guilt from other evidence apart from the statutory presumption of intent to defraud.

III. RESTITUTION

Defendant next claims that the trial court inquired at the sentencing hearing whether it possessed the power to order restitution to the victims of the three counts for which defendant was convicted, because of a potential conflict with the federal Bankruptcy Code. After being informed by both defendant and the prosecutor that the court had the power to order restitution, the judge stated, "Well, I don't think it makes a lot of difference right now in view of the fact that restitution is a condition of probation and that's not what the court's going to do." This post-conviction statement of the court made before entry of a judgment and sentence is not binding; only a written order or judgment signed and filed by the court is legally effective to implement the court's ruling. *See Smith v. Love,* 101 N.M. 355, 683 P.2d 37 (1984); *State v. Crespin,* 90 N.M. 434, 564 P.2d 998 (Ct.App.1977).

The filing by a defendant for bankruptcy or the obtaining of a discharge in bankruptcy does not void a restitution order imposed as a condition of probation under a state criminal judgment. *See Kelly v. Robinson,* — U.S. —, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). Defendant concedes that the sentence was within the statutory limits and, therefore, was not an abuse of discretion. Defendant contends, however, that because the court did not fully consider restitution as an option, the court did not consider imposing a deferred or suspended sentence. We disagree. Although the trial court was invested with the authority to impose a suspended sentence and place the defendant upon probation with a provision for restitution, here the record indicates the trial court was fully informed as to its sentencing options. Defendant's discharge in bankruptcy did not preclude his sentencing after conviction under state criminal statutes. *See Robinson; People v. Mosesson,* 78 Misc.2d 217, 356 N.Y.S.2d 483 (1974). Defendant's contention is without merit.

IV. SENTENCING

The judgment and sentence entered by the trial court recited that the offense of issuing worthless checks was a "fourth degree felony offense." The Worthless Check Act does not use the words "felony" or "misdemeanor." §§ 30–36–1 to –10. Under Section 30–36–5(B), the prescribed penalty for issuing worthless checks over $25 is a one-to-three-year sentence in the penitentiary, or a fine of $1,000 per check, or both such imprisonment and fine.

As worded, the Criminal Sentencing Act applies to both Criminal Code and other crimes. NMSA 1978, Section 31–18–13(A) (Repl.Pamp.1981), provides: "Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of [this Act]." Section 31–18–13(B) further provides:

> Whenever a defendant is convicted of a crime under the New Mexico constitution, or a statute not contained in the Criminal Code, which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by such statute or constitutional provision and may impose the fine prescribed by such statute or constitutional provision for the particular crime for which such person was convicted.

Under the Criminal Sentencing Act, the basic sentence that may be imposed for a fourth degree felony is eighteen months (NMSA 1978, § 31–18–15(A)(4) (Repl.Pamp. 1981)) and a fine not to exceed $5,000. § 31–18–15(D)(3). The minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. Hence, we determine that a conviction for issuing a worthless check over $25.00 does not constitute a fourth degree felony. § 30–36–5(B). NMSA 1978, Section 31–19–1 (Cum.Supp.1986), the sentencing authority for misdemeanors, imposes a jail term of less than one year; therefore, issuing worthless checks cannot constitute a misdemeanor. If the offense does not meet the legal requisites specified for a misdemeanor, it must be termed a felony. NMSA 1978, Section 30–1–6(A) (Repl.Pamp.1984), provides that "[a] crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized." The trial court imposed the sentences in accord with Section 30–36–5(B), but incorrectly designated defendant's felony conviction as "fourth degree felony offenses."

We remand this issue to the trial court for modification of defendant's judgment, sentence and commitment order. On remand, the order should denominate defendant's conviction for the offenses of issuing of worthless checks as "felonies", rather than "fourth degree felonies."

V. MOTION FOR A NEW TRIAL

Defendant argues that the trial court erred in failing to grant his motion for a new trial. Defendant's motion was grounded upon the fact that the trial court failed to give proper weight to his testimony regarding advice he received from his bankruptcy attorney. At trial, the judge allowed defendant to testify regarding what the bankruptcy attorney had told him. The record reflects that this testimony was admitted. The trial court could properly weigh the effect of this evidence. *See State v. McGhee,* 103 N.M. 100, 703 P.2d 877 (1985). The motion for a new trial claimed that the affidavit from the bankruptcy attorney was new evidence, that the trial court did not accord full consideration to defendant's testimony and that the evidence would probably change the result if a new trial were granted.

In denying defendant's motion, the judge pointed out that the evidence did not fit within the criteria outlined in *State v. Volpato,* 102 N.M. 383, 696 P.2d 471 (1985). We agree. Defendant's proffer of new evidence did not satisfy the *Volpato* criteria. The bankruptcy attorney was listed as a defense witness and, therefore, was not a newly discovered witness. Moreover, the trial court stated that the evidence would not have changed the court's ruling. The grant or denial of a new trial is addressed to the sound discretion of the trial court and is reversible only upon a showing of a clear abuse of that discretion. *State v. Perez,* 95 N.M. 262, 620 P.2d 1287 (1980). The trial court did not abuse its discretion in denying defendant's motion for a new trial.

VI. SUFFICIENCY OF EVIDENCE

Defendant claims the trial court lacked sufficient evidence to support his

conviction. The trial court found that defendant issued three checks totalling $7,434.04, that he knew there were insufficient funds or credit with the bank, that he was overdrawn by more than $7,000, and that he intended to cheat or deceive the victims at the time of issuing the checks. In reviewing a judgment of conviction, the appellate court views the evidence in the light most favorable to the verdict, resolving all conflicts therein, and viewing all reasonable inferences flowing therefrom in the light most favorable to the judgment. *State v. Lankford,* 92 N.M. 1, 582 P.2d 378 (1978). Applying this standard, our review of the record and transcript reveals sufficient evidence to support the trial court's findings.

Significant among other facts in the record, the evidence indicates that defendant had a long-term arrangement with his bank that it would cover overdraft checks if defendant made deposits "within a day or two" of the overdraft. Defendant's last positive balance was on May 14, 1985; the last deposit was made on May 21, 1985. Defendant then wrote approximately $7,400 worth of checks on May 31, June 1, and June 4, 1985. Defendant did not inquire with the bank what his balance was before writing these checks and circumstantial evidence exists indicating defendant knew that his bank funds were insufficient to cover these checks. Further, the record shows that defendant knew that he owed Coronado Center approximately $53,000 in back rent and utilities, payable May 31, 1985. Even if defendant's attempt to effect a lease assignment to a new tenant had been successful, defendant would not have had funds therefrom in hand at the time he wrote the checks in question. When defendant wrote the checks in question, he had only a tentative lease agreement, in addition to a $7,000 overdraft at the bank. Since defendant closed his business doors on June 2, 1985, there is circumstantial evidence that he knew he did not have sufficient receipts or deposits to cover the checks he had just written. Given these facts, we cannot say the trial court lacked sufficient evidence to support its finding that defendant knew his funds were insufficient to cover the checks.

Defendant's convictions are affirmed. The case is remanded for correction of the judgment and sentence as to the degree of felony for which defendant was charged and convicted.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

732 P.2d 1382

Thomas Joe NEEL, Plaintiff-Appellee,

v.

STATE DISTRIBUTORS, INC. and Mission Insurance Company, Defendants-Appellants.

No. 8584.

Court of Appeals of New Mexico.

Oct. 16, 1986.

Certiorari Quashed Feb. 16, 1987.

Howard R. Thomas, Matthew P. Holt, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for defendants-appellants.

John A. Bannerman, Sasha Siemel, Sutin, Thayer & Browne, P.C., Albuquerque, for plaintiff-appellee.

OPINION

HENDLEY, Chief Judge.

Defendants appeal plaintiff's worker's compensation award. Plaintiff was injured from a self-inflicted gunshot wound to the face. Defendants contend that the injury did not arise out of the scope of employment because (1) the gun was not required by plaintiff's employment as an officer of the liquor business; (2) when the gun went off plaintiff was not doing anything related to his employment; and (3) even if plaintiff had been cleaning the gun, he had finished by the time it went off. Defendants also contend that the event was not an accident but was an attempted suicide. This is essentially a case in which defendants are arguing a lack of substantial evidence. We affirm.

Plaintiff was vice-president and general manager of State Distributors, Inc., a liquor wholesaler. On April 27, 1983, plaintiff arrived at his office approximately forty minutes early. Phyllis A. Gutierrez, the controller, was at work and greeted him. Thereafter, plaintiff entered his office. A few minutes later, Gutierrez stated that she heard a loud noise and found plaintiff lying on the floor near his desk bleeding from a gunshot wound. A pistol was in his hand.

Plaintiff was taken to a local hospital and treated. Diagnosis of the injury revealed that the pistol had been discharged under plaintiff's chin. The bullet had struck the jawbone, traveled through his palate, tongue, left eye, and into the front portion of his brain. The treating physicians noted that the bullet's entry left a "stellate" pattern or a star-shaped tear, and that such a wound is indicative that the barrel of the gun was in contact with the skin at the time the pistol was discharged. However, the evidence also showed multiple stellate wounds in both the roof and floor of the mouth.

Following surgery, plaintiff was placed in intensive care. He was combative and had to be restrained. Plaintiff was fed through a tube. The first night plaintiff pulled out the tube. Dr. Tyler W. Payton, a psychiatrist, and Dr. Reid K. Hester, a psychologist, who had both treated plaintiff, testified that they had questioned him about whether he had deliberately attempted to take his own life and that plaintiff nodded affirmatively. Dr. Payton saw plaintiff two weeks after the shooting. He testified he had stated to plaintiff that it must be horrible to be so depressed that one would try to take his own life. Plaintiff, unable to talk, nodded. Dr. Hester testified that he had also inquired of the plaintiff whether the shooting was deliberate. At that time, plaintiff was unable to speak and responded by nodding or shaking his head to the questions posed. Dr. Hester stated: "At that time, he did nod his head to my question as to whether he * * * deliberately tried to kill himself or do himself in." Both doctors admitted, however, that at the time of their questioning plaintiff may have been confused.

Plaintiff denied the shooting was intentional and testified that on the morning of the incident, after he had arrived at work, he decided to clean a pistol which he kept in his desk. He stated that after cleaning and oiling the gun, he reloaded it and, thereafter, could not remember how the gun fired. Plaintiff also introduced testimony that a bolt was missing from the office chair in which he had been sitting, inferring that the chair may have broken and that the gun may have discharged as he fell. The trial court, however, rejected a finding submitted by plaintiff on this issue.

Testimony at trial was conflicting concerning whether a motive existed for the shooting. No suicide note was found. Dr. Payton testified that plaintiff did not fit the pattern of a middle-aged male suicide, and there was no history of prior depression.

Plaintiff told Drs. Hester and Payton that he had been worried he might lose his job if the company were sold.

A firearm's expert, Max Courtney, identified the pistol as a .38 revolver, and testified that he could not give a definite opinion as to how the gun was fired, that he was not certain the gun was discharged by pulling the trigger, and that the hammer block mechanism was only marginally working. Courtney testified that it was extremely difficult to fire the gun without pulling the trigger.

Plaintiff testified that he had purchased the gun several years prior and kept it because it was his responsibility to answer alarms at the business and, at times, he was required to go to the warehouse at night and weekends when the building was deserted. Other executives of plaintiff's company were also on the list of employees to be called when an alarm went off. Plaintiff's employer did not require him to possess a gun, but was aware that certain employees, including plaintiff, kept a handgun. Plaintiff also testified that he took the pistol with him when he went on vacations and, at times, he kept it in his car at home when there had been burglaries reported in his neighborhood. Plaintiff's wife testified that she did not like the gun in her house and had requested that her husband keep it elsewhere.

Plaintiff testified that he was not told by his employer to obtain a gun. He also stated that, since the alarm system of his company had been replaced, he had not had an occasion to use the gun. There was no company policy regarding the possession of firearms by employees. Plaintiff testified that possession of the gun, while not prohibited by his employer, was not a requirement of the job and that it was not normal practice of employees of the company to carry weapons. However, plaintiff also testified that he had the gun because of work.

The trial court adopted findings of fact and conclusions of law upholding plaintiff's claim for worker's compensation benefits. Specifically, the court found that plaintiff did not intend to shoot himself and that "[t]he gun accidentally discharged while plaintiff was cleaning it, wounding him in the face."

Defendants contend that the event was an attempted suicide. We disagree. There was sufficient evidence upon which the trial court could have found that plaintiff did not intend to commit suicide. Defendants recognize that, in worker's compensation cases, there is a presumption against suicide and that suicide is an affirmative defense which the defendants have to prove. *See Medina v. New Mexico Consolidated Mining Co.*, 51 N.M. 493, 188 P.2d 343 (1947). *Medina* states, "This presumption, though not conclusive, is sufficient unless rebutted by substantial evidence, to support an award for compensation." Defendants contend that there was substantial evidence to rebut the presumption and, accordingly, contend that the trial court erred in not finding that plaintiff intended to commit suicide.

Defendants' evidence supporting suicide was that the gun was in contact with plaintiff's skin (physicians' notes that the wound was stellate and expert's opinion that only a contact shot would yield a stellate wound), plaintiff pulled the trigger (expert's opinion that this was most likely way that gun discharged), plaintiff said he tried to commit suicide (his nodding to doctors when they asked that question), and plaintiff had a motive to commit suicide (his worry over the sale of the business and loss of his job). Plaintiff controverted each of these items. The evidence that there were multiple stellate wounds in both the roof and floor of the mouth cast doubt on the expert's knowledge of the types of flesh wounds which shots from different distances produce. The expert really did not know how the gun fired. There was evidence that plaintiff did not understand the doctors when they asked him about the

suicide attempt. Moreover, there was abundant evidence that plaintiff never expressed a reason to commit suicide, that he was happy and relaxed, that he did not point the gun in the right place to commit suicide, that he did not leave a suicide note, and that he did not fit the pattern of a typical middle-aged man attempting suicide. Finally, defendant's purported motive evidence concerning the sale of the business was shown not to have crossed plaintiff's mind. This evidence is similar to the evidence in the *Medina* case in which the Supreme Court held that a question for the fact finder was presented.

Here, too, the question was one for the trial court. As stated in *Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985):

> This court is bound to view the evidence in the light most favorable to support the trial court's findings * * * and to disregard all evidence unfavorable to that finding * * *. It is for the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistent statements of the witnesses, and determine where the truth lies. * The appellate court may not reweigh the evidence * * * nor substitute its judgment for that of the trier of fact. [Citations omitted.]

When viewed in the appropriate manner, there was sufficient evidence upon which the trial court could find that plaintiff did not attempt to commit suicide because the evidence and inferences therefrom conflicted.

Given that there was sufficient evidence upon which the trial court could find attempted suicide, there are only two remaining possibilities to explain this otherwise unexplained event: either plaintiff accidentally shot himself while finishing his cleaning of the gun and putting it away, or he shot himself while horsing around with the gun after he cleaned it. As the discussion in *Medina* makes clear, in worker's compensation cases, courts usually uphold awards of compensation in cases of unexplained death.

Two more recent New Mexico cases illustrate this principle. In *Thigpen v. County of Valencia,* 89 N.M. 299, 551 P.2d 989 (Ct.App.1976), a deputy sheriff was found dead of shotgun wounds in his car near the tank he used to water his horses. The shotgun was lying on the floor of the car. Thigpen was allowed to water his horses during his duty hours. This Court reversed the trial court's dismissal of the case at the close of plaintiff's evidence. Thus, on the *Thigpen* facts, a judgment in favor of plaintiff would have been sustained. *See also Sena v. Continental Casualty Co.,* 97 N.M. 753, 643 P.2d 622 (Ct. App.1982).

These cases represent the principle of applying a rebuttable presumption that the death arose out of the employment under facts such as we have here. " 'When the reason or cause for the accident is not explained, and it occurred during the time decedent was at work, the fundamental theory underlying our workmen's compensation law favors recovery rather than denial of compensation.' " *Sena, quoting Ensley v. Grace,* 76 N.M. 691, 417 P.2d 885 (1966).

Defendants seek to avoid a result foreshadowed by these cases by contending that the gun was not related to the employment. They rely on *Adamchek v. Gemm Enterprises, Inc.,* 96 N.M. 24, 627 P.2d 866 (1981), and its language that "a pistol in the hands of a corporate executive cannot be said to be a device or tool of his trade normally used in the performance of his executive duties." In *Adamchek,* the business was a restaurant and there was no evidence, or at least no evidence recited in the opinion, that a gun was in any way necessary or desirable in the hands of the officer of the corporation.

Although *Adamchek* could be read to support the proposition that, as a matter of law, a gun is never a necessary tool of the trade for a corporate executive, defendants

do not read it so broadly. "Defendants do not, of course, suggest that [*Adamchek*] holds that corporate executives need never use a gun as an incident of their employment * * *." Defendants recognize that in some cases there will be evidence which will justify the use of a gun by one in the position of a corporate executive. Thus, the apparent absence of such evidence in *Adamchek* makes that case distinguishable and not authority for reversal as a matter of law in this case.

Defendants do contend that there was insufficient evidence in this case to support a holding that it was logical for plaintiff to possess a gun in order to advance his employer's interests. This contention challenges the trial court's findings 4, 8, and 9. These findings are to the effect that plaintiff's employment required him to answer security alarms and work at night and on weekends, that plaintiff continued to take the gun with him on these occasions, and that the gun was kept and used by plaintiff solely for the protection of the employer's property and the protection of plaintiff while he was working. Defendants challenge these findings as misleading and contrary to logic. They argue that once the alarm system was changed plaintiff no longer had any use for the gun at work. They argue it would be absurd to conclude otherwise when plaintiff kept the gun in his desk inside the building, an unlikely place to keep the gun to respond to alarms. They argue that, at the time of the incident, plaintiff kept the gun because he did not know what else to do with it.

Certainly, defendants' view of the evidence is one legitimate view. However, the question on appeal is not whether there was evidence to support an opposite result but, rather, whether the evidence supports the result reached. *Hernandez v. Mead Foods, Inc.*, 104 N.M. 67, 716 P.2d 645 (Ct.App.1986); *Bagwell v. Shady Grove Truck Stop*, 104 N.M. 14, 715 P.2d 462 (Ct.App.1986). Defendants' factual arguments are more properly addressed to the trial court.

It is true there was no direct evidence to support each of the trial court's challenged findings. For example, plaintiff never directly testified that at the time of the incident he still carried the gun with him on alarm calls or at night or on weekends. However, plaintiff did testify that he did buy the gun to have with him at these times and he also testified that he currently kept the gun for the protection of his employer and himself at work. It is thus a reasonable inference that he still used the gun for these work-related purposes. In short, there was substantial evidence that the gun was kept for a work-related purpose.

Defendants' second contention relating to the gun is that plaintiff was not doing anything work-related when the incident occurred. This involves a challenge to the trial court's finding number 10 that plaintiff was cleaning the gun. Defendants contend that by spraying the gun with WD–40 and wiping it off plaintiff was not cleaning the gun in the conventional sense and was just whiling away time waiting for the coffee to be ready. This contention ignores plaintiff's testimony that this was how he always cleaned the gun. Every six months or so, he would spray it with WD–40 and wipe it off so that fingerprints would not rust it. Defendants' expert never testified that this was not a legitimate way to clean a gun, nor did he say that such cleaning was unnecessary or unreasonable, as defendants imply. Thus, the evidence supported both the trial court's finding that plaintiff was cleaning the gun and the implied finding that such cleaning was work-related, given the fact that the gun was work-related.

Defendants' final contention relies on *Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A.*, 97 N.M. 79, 636 P.2d 898 (Ct.App.1981). In that case, a doctor's receptionist became nauseous after eating a doughnut at work. She tried to induce vomiting by pushing a pen down her throat

and swallowed the pen. This Court reversed an award of compensation because the injury did not arise out of employment. "Arise out of employment" means that the injury must be caused by a risk to which the worker is subjected in the employment. Pushing a pen down one's throat is not such a risk. Similarly, here, defendants contend that putting a gun to one's chin and pulling the trigger is not such a risk. Defendants also repeat their arguments that the gun was not necessary to the employment and that plaintiff was not cleaning it.

Defendants also rely on a number of out-of-state cases in which compensation was denied because the guns were not being used for the employment at the time of the injury or because the tools of the trade were being misused for purposes unrelated to the employment at the time of the injury. *See Peetz v. Industrial Commission,* 124 Ariz. 324, 604 P.2d 255 (1979) (en banc) (gun accidentally discharged when policeman was showing it to his wife); *Horn v. Broadway Garage,* 186 Okl. 535, 99 P.2d 150 (1940) (worker trying to shoot a paper clip with a rubber band). These cases are more like *Losinski* in which the worker was not using the tool in the trade; rather, she was using it for personal reasons or misusing it.

Here, because there was substantial evidence that the worker used the gun in his business and that the worker was cleaning it so that it would be operational, *Losinski* and the out-of-state cases are inapposite. Moreover, no one knows whether the worker was misusing the gun or not at the time he was shot. Under these circumstances, the doctrine concerning unexplained injury comes to the worker's aid and suffices to uphold the trial court's judgment.

Defendants' arguments, that there is a more reasonable way to view the evidence and that the view adopted by the trial court is nonsensical, ask for this Court to reweigh the evidence. This the Court cannot do. *Sanchez.* Defendants' reliance on certain statements made by plaintiff in his testimony as "proof positive" of the force of defendants' arguments similarly misconstrues the nature of appellate review. Plaintiff's testimony was conflicting within itself. For example, at one point he acknowledged that he had not needed the gun for a number of years; at another point he said that the gun was for the protection of the company. It is for the trial court to resolve the conflicts even if those conflicts occur within the testimony of one witness. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967).

Cases such as *Medina, Thigpen,* and *Sena* amply support the judgment. *Adamchek* is distinguishable. For this reason, we affirm. Plaintiff is awarded $3,000 for attorney fees for the services of counsel on appeal.

IT IS SO ORDERED.

BIVINS, J., concurs.

DONNELLY, J., dissents.

DONNELLY, Judge (dissenting).

I respectfully dissent.

This appeal involves the question of whether a disability resulting from a self-inflicted gunshot wound sustained by the plaintiff, a general manager of a liquor wholesale company, is compensable under the Workmen's Compensation Act. On the date in question, plaintiff arrived early at work and shortly thereafter was found on the floor of his office with a gunshot wound to the head, still holding a pistol.

The evidence at trial was conflicting as to whether the shooting was accidental or intentional. Plaintiff testified that he decided to clean a pistol kept by him in his desk at the office and that it accidentally discharged. A psychiatrist and a psychologist who treated plaintiff after the injury, testified that plaintiff stated that he had been worried over the possible loss of his job and had responded to questions, indicating that the injury was intentional and self-inflicted.

The dispositive issue governing the case before us is whether the injury sustained by plaintiff was reasonably incident to and arose out of his employment. I am unable to agree with the majority that the trial court's key finding, that the injury "arose out of" plaintiff's employment, is supported by substantial evidence. Here, in my opinion, the record is devoid of substantial evidence indicating that at the time of plaintiff's injury he was engaged in an activity reasonably incident to or in furtherance of the employer's business, or that plaintiff's injury stemmed from a risk that he was subjected to by reason of his employment.

In order to establish liability under the Workmen's Compensation Act, a claim must be supported by substantial evidence indicating the existence of "an accidental injury arising out of, and in the course of [the worker's] employment" and that the injury was "reasonably incident to [the worker's] employment." NMSA 1978, § 52–1–28. *See also* NMSA 1978, § 52–1–19; *Hernandez v. Home Education Livelihood Program, Inc.*, 98 N.M. 125, 645 P.2d 1381 (Ct.App.1982).

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion. *Gutierrez v. City of Gallup*, 102 N.M. 647, 651, 699 P.2d 120 (Ct.App.1984); *Crane v. San Juan County*, 100 N.M. 600, 602, 673 P.2d 1333 (Ct. App.1983). Whether the record contains substantial evidence is a question of law. *Pickens-Bond Construction Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (Ark.1979).

In the present case, although the injury occurred on the employer's premises during work hours, the injury did not "arise out of" plaintiff's employment, nor was the injury "reasonably incident" to his employment. The necessity that an injury "must arise out of" and be reasonably incident to a worker's employment, requires a showing that the injury was caused by a risk to which the worker was reasonably subjected by reason of his employment. NMSA 1978, § 52–1–28; *Velkovitz v. Penasco Independent School District*, 96 N.M. 577, 633 P.2d 685 (1981); *Williams v. City of Gallup*, 77 N.M. 286, 421 P.2d 804 (1966); *Beckham v. Estate of Brown*, 100 N.M. 1, 664 P.2d 1014 (Ct.App.1983); *McDaniel v. City of Albuquerque*, 99 N.M. 54, 653 P.2d 885 (Ct.App.1982); *Losinski v. Corcoran*, 97 N.M. 79, 636 P.2d 898 (Ct.App.1981). *See also Shadbolt v. Schneider, Inc.*, 103 N.M. 544, 710 P.2d 738 (Ct.App.1985).

Whether an injury occurs in the course of employment relates to the time, place and circumstances under which the accident takes place. *Sena v. Continental Casualty Co.*, 97 N.M. 753, 643 P.2d 622 (Ct.App.1982). If the plaintiff was not reasonably involved in fulfilling the duties of his employment at the time of the injury, he was not acting within the course of his employment. *Gutierrez v. Artesia Public Schools*, 92 N.M. 112, 583 P.2d 476 (Ct.App. 1978). As stated in *McDaniel v. City of Albuquerque:*

> The "arising out of" requirement excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause; the causative danger must be peculiar to the work, it must not be independent of the relation of master and servant. After the event it must appear that the accidental injury had its *origin* in a risk connected with the employment and have flowed from the risk as a rational consequence.

Id. 99 N.M. at 55–56, 653 P.2d at 886–887 (emphasis in original).

In *Adamchek v. Gemm Enterprises, Inc.*, 96 N.M. 24, 627 P.2d 866 (1981), the supreme court considered a claim arising out of an incident whereby a workman was injured at work by a gunshot inflicted by an officer of a corporation who was playing with a revolver. The weapon accidentally discharged striking the employee. On appeal, the supreme court held that plaintiff could sue his employer in tort and that his personal injury action was not barred by the exclusivity provisions of the Work-

men's Compensation Act because the shooting was not a risk reasonably incident to the employee's work and the resulting injury was not caused by a danger peculiar to the plaintiff's employment. The court also held:

> [A] pistol in the hands of a corporate executive cannot be said to be a device or tool of his trade normally used in the performance of his executive duties. The negligent injury of an employee through the accidental discharge of such a pistol does not ordinarily arise out of the employment.

Id. 96 N.M. at 25, 627 P.2d at 867.

The rationale applied by the court in *Adamchek* is applicable here. It is not sufficient that the injury occur during the course of an individual's work, it must also arise out of the claimant's employment and stem from a risk reasonably incident to the claimant's work. *See also Ward v. Halliburton Co.,* 76 N.M. 463, 415 P.2d 847 (1966); *Walker v. Woldridge,* 58 N.M. 183, 268 P.2d 579 (1954). Requisite proof that the injury here "arose out of" or had its origin in a risk reasonably emanating from plaintiff's employment, is absent in the instant case.

732 P.2d 1389

Regina M. WHITE, Michael White and Charles Rose, Plaintiffs-Appellants,

v.

Roy H. SOLOMON, et al., Defendants-Appellees.

No. 8289.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Certiorari Denied Feb. 2, 1987.

A. Patrick Maynez, Messina, Madrid & Maynez, P.A., Albuquerque, for plaintiffs-appellants.

Richard B. Addis, Albuquerque, for defendants-appellees.

OPINION

NORMAN HODGES, District Judge.

Plaintiffs appeal from a denial of their motion for summary judgment to rescind the sale of a corporation and the entry of judgment for defendants. We affirm the trial court on two grounds.

Roy H. Solomon, Jeffrey A. Solomon, Burt Glucksman and Ralph Kaplan (defendants) sold all of their common stock in R.S., Incorporated, a New Mexico corporation (R.S., Inc.), to Regina M. White, Charles F. Rose and Michael H. White (plaintiffs). R.S., Inc. owned a business known as Friar's East at 1200 Wyoming Blvd., N.E. in Albuquerque including a liquor license, furniture, fixtures, inventory and a lease on real estate which was binding on R.S., Inc.

Plaintiffs paid $100,000 down and the balance of $450,000 was payable in certain terms specified in the agreement dated June 13, 1979. A commission, on the sale of the business, was paid to a realtor.

In June, 1979, new shares of R.S., Inc. stock were issued by plaintiffs Charles F. Rose, president, and Regina M. White, secretary, to the new owners, Charles F. Rose, Regina M. White and Michael H. White. In March, 1981, plaintiffs filed a complaint against defendants claiming a violation of the New Mexico Securities Act and requesting a rescission of their purchase and return of all money paid to defendants.

Plaintiffs then filed a motion for summary judgment which was heard by the trial court and, by order filed November 26, 1984, the trial court found and ruled that the transaction (sale of common stock) between defendants and plaintiffs was incidental to the sale of a business and therefore the registration requirements of the New Mexico Securities Act did not apply.

ISSUES

Plaintiffs raise three issues on appeal: (1) whether the sale of all of the R.S., Inc. stock by defendants to plaintiffs complies with the exemption under NMSA 1978, Section 58-13-30(J); (2) whether the stock sale is an isolated transaction under NMSA 1978, Section 58-13-30(A); and (3) whether the "sale of business" exception exists in New Mexico so as to relieve a seller of stock from the requirements of the New Mexico Securities Act.

ISSUE I

Section 58-13-30(J), as it existed in 1979, provides in pertinent part that an exempt transaction includes:

> J. [T]he issuance and sale by any corporation organized under the laws of this state of its securities at a time when the number of security holders does not, and will not in consequence of the sale, exceed twenty-five and:
>
> (1) the seller reasonably believes that all buyers are purchasing for investment; and
>
> (2) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer[.]

Here, R.S., Inc. did not issue and sell stock in June, 1979. After the sale of all stock in R.S., Inc. by defendants to plaintiffs, R.S., Inc., through its new officers, plaintiffs, issued new stock. Since

defendants never issued stock to plaintiffs, the Section 58–13–30(J) exemption cannot apply to this case. Thus, we agree with plaintiffs as to the inapplicability of this exemption. However, this does not affect our affirmance of the trial court since we find the transaction is exempted on two other grounds.

ISSUE II

Plaintiffs argue in their second issue that, in light of surrounding circumstances, defendants' sale of the corporation was not an isolated transaction. Plaintiffs offered evidence that in November, 1979, five months after the transaction between the parties, defendant Roy Solomon formed another corporation called Friar's Inc. which purchased Victor's Good Times Lounge in Albuquerque and renamed it Friar's North. Solomon sold all outstanding stock in Friar's Inc. in October, 1980. This stock was not registered with the New Mexico Securities Bureau. The purchasers then sold part of their stock to other people to finance the purchase. Plaintiffs contend these subsequent events constitute a series of stock sales and, when considered with defendants' June sale to plaintiffs, denote a course of successive transactions and not an isolated transaction which would be exempt from the Act. We disagree.

In Parnall and Ticer, *A Survey of the Securities Act of New Mexico,* 2 N.M.L. Rev. 1, 37–38 (1972), the authors state:

> A non-issuer may sell unregistered securities in "isolated transactions." As the Act does not define the term "isolated," the exemption is somewhat vague. The present New Mexico Commissioner has construed the term as inapplicable to a planned sale to two persons, and other states have similarly limited the exemption to from anywhere from two to five contemporaneous transactions.

We believe the term "isolated transaction" is not equivalent to "single transaction." The mere fact that defendants sold two incorporated businesses in separate transactions does not require a determination that defendants have brought themselves within the requirements of the New Mexico Securities Act. *See* 69 Am.Jur.2d, *Securities Regulation-State* § 79 (1973). *See also* Note, *The Paper Trail to Jail,* 11 N.M.L.Rev. 255 (1980–81).

In *State v. Sheets,* 94 N.M. 356, 610 P.2d 760 (Ct.App.1980), we noted that "isolated" was not defined in our Securities Act and we utilized its ordinary meaning. We defined an isolated transaction as one that is "unique; occurring alone or once, sporadic; not likely to recur." *Id.* at 365, 610 P.2d at 769. Because of the repetitive issuance of promissory notes and the dates involved, we determined that the transactions in *Sheets* could not be considered isolated transactions and the exemption did not apply. *Id.* The facts in this case, however, differ. The transfer of stock by defendants to plaintiffs in June, 1979, should be governed by the facts surrounding that sale. The sales were not connected in any way. The formation of another lounge-restaurant corporation and the sale of its stock some sixteen months later does not amount to a *series* of transactions by defendants that would cause the 1979 sale to be governed by the New Mexico Securities Act. The sale of stock by defendants to plaintiffs was an isolated transaction exempt from the Act. For the Act to apply, the transactions must have some tangible connection to one another, more than just the same seller. *Sheets* did not make this distinction and to the limited extent this broader approach conflicts with *State v. Sheets, Sheets* is modified.

ISSUE III

We also affirm the trial court by virtue of the "sale of business" exception. The purpose of securities laws is generally held to be the protection of the public from various methods of deceit and fraud in the sales of securities, not the regulation of commercial transactions. *See McClure v.*

First National Bank of Lubbock, Texas, 352 F.Supp. 454 (N.D.Tex.1973), *cert. denied,* 420 U.S. 930, 95 S.Ct. 1132, 43 L.Ed.2d 402 (1975); *McElfresh v. State,* 151 Fla. 140, 9 So.2d 277 (1942).

In a case similar to the one at bar, the Tenth Circuit Court of Appeals held that a transaction, in which plaintiff bought a liquor store and, as an indicia of ownership, received 100% of the stock of the company owning the store, was not a "security transaction" within the purview of federal securities law. *Chandler v. Kew, Inc.,* 691 F.2d 443 (10th Cir.1977). We believe the circuit court's analysis is applicable in the instant case. Defendants argue, and we agree, that although the *Sheets* case stands for the proposition that New Mexico will not follow federal decisions as to the definition of "security" or "commercial paper" because of the difference in wording of the federal and state definitions, it does not stand for the proposition that New Mexico will ignore the laws of other states or the federal cases in dealing with the economic realities of the business world. To read *Sheets* too narrowly is to render useless its utility.

In the instant case, also, the transfer of stock was merely an indicia of ownership. Plaintiffs' purchase was, in reality, a purchase of the entire business. *Cf. Tcherepnin v. Knight,* 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967). The New Mexico Securities Act was never intended to govern this type of situation.

In sum, not only is the sale by defendants exempted from the New Mexico Securities Act by the isolated transaction exemption but, also, the sale represented an exception to the Securities Act since it was the sale of a business.

Affirmed.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

733 P.2d 1

Jimmy MAITLEN, Plaintiff-Appellant,

v.

GETTY OIL COMPANY, Employer, and Travelers Insurance Company, Insurer, Defendants-Appellees.

No. 9617.

Court of Appeals of New Mexico.

Jan. 6, 1987.

Jay L. Faurot, Farmington, Winston Roberts-Hohl, Santa Fe, for plaintiff-appellant.

Alice Tomlinson Lorenz, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for defendants-appellees.

OPINION

ALARID, Judge.

This workmen's compensation case requires us to determine (1) whether a dismissal without prejudice on the ground the complaint is premature is a final, appealable order, and (2) whether NMSA 1978, Section 52–1–69, prohibiting claims by workers who are receiving maximum compensation benefits applies to vocational rehabilitation benefits. We hold that a dismissal without prejudice may be appealed and Section 52–1–69 does not apply to vocational rehabilitation benefits.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed a complaint for workmen's compensation benefits. In it, he sought a judgment for "compensation, medical treatment, vocational rehabilitation expenses and attorney's fees." Defendants' answer admitted the accident arising out of and in the course of employment, but denied that plaintiff was entitled to vocational rehabilitation expenses, denied that they had refused to pay compensation and denied that plaintiff was entitled to attorney fees. They also claimed that the suit was premature under Section 52–1–69.

Following some discovery, defendants moved for summary judgment. Proceedings on the motion showed that defendants had paid plaintiff all of the installments of compensation and medical benefits to which he was entitled. The only disputed issue was plaintiff's entitlement to vocational rehabilitation expenses. On this issue, the showing was that defendants had plaintiff evaluated for vocational rehabilitation, but that plaintiff informed the evaluators that he was not motivated to change jobs. Plaintiff had returned to his old job and was performing it, albeit with difficulty. The first time defendants knew that plaintiff wanted vocational rehabilitation benefits was when the suit was filed; the first time plaintiff personally told defendants that he wanted vocational rehabilitation benefits was during his deposition.

Summary judgment was granted and plaintiff appealed. Plaintiff's contention was that the court erred in granting summary judgment because there was a genuine issue of material fact concerning whether plaintiff was able to return to his former job. Our calendaring notice proposed summary reversal because we perceived a factual question as to whether plaintiff was able to return to his former job. We said that, because a person can be working and still be wholly able to perform his usual tasks, *Davis v. Homestake Mining Co.*, 25 SBB 976 (Ct.App.1986), and because the compensation act is to be construed liberally in favor of the employee, *id.*, we believe that a person can return to his former job and still be eligible for vocational rehabilitation expenses if the evidence showed difficulties in performing the former job.

We also addressed the issue of prematurity under Section 52–1–69, recognizing that we were required to affirm the trial court if any reason for affirmance exists. *Scott v. Murphy Corp.*, 79 N.M. 697, 448 P.2d 803 (1968). On this issue, we relied on *Minnerup v. Stewart Brothers Drilling Co.*, 93 N.M. 561, 603 P.2d 300 (Ct.App. 1979), for the proposition that Section 52–1–69 only applies to installments of compensation benefits.

Defendants filed a timely memorandum in opposition to summary reversal, arguing that the appeal ought to be dismissed because no appeal will lie from an order which is not final, such as a dismissal without prejudice, *see Armijo v. Co-Con Construction Co.*, 92 N.M. 295, 587 P.2d 442 (Ct.App.1978); *Ortega v. Transamerica Insurance Co.*, 91 N.M. 31, 569 P.2d 957 (Ct.App.1977); *Chavez v. Chenoweth*, 89

N.M. 423, 553 P.2d 703 (Ct.App.1976), and that the suit was properly dismissed as premature. Our second calendaring notice again proposed summary reversal, proposing to reject both defendants' arguments. Defendants have again filed a timely memorandum in opposition.

Although defendants take no issue with this court's resolution of the question of its jurisdiction over the appeal from an order that was alleged to be not final, we take this opportunity to explain why we have jurisdiction because this is the second case coming before this court in which this issue was initially raised and then abandoned. Defendants also concede that there are genuine issues of fact surrounding the question of whether plaintiff was able to return to his former job. In light of the concession, we discuss that issue no further. We are not persuaded by defendants' arguments concerning why this suit is premature; therefore, we reverse.

JURISDICTION

Armijo, Ortega and *Chavez* are to the effect that a dismissal without prejudice is not a final order from which appeal may be taken because a dismissal without prejudice ordinarily imports further proceedings. We take no issue with these cases to the extent that the dismissal without prejudice in them did, in fact, import further proceedings. *See Ortega; Chavez.* However, in a workmen's compensation case, such as *Armijo,* when the trial court dismisses on the ground that the worker is being paid all the compensation to which he is entitled, the order in effect terminates the suit and puts the case out of court without an adjudication on the merits.

In *Bralley v. City of Albuquerque,* 102 N.M. 715, 699 P.2d 646 (Ct.App. 1985), this court held that such an order would be appealable. In determining whether an order is final for purposes of appeal, this court looks to the substance rather than the form of the order. *Johnson v. C & H Construction Co.,* 78 N.M. 423, 432 P.2d 267 (Ct.App.1967). The effect of a ruling that a dismissal without prejudice on grounds of prematurity in a workmen's compensation case is not final would be that the worker would never be entitled to review of the trial court's determination that he was receiving full benefits. Such an order is sufficiently final to be appealable. *Bralley.* Accordingly, we take jurisdiction of this appeal and overrule *Armijo* to the extent it is inconsistent with our decision today.

PREMATURITY

Defendants rely on Section 52–1–69 and NMSA 1978, Section 52–1–31(A), as authority for the proposition that plaintiff cannot maintain this suit because he did not, prior to commencing this suit, seek vocational rehabilitation benefits nor was he refused them before commencing this suit. Defendants also rely on the "principles of fundamental fairness" which govern the interpretation of the Act.

Section 52–1–69 provides: "No claim shall be filed by any workman who is receiving maximum compensation benefits...." Our calendaring notices relied on *Minnerup* to refute defendants' contention that Section 52–1–69 applied to vocational rehabilitation benefits. Specifically, we held, in *Minnerup,* that " '[c]ompensation' in § 52–1–69, supra, refers to payments of compensation for disability; 'compensation' in § 52–1–69, supra, does not refer to medical benefits." *Id.* 93 N.M. at 564, 603 P.2d at 303. We reasoned that if compensation applies to installments of disability benefits and not medical benefits, then it follows that compensation does not refer to vocational rehabilitation benefits. Moreover, NMSA 1978, Section 52–1–50 (Cum.Supp. 1985) provides for vocational rehabilitation benefits "[i]n addition to the medical ... [benefits]." The wording of the statute on vocational rehabilitation benefits indicates a legislative intent to treat them like medical benefits as opposed to installments of compensation for disability.

Defendants' second memorandum in opposition appears to recognize that Section 52–1–69 does not bar the suit because

it relies exclusively on Section 52–1–31(A). That statute provides in part:

> If an employer or his insurer fails or refuses to pay a workman any installment of compensation to which the workman is entitled ... it is the duty of the workman insisting on the payment of compensation to file a claim therefor as provided in the Workmen's Compensation Act, not later than one year after the failure or refusal of the employer or insurer to pay compensation.

Defendants read into this statute a requirement that the employer or insurer must refuse to pay before any cause of action accrues. The problem with defendants' reliance on Section 52–1–31(A) is, again, that we have cases holding that it only applies to installments of compensation for disability and does not apply to medical benefits. *E.g., Valdez v. McKee,* 76 N.M. 340, 414 P.2d 852 (1966); *Nasci v. Frank Paxton Lumber Co.,* 69 N.M. 412, 367 P.2d 913 (1961). Indeed, these cases were the basis for the decision in *Minnerup.*

Defendants argue that fundamental fairness requires that they be given a chance to voluntarily pay for vocational rehabilitation benefits before being subjected to suit. Our calendaring notice responded that the principle found in *Tafoya v. Leonard Tire Co.,* 94 N.M. 716, 616 P.2d 429 (Ct.App.1980) (attorney fees will not be awarded for securing benefits when the desire for those benefits has not been communicated to defendants), would adequately deter workers from filing suits based on desires to which defendants have not been given the opportunity to respond. Defendants disagree and state that they still have litigation expenses, including their own attorney fees, court costs, costs associated with discovery, and the like, which are not reimbursed. Defendants contend that they had to take depositions and expend time in order to file their motion for summary judgment. Defendants urge this court to further protect them from these costs by holding that a worker cannot file suit for any benefits until he has requested them and they have been refused. After all, conclude defendants, affirming the lower court's decision would do no more than require plaintiff to make a simple request; if the request is granted, that would be the end of the matter; if the request is denied, plaintiff could then file suit.

Notwithstanding defendants' arguments, we see nothing fundamentally unfair to require defendants to give plaintiff their answer to his request in the context of this suit. Nothing prevented defendants from admitting they were liable for the vocational rehabilitation benefits if, indeed, it was their intent to pay them; yet, they denied liability. Nothing prevented defendants from using less costly discovery devices to elicit plaintiff's admission that he had not been denied installments of compensation, medical benefits, or vocational rehabilitation benefits that were requested.

In sum, neither Section 52–1–31(A) nor–69 bars this suit. Nor do principles of fundamental fairness or policy reasons require that plaintiff make a request for and be denied vocational rehabilitation benefits before he can make a claim for them in court. The prevention of unwarranted litigation is equally served by the ruling prohibiting plaintiff from recovering attorney fees.

The summary judgment is reversed.

IT IS SO ORDERED.

DONNELLY and GARCIA, JJ., concur.

733 P.2d 4

Thomas Gerard ALFIERI,
Petitioner-Appellee,

v.

Christine Ann ALFIERI,
Respondent-Appellant.

No. 9403.

Court of Appeals of New Mexico.

Jan. 6, 1987.

Thomas C. Montoya, Atkinson & Kelsey, P.A., Albuquerque, for petitioner-appellee.

Calvin Hyer, Jr., Albuquerque, for respondent-appellant.

OPINION

DONNELLY, Judge.

Appellant appeals from a judgment of the trial court continuing child custody placement with her contingent upon her returning to New Mexico from California with her minor daughter and complying

with child visitation awarded to appellee, her former husband, as provided by the court's prior order. On appeal, the mother raises six contentions which we group and jointly discuss as follows: (1) legality of restricting relocation of minor child; (2) claim of error in the trial court's adoption of findings of fact; and (3) whether the trial court's order is supported by substantial evidence. Other issues raised in the docketing statement but not briefed are deemed abandoned. *State v. Doe*, 99 N.M. 456, 659 P.2d 908 (Ct.App.), *cert. denied*, 99 N.M. 477, 660 P.2d 119 (1983). We affirm.

This case involves a turbulent history. During their marriage, the parties had one child, a daughter. The child was approximately two years old when the marriage was dissolved on January 20, 1984. Following the divorce, the father remarried. Thereafter, the mother filed a motion for an order to show cause, requiring the father to show why he should not be held in contempt for failing to pay child support in a timely manner. The trial court ordered the father to pay child support in the amount provided in the agreement and to make monthly payments on arrearages.

In January 1985, the father obtained an order to show cause why the mother should not be held in contempt of court for failing to comply with his rights to visit and communicate with the child and to advise the father "as to the health, welfare and whereabouts" of his daughter. The trial court also referred the parties to the court clinic for evaluation and mediation of this issue. After a hearing, the court entered an order providing for the father's child visitation rights and specifically detailing the dates and times when he was permitted to visit his daughter. The April 4, 1985, order provided, among other things, for weekly visitation by the father, two-month summer visitation periods, and alternate visitation schedules on Thanksgiving and Christmas holidays. The order also directed that the parties keep each other informed as to the address of the child and recited that noncompliance with the visitation schedule could subject a party to contempt of court.

In August 1985, the mother secretly moved to California and took her daughter with her without notifying her former husband of the proposed move or the child's new address. Thereafter, both parties filed motions in the district court: the father moved for change of child custody and the mother sought to terminate or to modify the father's rights of child visitation.

After a hearing on the merits, the trial court adopted findings of fact providing, inter alia, that prior to removing the child from this state, the mother did not inform the father of her intent to move to California, nor of the child's new address or phone number in California; that the minor child has a very close attachment to her father and that the two have a good father-daughter relationship; that the mother moved from New Mexico, "in part, to avoid dealing with [the father] regarding [the child], and, in part, to interfere with and diminish [the father's] parent/child relationship"; that the mother's action in removing the child from the possibility of weekly contact with her father was not in the child's best interest; and that removal of the child from New Mexico to California "was detrimental to [the child's] welfare."

Based upon its findings, the trial court concluded in part that:

> 2. If [the mother] moves to Albuquerque, New Mexico, she will retain sole custody as provided in the Final Decree and [the father] will have visitation as provided in the Court's April 4, 1985, order;
>
> 3. If [the mother] decides not to move to Albuquerque, New Mexico, then the parties are awarded joint legal custody of [the child], with [her] principal place of residence placed with [the father] [.]

The trial court also concluded that because the mother's moving the child to California "was done primarily to interfere with and diminish [the father's] contact and relationship with [his daughter], New Mexico law allows for a change of custody from the mother to the father." The court further concluded that it would order a change

of child custody only if the mother persisted in her decision to remain in California, and that if she persisted in her efforts to interfere with and diminish the father's relationship with the child of the parties, this conduct "in turn render[s] her a less fit parent than is the father...."

I. RESTRICTION OF RIGHT TO TRAVEL

At the heart of the mother's appeal is her contention that the trial court's order providing for joint custody and requiring her to give physical custody of her child to the father unless she returns to this state, in actuality seeks to adjudicate the place where the mother must reside; the mother argues this is an unlawful infringement upon her right to travel or to relocate.

The Supreme Court has recognized that the right of an individual to travel freely throughout other states or territories is secured by the United States Constitution. *E.g., Jones v. Helms,* 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981); *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Edwards v. California,* 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941). This constitutionally-protected right to travel has been extended to invalidate laws which impede the individual's right to travel or which discourage the exercise of this right. *Shapiro v. Thompson.*

Although recognizing the right of a divorced parent who has been awarded custody of a minor child to relocate, state courts have generally upheld judicial restrictions or limitations upon removing a child from the jurisdiction in cases where the relocation is determined to be contrary to the best interests and welfare of the child. *See Garcia v. Garcia,* 81 N.M. 277, 466 P.2d 554 (1970); *Urzua v. Urzua,* 67 N.M. 304, 355 P.2d 123 (1960); *see also Johnson v. Johnson,* 455 So.2d 1332 (Fla.App.1984); *Ziegler v. Ziegler,* 107 Idaho 527, 691 P.2d 773 (App.1985); *Carlson v. Carlson,* 8 Kan.App.2d 564, 661 P.2d 833 (1983); *Meier v. Meier,* 286 Or. 437, 595 P.2d 474 (1979); Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and The Courts,* 1985 Ariz. St.L.J. 1; Hoffman, *Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions,* 6 U.D.L.R. 181 (1973). In the Annotation in 154 A.L.R. 552, 556 (1945), it is noted:

> The general rule that in matters affecting the custody of a child the court will be governed primarily by the welfare and best interests of the child applies in determining whether the court will award custody to a nonresident or grant or refuse permission to remove a child from the jurisdiction in a divorce or separation case.

See also Annots., 15 A.L.R.2d 432 (1951); 30 A.L.R.4th 548 (1984).

In *Garcia,* the the New Mexico Supreme Court confirmed the "best interests of the child" rule, but recognized that the right of a custodial parent to relocate should not be interfered with except where the move would clearly be contrary to the child's welfare. The court held:

> the fact the parent with custody is a non-resident or about to become one, for whatever reason, [does not alter] the universal rule that the best interests of the child are paramount; that if those interests are best served by being with the mother, even though outside this jurisdiction, removal should be permitted.

Id., 81 N.M. at 279, 466 P.2d at 556. *See also Urzua v. Urzua.* In *State v. Whiting,* 100 N.M. 447, 449, 671 P.2d 1158, 1160 (Ct.App.1983), this court further observed that a parent's "natural right to custody includes the right to remove the child from this jurisdiction in the absence of any legal modification of that right."

As observed in *Garcia* and *Urzua,* the best interests of the child control the right of a custodial parent to remove a child from this jurisdiction and where a challenge to the right of a parent to move a child from the state is raised by the noncustodial parent, the decision of whether to grant the relocation is addressed to the sound discretion of the trial court based

upon the child's best interest and welfare. *See also Meier v. Meier.*

Following entry of the initial decree of divorce, on April 4, 1985, the trial court entered an order modifying child visitation rights, thereby amplifying the father's rights to specific visitation. The order specified that the father was awarded visitation on alternating weekends from 4:30 p.m. Friday until Monday morning; each Wednesday from 4:30 p.m. until Thursday morning; on specified holidays; and for a two-month period during each summer. The order further recited that the failure of the parties to comply with the terms of the order may subject them to a ruling of contempt. Under these facts, the mother, as custodial parent, could not unilaterally abrogate the father's right to specific visitation with his daughter without court approval.

The trial court expressly determined that the parties' minor child has a close attachment to her father and that one of the mother's motives in relocating outside New Mexico was to diminish the father's parent-child relationship so as to deprive the child and her father of the interaction, society and visitation of the other. The court also found that restricting the child's contact with her father and removal from New Mexico to California "was detrimental" to the child's welfare.

Under the facts herein, the ruling of Judge Kass sought to balance the best interests of the child with the right of the mother to relocate. New Mexico follows the rule that a parent's natural right to custody includes the right of a custodial parent to relocate, except where such right has been legally modified. Here, however, that right had been modified by the mandatory visitation provisions spelled out in the April 4, 1985, court order. The trial court's ruling under the circumstances here shown, was based upon findings of the best interests and welfare of the child and that the mother improperly sought to cut off the father and the child from visiting and associating with each other. Under these circumstances, we do not find that the trial court's ruling was an abuse of discretion or contrary to law. Although we caution that orders limiting or restricting a custodial parent's right to relocate should only be entered in exceptional cases after alternative means of continuing parent-child association have been considered, we find no error in the trial court's ruling under the facts herein.

II. FINDINGS OF FACT

The mother argues that there is an insufficient evidentiary basis for the trial court's finding that her primary purpose in moving from this state was to avoid or diminish the father's rights of visitation with his daughter and that her purpose in part was to interfere with and diminish the father's parent-child relationship. The mother's brief-in-chief specifically challenges other related findings adopted by the trial court and asserts that they are not supported by substantial evidence. Since the mother's challenge to the findings turns on her assertion that they are not supported by substantial evidence, we discuss these issues jointly. We have examined the record herein and find against her on this issue.

It is black-letter law that on appellate review wherein appellant challenges the sufficiency of the evidence, the reviewing court will uphold the trial court's findings and conclusions if they are supported by substantial evidence. *Martinez v. Martinez,* 101 N.M. 88, 678 P.2d 1163 (1984). The appellate court will view the facts and evidence in a light most favorable to the ruling of the trial court, indulge in all reasonable inference in support of the court's findings, and will disregard all inferences or evidence to the contrary. *Cave v. Cave,* 81 N.M. 797, 474 P.2d 480 (1970). *See also Seeley v. Jaramillo,* 104 N.M. 783, 727 P.2d 91 (Ct.App.1986).

The mother also argues that the trial court erred in refusing to adopt requested findings of fact submitted by her and which she alleges were supported by substantial evidence. The mother misperceives the role of this court on appeal. The

test to be applied on appeal is whether there is substantial evidence to support the trial court's ruling, not whether there is evidence to support a different result. *Abbinett v. Fox,* 103 N.M. 80, 703 P.2d 177 (Ct.App.1985).

The mother ascribes other motives to her actions and contends that she moved to California because her former husband mentally and physically abused both her and the child. She argues that her testimony substantiating this motive is uncontroverted and that the trial court is compelled to find accordingly. We disagree. The trier of fact does not act arbitrarily in disregarding alleged uncontradicted testimony where legitimate inferences may be drawn from the facts and circumstances that contradict or cast reasonable doubt on the truth or accuracy of the testimony. *Medler v. Henry,* 44 N.M. 275, 101 P.2d 398 (1940). Further, "*the interest of the witness furnishes a proper ground for hesitating to accept his statements* [.]" *Strickland v. Roosevelt County Rural Electric Cooperative,* 94 N.M. 459, 465, 612 P.2d 689, 695 (Ct.App.1980) (*quoting* and emphasizing *Hull v. Littauer,* 162 N.Y. 569, 57 N.E. 102 (1900)). The evidence bearing on this issue was conflicting. The trial court having heard the evidence and seen the witnesses and weighed their demeanor, could reasonably infer from the evidence that one of the mother's motives in removing the child from New Mexico was based upon a desire to impede the father's right of visitation and association with his daughter.

The trial court ordered a psychological evaluation of both parents by the court clinic. As shown by the report prepared by psychologists Dan Matthews, Ph.D., and Terry Ginsberg, M.A., and admitted into evidence, the mother was found to harbor strong anger toward her former husband and sought to escape contact with him because she "resents his continued intrusion in her life through their daughter." The court clinic also noted that the mother moved to California to avoid her own problems with the father as well as the specific difficulties in dealing with him regarding the child. Moreover, Dr. Matthews testified that the mother was adamant about not having her child around the father and appeared agitated and angry about this factor. Additionally, Ginsberg testified that the clinic was concerned because it discerned that the mother was talking negatively about the father to the child and to others in the presence of the child.

The report recommended leaving the child with her mother but further noted that the mother's "action in removing [the child] from the possibility of weekly contact with [the father] . . . cannot be seen as in [the child's] ultimate best interest." The court clinic further recommended that the child "spend frequent time in her father and step-mother's care. Weekly contact would be most desirable."

Ginsberg also testified that, based on his observation, the child appeared to have a very close attachment to the father; they easily engaged each other during structured and unstructured activities; and, there was no indication of stress or anxiety.

Dr. Matthews testified that moving the child to California negatively impacted and was detrimental to the child's relationship with her father. Dr. Matthews' further testimony indicated that if the child grows up without a relationship with her father or with a negative image of her father, this could foreseeably result in causing problems with the child's progress in school, emotional health, and future relationships. Dr. Matthews also testified that one reason a weekly visitation schedule is in the child's best interests is because a child at that age (four years) does not have a long enough memory span to remember her father even from a previous contact at three-week intervals and will be unable to imagine the next contact if they are not frequent; consequently, it was important that a child of this age should have frequent parent contacts.

The record further indicates that the mother, without notice to her former husband, secretly made arrangements to re-

move the child from New Mexico and to prevent the father from obtaining phone contact or knowing of the child's location. The mother contends she was not restricted in any way from moving to California with the child in August 1985, because the January 20, 1984, marital settlement agreement included an alternative visitation schedule in the event the parties at some point no longer continued to reside in the same metropolitan area. The subsequent April 4, 1985, visitation order adopted by the trial court, however, did not include such a provision and specifically mandated each parent's compliance with the visitation schedule detailed by the court. The mother's challenge to the trial court's findings are without merit. Applying the above rules, we determine that the trial court's findings are supported by substantial evidence.

III. BASIS FOR CHANGE OF CUSTODY

We turn next to the mother's argument that the record fails to support the trial court's determination that there has been a significant change of circumstances sufficient to justify the contingent change of custody as ordered by the court.

Child custody may be modified only upon evidence establishing a substantial change of circumstances which has occurred subsequent to the entry of a decree of divorce and which changed circumstances are shown to materially affect the best interests and welfare of the child. *See Seeley v. Jaramillo; see also* NMSA 1978, §§ 40–4–7 and –9.1 (Repl.1986). The burden of proof to establish a change of custody is upon the party seeking modification. *Seeley v. Jaramillo.*

Inherent in the visitation privileges granted to a noncustodial parent under a court decree is a correlative obligation resting upon the custodial parent that such visitation privileges and the right of the child to associate with both parents will not be unreasonably impeded or destroyed. *See Johnson v. Johnson,* 455 So.2d 1332 (Fla.1984). *Lopez v. Lopez,* 97 N.M. 332, 639 P.2d 1186 (1981), recognized that a custodial parent's demonstrated lack of cooperation and refusal to follow prior court orders concerning visitation may constitute grounds for a change of custody in an extreme case.

In *Montero v. Montero,* 96 N.M. 475, 632 P.2d 352 (1981), the court noted that where a close relationship already exists, visitation between parent and child involves a wholesome, if not vital, contribution to the child's emotional well-being. The custodial parent, who usually has a great deal of influence over the children so as to prevent bitterness or vindictiveness against the noncustodial parent, has an important responsibility to endeavor and preserve the normal parent-child relationship with the noncustodial parent. *Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978).

The trial court found that the mother sought to improperly interfere with the parent-child relationship existing between the child and her father. The court also concluded that, while the fact of moving to another state does not constitute a proper basis to warrant a change of custody, when coupled with the "inappropriate goal of interferring with and diminishing the other parent's relationship with the child," these facts constitute sufficient changed circumstances to warrant a change of custody.

Although the evidence was in part circumstantial, there was substantial evidence to allow the trial court to form the basis requiring the mother to return her daughter to this state in order to permit continued association with her father. It is not necessary to establish by direct testimony of witnesses the existence of every material fact; facts may be proven by circumstantial evidence. *Dodge v. Tradewell Stores, Inc.,* 256 Or. 514, 474 P.2d 745 (1970). *See also Tanner v. Farmer,* 243 Or. 431, 414 P.2d 340 (1966). In a civil case, circumstantial evidence is competent to prove a fact in issue and it is unnecessary that such proof rise to the degree of certainty to support only one conclusion to the exclusion of all others. *Casey v. Phillips Pipeline Co.,* 199 Kan. 538, 431 P.2d

518 (1967). Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the facts sought to be proved. *See* NMSA 1978, UJI Civ. 3.11 (Repl.Pamp. 1980).

The trial court's conditional order relating to custody of the minor child of the parties was not an abuse of discretion or contrary to law.

The order of the trial court is affirmed.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

733 P.2d 11

George MACARON, Plaintiff-Appellee,

v.

ASSOCIATES CAPITAL SERVICES CORPORATION, et al., (International State Bank), Defendant-Appellant.

No. 8348.

Court of Appeals of New Mexico.

Jan. 8, 1987.

Robert S. Skinner, Raton, for plaintiff-appellee.

Pamela A. Dugger, Kastler Law Offices, Ltd., Raton, for defendant-appellant.

OPINION

GARCIA, Judge.

Defendant International State Bank (Bank) appeals the trial court's order quieting title to real estate in plaintiff. The sole issue on appeal is whether notice by publication, in compliance with NMSA 1978, Section 7–38–67 (Repl.1986), provides a mortgagee of real property with constitutionally adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. We hold that it does not and reverse the court's order and remand. (Although the tax sale occurred in 1983, we

cite to the 1986 Replacement because the relevant provisions are identical in all material respects to the provisions in the 1982 Replacement Pamphlet.)

FACTS

The facts giving rise to this appeal are not in dispute. Defendant Roman Construction Company (Roman) was the owner in fee of real property located in Colfax County. In June and August of 1979, Roman executed promissory notes in favor of the Bank for a total of $162,000. These notes were secured by a mortgage and the mortgage was duly recorded in the office of the Colfax County Clerk on September 19, 1979. The identity of the Bank and its address were readily ascertainable from the publicly recorded mortgage.

As of January, 1979, prior to the execution of the notes and mortgage, the taxes on the property mortgaged to the Bank were delinquent. Roman failed to pay property taxes on the mortgaged property through 1983. On July 19, 1983, the State of New Mexico sold the property for the 1979 delinquent taxes pursuant to NMSA 1978, Section 7-38-61 (Repl.Pamp.1986). Roman was served by certified mail with notice of the impending tax sale. NMSA 1978, § 7-38-66 (Repl.Pamp.1986). Notice of the tax sale was also accomplished by publication in accordance with Section 7-38-67(B). No effort was undertaken by the state to discover the identity of, or serve notice in person or by mail on, the mortgagee or any other party who might have an interest in the property.

Plaintiff purchased the property at the tax sale for $3,800 and the state issued a tax sale deed to him. *See* NMSA 1978, § 7-38-70(A) (Repl.Pamp.1986). Plaintiff subsequently filed a suit to quiet title in the property. The Bank contested plaintiff's claim and raised the failure to provide actual notice of the impending tax sale as a defense. The trial court quieted title in plaintiff and the Bank appeals. Aside from the Bank, none of the other parties with an interest in the property appeared below to contest the quiet title action nor are they parties to this appeal.

DISCUSSION

Shortly before the tax sale was conducted by the state, the United States Supreme Court decided *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In *Mennonite,* the Supreme Court invalidated an Indiana tax sale because the Indiana Tax Code did not provide that the holder of a recorded mortgage, whose identity and address were reasonably ascertainable, be given actual notice of an impending tax sale. The Court first noted that the mortgagee has a legally protected property interest in the mortgaged property under Indiana law. Hence, the mortgagee is entitled to " 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' "; *Id.* (*quoting Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). The Court held that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* 462 U.S. at 798, 103 S.Ct. at 2711.

This case is controlled by the holding in *Mennonite.* The trial court sought to distinguish this case from *Mennonite* by finding that because the tax lien on the property had arisen before the note and mortgage had been executed, the Bank should have been on notice that the property was subject to sale for nonpayment of taxes. The trial court, accordingly, held that the Bank had all the notice to which it was entitled under the due process guarantee. We cannot agree with the trial court since, according to *Mennonite,* "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Id.* at 800, 103 S.Ct. at 2712.

A mortgagee in New Mexico also possesses a substantial property interest. A mortgagee acquires a lien on the owner's property which may be conveyed together

with the mortgagor's personal obligation to repay the debts secured by the mortgage. *See* NMSA 1978, §§ 39–5–1 to –23; NMSA 1978, § 48–7–7. *See also Slemmons v. Massie,* 102 N.M. 33, 690 P.2d 1027 (1984). The mortgagee's security interest generally has priority over subsequent claims or liens attaching to the property. *See Chesspport Millworks, Inc. v. Solie,* 86 N.M. 265, 522 P.2d 812 (Ct.App.1974) (landlord's lien given priority on basis of "first in time, first in right" doctrine.) "The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." *Mennonite,* 462 U.S. 798, 103 S.Ct. at 2711; *see* § 7–38–70(B). In this case, the Bank's interest in the property was extinguished on the date of the tax sale because it arose subsequent to the tax lien. *See* § 7–38–70(B). Consequently, the Bank possessed a constitutionally-protected interest in the mortgaged property and was entitled to notice reasonably calculated to apprise it of the impending tax sale. *Mennonite; Mullane.*

■ We next consider whether the New Mexico Tax Code sale provisions provide constitutionally adequate notice. *See Mennonite.* The New Mexico notice provisions are similar to Indiana's provisions. The Supreme Court found Indiana's provisions to be constitutionally inadequate. *Compare* §§ 7–38–66 and –67 *with* Ind.Code Ann. §§ 6–1.1–24–3 and –4 (Burns 1984). In New Mexico, real property having delinquent taxes for more than three years may be sold at public auction. § 7–38–67(A). Prior to the sale, the Property Tax Division must publish notice in a newspaper of general circulation of an impending sale for at least three weeks immediately preceding the tax sale. § 7–38–67(B). The legal owner of the property is entitled to notice by certified mail to his last known address. § 7–38–66(A). There is no provision in New Mexico for notice by mail or personal service to mortgagees of property that is to be sold for nonpayment of taxes.

"Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite* at 800, 103 S.Ct. at 2712 (emphasis in original). The Supreme Court rejected the argument that actual notice to the mortgagor was sufficient to apprise the mortgagee that his property interest was in danger of being destroyed by a tax sale. *Id.* at 799, 103 S.Ct. at 2711. It was unlikely that a mortgagor who had not taken steps to preserve his own property would take steps to preserve the interests of a mortgagee. *See* Note, *Mennonite Board of Missions v. Adams: 11 Years After Fuentes v. Shevin, the Supreme Court Has Found That Creditors Also Have Notice Rights,* 37 Ark.L.Rev. 971 (1984).

The *Mennonite* Court did not impose any extraordinary obligation on the state to discover the identity of the mortgagee. *Id.* at 798–99 n. 4, 103 S.Ct. at 2711 n. 4. Rather, the court required "reasonably diligent efforts" to discover names and addresses of those whose interest could be ascertained. *Id.* Here, extraordinary efforts were not necessary; the Bank had recorded the mortgage in the county clerk's office so that the identity and address of the Bank were readily ascertainable.

The fact that the tax lien had arisen before the mortgage was executed and recorded does not mandate a different result. *See Mennonite* at 800, 103 S.Ct. at 2712; *cf. First Pennsylvania Bank N.A. v. Lancaster County Tax Claim Bureau,* 504 Pa. 179, 470 A.2d 938 (1983). Although the trial court noted the sophistication of the Bank, "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Mennonite,* 462 U.S. at 799, 103 S.Ct. at 2712.

In conclusion, we hold that the manner of notice provided to the Bank did not meet

the requirements of the due process clause of the fourteenth amendment of the United States Constitution. *Mennonite.* We reverse the trial court's order quieting title to the property in plaintiff and remand with instructions to void the tax sale.

Oral argument is not necessary. *Cf. Garcia v. Genuine Parts Co.,* 90 N.M. 124, 560 P.2d 545 (Ct.App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977).

IT IS SO ORDERED.

DONNELLY, C.J., and BIVINS, J., concur.

733 P.2d 14

Rogelio REYES, Jr., Petitioner-Appellant,

v.

Jacqueline L. REYES, Respondent-Appellee.

No. 8563.

Court of Appeals of New Mexico.

Jan. 13, 1987.

Certiorari Denied Feb. 18, 1987.

W.H. Greig, Van Soelen, Greig & Gutierrez, Clovis, for petitioner-appellant.

Robert G. Marcotte, Albuquerque, for respondent-appellee.

OPINION

GARCIA, Judge.

Petitioner and respondent were divorced in Colorado. The decree awarded alimony to respondent but made no mention of petitioner's military retirement. Subsequently, petitioner filed the decree in New Mexico and attempted to terminate the alimony obligation. Respondent answered and also requested that the trial court award her a portion of petitioner's military retirement. The trial court refused to terminate the alimony and awarded respondent a portion of the military retirement.

Petitioner appeals from the award of part of his military retirement benefits to respondent. The sole issue on appeal is whether the trial court erred in reopening the Colorado divorce decree and awarding military retirement benefits to respondent,

some five and one-half years after the grant of divorce. One other issue, listed in the docketing statement but not briefed, is abandoned. *State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.), *cert. denied,* 102 N.M. 734, 700 P.2d 197 (1985). We agree with petitioner and reverse.

The authority to modify a division of property in a prior divorce action depends on the law of the jurisdiction that granted the award. *See Corliss v. Corliss,* 89 N.M. 235, 549 P.2d 1070 (1976); *Dunning v. Dunning,* 104 N.M. 296, 720 P.2d 1237 (Ct.App.1985), *rev'd on other grounds,* 104 N.M. 295, 720 P.2d 1236 (1986). Thus, since the divorce decree in this case was granted in Colorado, that state's substantive law is to be applied in any modification.

In a Colorado proceeding, *In re Marriage of Ellis,* 36 Colo.App. 234, 538 P.2d 1347 (1975), *aff'd,* 191 Colo. 317, 552 P.2d 506 (1976), the court held that military retirement benefits do not constitute property and are not subject to division upon dissolution of marriage. Because Colorado's substantive law must be followed, the New Mexico trial court was without authority to award respondent part of petitioner's military benefits. Although respondent contends that she is not attempting to modify the Colorado decree but, rather, is filing a separate action under NMSA 1978, Section 40–4–20 (Repl.1986), still she is not entitled to do in New Mexico what she could not do in Colorado. *See Dunning.* The language of Section 40–4–20 provides for a post-decree division of property "which *could* have been litigated in the original proceeding for dissolution of the marriage." (Emphasis added.) Here, respondent's military retirement benefits could not have been litigated in the original proceeding since such benefits are not recognized under Colorado law as marital assets. For these reasons, the trial court is reversed and the case is remanded for the court to amend its order to conform with this opinion. Petitioner is awarded his appellate costs.

IT IS SO ORDERED.

BIVINS and FRUMAN, JJ., concur.

733 P.2d 15

AG–CHEM FARM SERVICES, INC., Plaintiff-Appellant,

v.

Dennis R. COBERLY, an individual d/b/a Coberly and Coberly, a partnership; Craig Coberly, an individual d/b/a Coberly and Coberly, a partnership; First National Bank of Woodbine, Iowa, a foreign banking corporation; Gerald Crozier, an individual d/b/a Crozier and Company; Crozier and Company, a New Mexico Corporation, and Worley Mills, Inc., Defendants-Appellees.

No. 8331.

Court of Appeals of New Mexico.

Jan. 15, 1987.

Duane S. Hamar, Portales, for plaintiff-appellant.

Steve Doerr, Randy Knudson, Portales, for defendants-appellees, Gerald Crozier, Crozier & Company and Worley Mills, Inc.

OPINION

GARNETT R. BURKS, Jr., District Judge (By Order of Designation).

Ag-Chem Farm Services, Inc. (Ag-Chem) brought this action to "foreclose" on a

security agreement and for money damages based on alleged conversion against two grain dealers, Worley Mills, Inc. (Worley Mills) and Gerald Crozier, an individual d/b/a Crozier and Company, and Crozier and Company, a corporation (Crozier). From an order and judgment granting summary judgment in favor of Worley Mills and Crozier, Ag-Chem appeals. The parties seem to agree that there are no factual disputes, and that the propriety of the summary judgment turns on the legal effect of the agreed facts. Neither the debtors, Coberly and Coberly, a partnership (Coberly) nor First National Bank of Woodbine, Iowa (First National) are parties to this appeal.

UNDISPUTED FACTS

On April 21, 1982, Coberly executed a promissory note in the sum of $94,709.78 to Ag-Chem. The consideration for the note was the balance owing Ag-Chem on an account for the sale of fertilizer to Coberly for use in its farming operation.

At the same time as the execution of the note, Ag-Chem, as the secured party, and Coberly, as the debtor, entered into a security agreement covering wheat on 1,500 acres to secure payment on the note. The security agreement, in addition to securing the payment of the note, by its terms and provisions, also secured the payment of "all other money" thereafter advanced by Ag-Chem to or for the account of Coberly. Ag-Chem's security interest was perfected by filing the security agreement on April 22, 1982.

On May 24, 1982, First National, by filing a security agreement and financing statement, perfected a security interest in the same collateral covered by Ag-Chem's security interest, securing a debt owed First National by Coberly.

Early in June 1982, Coberly stored with Worley Mills some of the wheat covered by the security agreements of Ag-Chem and First National.

On June 10, 1982, Ag-Chem wrote Worley Mills informing it of Ag-Chem's note and security agreement and insisting that the note be satisfied before Worley Mills sold any wheat stored with it by Coberly. Worley Mills was further informed that the total amount due Ag-Chem from Coberly was $94,709.78.

On June 18, 1982, Worley Mills drew a check on its account in the sum of $26,774.40 payable to the order of Coberly and Ag-Chem. Ag-Chem endorsed this check and gave it to Coberly. It was either cashed or deposited in Coberly's account. Coberly gave back to Ag-Chem part of the check, and Ag-Chem permitted Coberly to keep the rest of the check to pay its labor and fuel expenses.

On June 24, 1982, Worley Mills drew another check on its account in the sum of $38,952.55 payable to the order of Coberly and Ag-Chem. Again, Ag-Chem endorsed this check and gave it to Coberly, and it was either cashed or deposited in Coberly's account. Coberly gave part of the second check back to Ag-Chem, and Ag-Chem permitted Coberly to keep the rest of the check to pay custom combiners.

On July 7, 1982, Worley Mills drew a third check on its account in the sum of $28,982.83 payable to the order of Coberly and Ag-Chem. It is not clear what happened to this third check, but we assume it was deposited in Ag-Chem's account.

The sum of the three checks totals the $94,709.78 that Ag-Chem informed Worley Mills was owed it by Coberly. However, by reason of its having permitted Coberly to keep part of the first two of said checks, Ag-Chem lacked $39,727.85 of having actually received the entire payment of $94,709.78.

All three checks drawn by Worley Mills to the order of Coberly and Ag-Chem were from the proceeds of sales of part of the wheat Coberly stored with Worley Mills and covered by the security agreements of Ag-Chem and First National. On and after July 7, 1982, Worley Mills drew other checks from the proceeds of sales of other parts of Coberly's wheat from the 1,500 acres, and the other checks were paid to other creditors of Coberly.

In the summer of 1983, other wheat harvested by Coberly from the 1,500 acres was

stored with Crozier. Crozier paid the proceeds from sales of this wheat to First National.

At no time was a termination statement filed terminating Ag-Chem's security interest nor was its security interest in any other way released of record. The issues between Ag-Chem and Worley Mills and between Ag-Chem and Crozier are not the same and we will treat them separately. The issue between Ag-Chem and Worley Mills is whether Ag-Chem owed Worley Mills any duty to apply the entire sums of the checks drawn by Worley Mills to Coberly's note of April 21, 1982.

1. SUMMARY JUDGMENT FOR WORLEY MILLS

As between Ag-Chem and Coberly, those parties were free to apply the money from the checks given by Worley Mills in whatever way was mutually agreeable to them. *Schreiber v. Armstrong,* 70 N.M. 419, 374 P.2d 297 (1962); *In re American Gypsum Co.,* 36 B.R. 360 (Bkrtcy.D.N.M. 1984). However, the general rule that the debtor and the creditor may mutually direct the application of a payment is subject to the exception that when the creditor knows or is chargeable with knowledge of the source of the funds constituting the payment, and the rights of a third party are involved, the creditor is obligated to apply the payment so as to protect the rights of the party supplying the funds from which the payment is made. *Security Trust & Savings Bank v. June,* 38 Ariz. 513, 1 P.2d 970 (1931); *Cooper v. Sparrow,* 222 Ark. 385, 259 S.W.2d 496 (1953); *Reger Roofing & Siding Co. v. R & H Roofing & Supply Co.,* 582 S.W.2d 716 (Mo.App.1979); *Bain-Nicodemus, Inc. v. Bethay,* 40 Tenn. App. 487, 292 S.W.2d 234 (1953); *Hastings v. American General Insurance Co.,* 547 S.W.2d 360 (Tex.Civ.App.1977); *Ivers & Pond Piano Co. v. Peckham,* 29 Wis.2d 364, 139 N.W.2d 57 (1966).

None of the cases above cited, however, is precisely on point. Worley Mills had no interest of any kind in the wheat stored with it by Coberly. Neither was there any agreement under which Worley Mills was a surety for the payment of Coberly's note to Ag-Chem. Nevertheless, this case falls within the exception. By selling the wheat covered by Ag-Chem's security agreement, Worley Mills became secondarily liable for the payment of Coberly's note secured thereby in the sense that, if the note were not paid, Worley Mills would become liable for conversion of the wheat. Upon paying the proceeds from the sale of the wheat to Ag-Chem, Worley Mills had every right to expect that Ag-Chem would apply the entire payment in a way which would exonerate Worley Mills from any liability for such a conversion, and leave it free to use the proceeds from other sales of the wheat to pay other creditors of Coberly. Having failed to so apply the payment, Ag-Chem may not now assert against Worley Mills the very claim against which Ag-Chem was obligated to protect it. The district court was correct in granting summary judgment for Worley Mills.

2. SUMMARY JUDGMENT FOR CROZIER

The issue between Ag-Chem and Crozier is whether the security interest of Ag-Chem, securing the balance of $39,727.85 remaining on the Coberly note after the partial application of the money received from Worley Mills, is prior to the security interest of First National. Most of the cases we have found bearing on this issue involve future advances. For this reason, we first decide whether Ag-Chem, by permitting Coberly to keep part of the money from the checks drawn by Worley Mills to pay some of its other creditors, made Coberly a future advance authorized by their security agreement, which would be secured by its security interest and which would be prior to the security interest of First National.

NMSA 1978, Section 55–9–204(3) (Cum. Supp.1986) provides: "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (Subsection (1) of Sec-

tion 9-105 [55-9-105(1) NMSA 1978]).” We conclude that Ag-Chem did not make a future advance to Coberly. The “other value” embraced by the statute does not apply because “other value” was not provided for by Ag-Chem and Coberly in their security agreement. Neither did Ag-Chem make Coberly a future advance of “other money” within the meaning of their security agreement, since Ag-Chem did not advance any money so as to create a new debt. Ag-Chem merely failed to apply payments to a debt Coberly already owed it.

Even if we were to assume that Ag-Chem did make Coberly a future advance, such a future advance would not be secured by Ag-Chem's security agreement and, thus, be prior to the security interest of First National. Under Section 55-9-204(3) of the Uniform Commercial Code, it is generally held that, “[w]ith respect to third persons, future advances do not come within the protection of the future advance clause of the security agreement unless the future advance is of the same general class of debt as the original debt and was within the contemplation of the parties when the security agreement was made....” 8 R. Anderson, *Uniform Commercial Code,* § 9-204:31 (3d ed. 1985) (footnote omitted). *See, e.g., Kimbell Foods, Inc. v. Republic National Bank,* 557 F.2d 491 (5th Cir. 1977); *Kitmitto v. First Pennsylvania Bank, N.A.,* 518 F.Supp. 297 (E.D.Pa.1981); *Security National Bank & Trust Co. v. Dentsply Professional Plan,* 617 P.2d 1340 (Okl.1980); *John Miller Supply Co. v. Western State Bank,* 55 Wis.2d 385, 199 N.W.2d 161 (1972).

Although the original debt for fertilizer and the later debts for labor, fuel and custom combiners all fall within the same general classification of operating expenses, there is nothing in the record from which it can be reasonably inferred, nor do any of the parties contend, that a future advance out of the proceeds of a sale of part of the collateral was within the contemplation of either Ag-Chem or Coberly when their security agreement was made. We conclude that Ag-Chem did not make Coberly a future advance which would be secured by its security interest and, thus, be prior in time to the security interest of First National.

Having decided that Ag-Chem's claimed priority cannot be upheld as a future advance, the issue remaining for decision is whether Ag-Chem owed First National any duty to apply the entire sums of money received from Worley Mills to Coberly's note of April 21, 1982.

Ag-Chem cites us to *Heller v. Gate City Building & Loan Association,* 75 N.M. 596, 408 P.2d 753 (1965), where the mortgagee under a first mortgage on real estate, with actual knowledge of a second mortgage on the same real estate, made a discretionary future advance pursuant to a clause in its mortgage providing that future advances were secured by the lien. It was held that the lien of the first mortgage was inferior to that of the second mortgage insofar as it secured the future advance, since the future advance was discretionary rather than obligatory. The rule in *Heller v. Gate City Building & Loan Association* was followed in *Farmers & Stockmens Bank of Clayton v. Morrow,* 81 N.M. 678, 472 P.2d 643 (1970), and was acknowledged in *House of Carpets, Inc. v. Mortgage Investment Co.,* 85 N.M. 560, 514 P.2d 611 (1973), but not followed since the future advances in that case were obligatory.

These cases are not applicable because, first, they involve real estate mortgages and, second, they involve future advances. Furthermore, the decision in *Heller v. Gate City Building & Loan Association* has been derogated by the enactment of NMSA 1978, Section 48-7-9 providing in substance that the lien of a mortgage on real estate securing future advances shall have priority from the time of recording as to all advances, whether obligatory or discretionary, made thereunder.

We have been unable to find a case from any jurisdiction decided under the Uniform Commercial Code which is similar to the case before us. The closest case we have been able to find at common law is *Goss v. Iverson,* 72 Idaho 240, 238 P.2d 1151 (1951).

There, plaintiff leased a farm to one Flores, and sometime later took a promissory note from Flores for money he had loaned him for operating expenses. The note was secured by a chattel mortgage on Flores' share of the crops. On the same day that plaintiff took the note and chattel mortgage, Flores gave defendant a chattel mortgage on his share of the same crops to secure a debt Flores owed defendant for groceries and other supplies. Defendant's chattel mortgage was expressly subordinated to the chattel mortgage given plaintiff. Plaintiff, with actual knowledge of defendant's chattel mortgage, subsequently advanced further sums to Flores for operating expenses. Neither plaintiff's chattel mortgage nor his lease with Flores provided for future advances. Thereafter, Flores abandoned the farm and plaintiff entered thereon and sold part of the crops. Flores' share of the proceeds was sufficient to pay plaintiff the amount Flores owed him under the note, but was not sufficient to fully pay him the amount due for the future advances. The proceeds from other sales of the crops were being held pending a decision in the case. It was held that as to the future advances, plaintiff's lien on the crops was inferior to defendant's lien.

We think the principle applied in *Goss v. Iverson* is applicable to the issue in this case in spite of the differences between the cases. In neither case, although for different reasons, is the issue of future advances relevant to the ultimate decision. The essential issue in both cases is whether the proceeds of a sale of part of the collateral should be applied to an unsecured debt to the prejudice of the holder of a subordinate security interest. A distinction between the cases is that, in *Goss v. Iverson,* plaintiff had actual knowledge of defendant's chattel mortgage when he made future advances. However, the Idaho court did not indicate in its opinion whether this fact was material to its decision.

Where a security agreement provides that it secures future advances, a party taking a subordinate security interest knows that his security interest will be subordinate to the prior security interest for any such advance. However, in this case, when First National took its subordinate security interest it had no reason to believe that any proceeds from a sale of part of the collateral would be applied to unsecured debts. For this reason, we think the constructive notice to Ag-Chem was sufficient to prevent it from prejudicing the rights of First National by permitting the proceeds from a sale of part of the collateral to be applied to unsecured debts.

We hold that a party having a prior security interest, who receives proceeds from a sale of part of the collateral with actual or constructive notice of subordinate security interests in the collateral, must apply all of such proceeds to the debt secured by his security interest so as to protect the remaining collateral for the benefit of parties having such subordinate security interests. Accordingly, Ag-Chem owed First National a duty to apply the money received from Worley Mills entirely to the Coberly note of April 21, 1982, and having failed to do so, Ag-Chem's security interest thereby became subordinate to the security interest of First National. To hold otherwise would enable unsecured creditors to share in proceeds from a sale of the collateral before parties having security interests are fully paid.

Ag-Chem maintains that it permitted Coberly to use part of the payment from Worley Mills to pay its operating expenses so that Coberly could stay in business and the chances would be increased of its eventually paying all of its creditors, including those having subordinate security interests in the wheat. This was not a decision Ag-Chem was entitled to make unilaterally without the agreement of other secured parties.

The security interest of Ag-Chem in the wheat stored with Crozier was subordinate to the security interest of First National. Thus, Crozier properly paid the proceeds from the sales to First National, and cannot be held liable to Ag-Chem for conversion. The district court's granting of summary judgment for Crozier was proper.

As to both Crozier and Worley Mills, Ag-Chem argues that Coberly's and Ag-Chem's endorsements on the checks cannot be construed as full payment to Ag-Chem except by their mutual agreement. This argument is answered by what has already been said. Ag-Chem had a duty to apply the payments so as to protect Crozier and Worley Mills, and Coberly had no right to interfere in such an application. Indeed, there is nothing in the record to indicate that Coberly ever attempted to interfere with the application of payments to its note with Ag-Chem. Had Coberly attempted to make its retaining part of the payments from the checks a condition of its endorsements, Ag-Chem could have asked Worley Mills to issue new checks payable to Ag-Chem only and, had Worley Mills refused, Ag-Chem could have filed an action to have the rights and duties of the parties judicially determined.

The summary judgment granted by the district court for Crozier and Worley Mills is affirmed. Ag-Chem is to pay the cost of appeal.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

733 P.2d 360

In the Matter of Vince D'ANGELO, Attorney at Law.

No. 15906.

Supreme Court of New Mexico.

July 28, 1986.

Rehearing Denied Sept. 15, 1986.

Certiorari Denied Jan. 27, 1987.
See 104 S.Ct. 952.

Harris L. Hartz, Albuquerque, for Board.

William S. Dixon, Albuquerque, for respondent.

OPINION

PER CURIAM.

This matter having come before this Court on March 10, 1986, after completion of disciplinary proceedings conducted pursuant to NMSA 1978, Rules Governing Discipline (Repl.Pamp.1985), wherein attorney Vince D'Angelo (D'Angelo) was found to have engaged in acts of misconduct in violation of NMSA 1978, Code of Prof. Resp. Rules 1–102(A)(1), 5–101(A), 5–104(A), 7–101(A)(3) (Repl.Pamp.1985), the Court adopts the findings and recommendations of the Disciplinary Board. Those findings are summarized as follows:

1. D'Angelo undertook representation of Margaret O'Rourke (O'Rourke) in June of 1979 concerning a workmen's compensation claim and other matters. Throughout 1979, O'Rourke consulted with D'Angelo and his associate, Don Vigil, on a variety of legal matters. O'Rourke sought a lump sum payment of workmen's compensation benefits, and Mr. Vigil filed suit on her behalf in this matter in October, 1979. O'Rourke also sought assistance in obtaining social security benefits, in getting out of a contract to purchase a water softener, in possibly pursuing a wrongful death action, and in preparing a will for her and a trust for her children. At all times material to the instant action, an attorney-client relationship existed between O'Rourke and D'Angelo's law firm.

2. D'Angelo was the owner and president of a New Mexico corporation known as Nacon, Inc., (Nacon) which was organized in 1979 for the purpose of constructing office buildings, multi-family dwellings and acting as a general contractor. In May or June of 1980, D'Angelo introduced O'Rourke to one of Nacon's employees, Wayne Pirtle (Pirtle), for the purpose of

discussing a possible investment by O'Rourke in a fourplex to be constructed by Nacon. D'Angelo failed to disclose to O'Rourke that he was the owner and president of Nacon. D'Angelo further failed to disclose the background of Pirtle and the fact that Pirtle had just been released from prison on a felony conviction.[1] D'Angelo failed to advise O'Rourke of the risks of the investment of her funds in Nacon and that Nacon had no substantial assets. He also failed to prepare mortgages or other security instruments to protect the interests of O'Rourke in the investment of her funds in Nacon. D'Angelo failed to advise O'Rourke that her interests could conflict with his interests and that she was free to seek other legal counsel to advise her in the Nacon transaction.

3. O'Rourke ultimately relinquished $90,000 to Nacon at the inception of the contract. O'Rourke, who thought D'Angelo to be her attorney and protecting her interests in her dealings with Nacon, asked D'Angelo if the contract was satisfactory. D'Angelo informed her that it was a standard contract and everything was in order. At the closing, O'Rourke was required to supply a certificate of deposit to be used as collateral for her $90,000 bank note. Again, believing that D'Angelo was acting as her attorney, O'Rourke inquired of him if this was customary procedure. D'Angelo informed her that she needn't worry, everything was proper.

4. For various reasons, O'Rourke's fourplex was never completed and she lost her $90,000 investment.[2]

5. D'Angelo's actions in entering into a business transaction with a client without full disclosure were in violation of Rules 1–102(A)(1), 5–101(A), 5–104(A), 7–101(A)(3) of the Code. The Disciplinary Board recommended that Vince D'Angelo be suspended for a period of one year.

In attacking the Board's recommendation, D'Angelo argues that the hearing committee's findings of fact are unsupported by clear and convincing evidence, that there was no attorney-client relationship existing between D'Angelo and O'Rourke at the time of the transaction between O'Rourke and Nacon (D'Angelo's corporation), and that D'Angelo's conduct was ethical throughout. We disagree.

D'Angelo argues that the standard of proof in disciplinary proceedings is clear and convincing evidence. The Board apparently believed that the standard of proof required was that of clear and convincing evidence. The Board's counsel argued to the Court that the evidence in the record met the standard of clear and convincing evidence and recommended D'Angelo's suspension. Clear and convincing evidence must "instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *In re Sedillo,* 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972).

We have reviewed the record and agree that the evidence in this case meets the test required for clear and convincing evidence. However, we believe the Board applied the incorrect standard.

■ From 1916 to 1983, the standard of proof that was utilized was clear and convincing evidence. *See In re Marron,* 22 N.M. 252, 160 P. 391 (1916). This standard of proof was previously adopted by court rule and appears at Supreme Court Rule 3, NMSA 1953, Section 21–2–1(3), Paragraph 1.10 (Supp.1961). This rule stated in pertinent part:

> To warrant a finding of misconduct in contested cases, the facts must be established by clear and convincing evidence.

The rule and statutory section were renumbered (*see* NMSA 1953, Repl. Vol. 4 (1970) Section 18–4–8(c) (Supp.1975)), but the standard remained the same. Then, on April 15, 1983, Rule 8 was withdrawn when the attorney disciplinary system in New Mexico was revised, leaving no express state-

1. Pirtle's conviction was subsequently set aside.

2. In a subsequent civil action against D'Angelo, O'Rourke has recovered her full $90,000 investment.

ment by court rule as to the standard of proof in disciplinary proceedings. Thus, the requirement for a standard of proof in disciplinary proceedings of clear and convincing evidence is supported by case law decided under a now repealed rule. This former standard conflicts with the reasoning of this Court in the recent case of *Foster v. Board of Dentistry,* 103 N.M. 776, 714 P.2d 580 (1986). In *Foster* this Court stated in pertinent part that:

> [I]t is only where allegations such as fraud are involved or where the clear and convincing burden has been established by statute that such a higher burden is allowed in civil cases.

Id. at 778, 714 P.2d at 582. Thus, absent an allegation of fraud or a statute or court rule requiring the higher standard, the standard of proof in administrative hearings is a preponderance of the evidence. Since *Foster* did not involve any allegations of fraud or a statute specifying that the standard should be clear and convincing in cases under the Uniform Licensing Act, this Court determined that the standard in such cases was a preponderance of the evidence.

It is true that many disciplinary cases involve allegations of fraudulent conduct and thereby, under *Foster,* a clear and convincing standard of proof is appropriate. However, other disciplinary cases (such as the instant case), do not involve fraud and therefore, under *Foster,* the usual standard of proof is to be applied. In disciplinary proceedings where fraud has not been alleged, the standard of proof is a preponderance of the evidence. In this case, we reiterate that the record on appeal meets the clear and convincing evidence standard, which *includes* the lesser standard of a preponderance of the evidence, to support the Board's recommendation of suspension.

The evidence at the hearing supports the finding that an attorney-client relationship existed between D'Angelo and O'Rourke. D'Angelo never clearly stated to O'Rourke that he was not acting as her attorney, O'Rourke reasonably believed that D'Angelo was acting as her attorney and protecting her interests in the Nacon transaction, and more importantly, D'Angelo's own intention was to act for O'Rourke in the Nacon transaction. D'Angelo stated at the hearing that "she [O'Rourke] didn't need a lawyer. I was going to look out for her, at least that was my feeling and my attitude at all points."

The evidence is that D'Angelo never made a full disclosure to O'Rourke regarding his involvement in Nacon. The testimony at the hearing was that O'Rourke may have known that D'Angelo owned Nacon because Nacon had its office adjacent to the D'Angelo law firm offices and, various parties, including D'Angelo, told O'Rourke that D'Angelo had bought a construction company. Again, this evidence meets both standards. However, even if O'Rourke knew that D'Angelo owned and was president of Nacon, this is not enough to meet the requirements of Rules 5–101(A) and 5–104(A). Rule 5–104(A) "prohibits an attorney from entering into a business transaction with a client where the attorney and the client have differing interests and where the client would expect the attorney to exercise his professional judgment for the client's protection *unless the inherent problems are disclosed to the client and his informed consent obtained.*" *In re Chowning,* 100 N.M. 375, 376, 671 P.2d 36, 37 (1983) (emphasis added). An attorney has an affirmative duty to fully inform a client, not only of the attorney's interest in the transaction, but also how such interest might affect the attorney's personal judgment and that the client is free to seek outside legal advice regarding the transaction. This was not done in the instant case.

Thus, based upon the evidence that an attorney-client relationship existed during the time of the transaction herein involved, and the fact that D'Angelo did not give full disclosure to O'Rourke in his business dealings with her, we determine that D'Angelo's conduct does not meet the ethical standards required of a member of the New Mexico Bar and IT IS THEREFORE ORDERED that:

Vince D'Angelo be suspended from the practice of law in the State of New Mexico for a period of twelve (12) months effective August 15, 1986 and, prior to being readmitted, D'Angelo be required to take the Multistate Professional Responsibility examination and receive a passing grade of at least seventy-five percent (75%); and that costs of this action in the amount of $2,661.93 be paid by D'Angelo to the Disciplinary Board no later than September 15, 1986.

IT IS SO ORDERED.

SOSA, Senior Justice, dissenting.

With the majority opinion in this matter, I disagree for two reasons:

First, I have difficulty in concluding that the evidence is clear and convincing on the existence of an attorney-client relationship at all material times.

Second, and more importantly, I must take issue with the movement of the majority away from clear and convincing evidence as the standard of proof in a disciplinary proceeding such as this, where a person's reputation and very livelihood are at risk. I believe that the property interest in a professional license is entitled to the due process protections of the Constitutions of the United States and New Mexico. I am troubled, therefore, by the decision of this Court to jettison a body of case law dating back to 1916, simply because a rule of this Court has been withdrawn. The majority incorrectly implies that case law has followed the rule. In fact the opposite is true. Supreme Court Rule 3, paragraph 1.10 was only adopted by this Court on August 22, 1960, some 44 years after our precedent had been established. Compiler's notes, NMSA 1953 Comp.

I did not participate in *Foster v. Board of Dentistry,* 103 N.M. 776, 714 P.2d 580 (1986), on which the majority relies for lowering the standard of proof in licensing proceedings from clear and convincing evidence to a preponderance of the evidence. The majority recognizes that *Foster* conflicts with the traditional standard which all parties had assumed was applicable in the case at bar. In this context, the *Foster* decision is erroneous as to both precedent and policy. In my judgment, *Foster* does not expressly overrule our case law dating back to 1916. Moreover, the portion of *Foster* which lowers the standard of proof is not part of the holding of the case, but is merely dicta, in the nature of an advisory opinion, which is not the proper method to introduce such a drastic revision of our legal doctrine.

The present case does expressly overturn our precedents, even though it could have been decided and the same result reached without such disruption. I cannot concur with the lowering of the burden on those who seek to cancel a professional license. Obviously, the public needs to be protected against misdeeds of lawyers. Such misdeeds, however, should be proven by a clear and convincing standard. A lawyer also has some rights, particularly when his license to practice his chosen profession is in jeopardy. Therefore, I must object to the imposition of a standard of proof which endangers those rights.

For the foregoing reasons, I respectfully dissent.

[redacted]

733 P.2d 365

STATE of New Mexico,
Plaintiff-Appellee,

v.

Estela L. MADRIL,
Defendant-Appellant.

No. 9501.

Court of Appeals of New Mexico.

Jan. 15, 1987.

Hal Stratton, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellant Defender, Santa Fe, for defendant-appellant.

OPINION

FRUMAN, Judge.

Following the burglary of a neighbor's residence, defendant was charged with intentionally receiving stolen property over one hundred dollars, contrary to NMSA 1978, Section 30-16-11 (Repl.Pamp.1984).

At some time during the pendency of this charge, the property that had been in defendant's possession was returned to the victim. Other property taken in the burglary and valued at approximately $4,892 was not recovered. Defendant was not charged with burglary and did not admit to any of the elements of burglary or conspiracy to commit burglary. Defendant entered a plea of nolo contendere to the charge of receiving and concealing stolen property and, as a condition of her probation, was required to "make restitution to the victim in the amount of $4892." Defendant raises two issues on appeal: (1) whether this restitution requirement is authorized by law; and (2) whether the restitution provision is constitutional. Because we resolve this appeal under the statutory grounds of the first issue, we need not reach the constitutional question in the second issue. We affirm in part and reverse in part.

Defendant claims that the requirement of victim restitution under NMSA 1978, Section 31–17–1 (Repl.Pamp.1981), is not authorized here because the damages of $4,892 were not caused or admitted to have been caused by defendant and were based on an uncharged offense. The state contends that restitution was correctly assessed against defendant under the public policy of Section 31–17–1 and under the conditions of probation found in NMSA 1978, Section 31–20–6(A), (F) (Cum.Supp. 1986).

Section 31–17–1(A) provides, in part, that "[i]t is the policy of this state that restitution be made by each violator of the Criminal Code of New Mexico to the victims of his criminal activities...."

This court has stated that the public policy behind Section 31–17–1 is to: "1) make whole the victim of the crime to the extent possible; and 2) to remind the defendant of his wrongdoing and to require him to repay the costs society has incurred as a result of his misconduct." *State v. Taylor,* 104 N.M. 88, 96, 717 P.2d 64, 72 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986). *See State v. Lack,* 98 N.M. 500, 650 P.2d 22 (Ct.App.), *cert. denied,* 98 N.M. 478, 649 P.2d 1391 (1982). If a sentence is deferred or suspended, Section 31–17–1(B) mandates that the court require a defendant, as a condition of probation, to make restitution to the victim for actual damages caused by the crime for which the defendant was convicted. *State v. Taylor; State v. Lack.*

Section 31–17–1(A) defines what "victim," "actual damages," "criminal activities" and "restitution" mean in this context. A "victim" is "any person who has suffered actual damages *as a result of the defendant's criminal activities*[.]" § 31–17–1(A)(1). (Emphasis added.) "Actual damages" are "all damages which a victim could recover against the defendant in a civil action *arising out of the same facts or event.*" § 31–17–1(A)(2). (Emphasis added.) "Criminal activities" include any crime for which there is a guilty plea or guilty verdict and "*any other crime ... which is admitted or not contested.*" § 31–17–1(A)(3). (Emphasis added.) "Restitution" is the "payment of actual damages to a victim." § 31–17–1(A)(4).

We interpret these statutory provisions as requiring a direct, causal relationship between the criminal activities of a defendant and the damages which the victim suffers. *See State v. Eastman,* 51 Or.App. 723, 626 P.2d 956, *aff'd,* 292 Or. 184, 637 P.2d 609 (1981). Restitution must be limited by and directly related to those criminal activities. *State v. Insabella,* 190 N.J.Super. 544, 464 A.2d 1165 (1983). Other jurisdictions agree with this analysis.[1]

In determining whether a direct or causal relationship exists between a defendant's criminal activities and the dam-

1. Some of the recent decisions include: *United States v. Burger,* 739 F.2d 805 (2d Cir.1984); *United States v. Tyler,* 767 F.2d 1350 (9th Cir. 1985); *Barnes v. State,* 489 So.2d 1182 (Fla.App. 1986); *People v. Daniels,* 113 Ill.App.3d 523, 69 Ill.Dec. 291, 447 N.E.2d 508 (1983); *State v. Olson,* 381 N.W.2d 899 (Minn.App.1986); *State v. Froneberger,* 81 N.C.App. 398, 344 S.E.2d 344 (1986); *State v. Dillon,* 292 Or. 172, 637 P.2d 602 (1981); *Commonwealth v. Cooper,* 319 Pa.Super. 351, 466 A.2d 195 (1983); *State v. Knapp,* 147 Vt. 56, 509 A.2d 1010 (1986).

age suffered by a victim of those activities, an adequate evidentiary basis must be presented. *See State v. Lack.* Mere speculation or supposition as to that relationship will not suffice. *Cumhuriyet v. People,* 200 Colo. 466, 615 P.2d 724 (1980) (en banc). Awarding restitution to the victim is improper where a defendant does not admit liability for the crime, was not convicted of the crime, or does not plead guilty to the crime. *State v. Elkins,* 489 So.2d 232 (La.1986); *State v. Froneberger; State v. Cox,* 35 Or.App. 169, 581 P.2d 104 (1978).

In the present case, there is no evidence in the record showing either a direct or a causal relationship between defendant's criminal activity of receiving stolen property, which was returned to the victim, and the victim's damage of $4,892, constituting the value of other property taken in the burglary. Defendant denied any involvement in the burglary and was never charged with burglary. There is no evidence in the record to indicate that defendant participated in the burglary of her neighbor's residence or that she had knowledge that would lead to the discovery of the unrecovered stolen items, valued at $4,892. Defendant's participation in the burglary was premised on nothing more than speculation by the state. We find such speculation insufficient to establish the requisite relationship between defendant's criminal activities and the victim's damages pursuant to Section 31–17–1.

Defendant also asserts that we should look to principles of civil law for guidance in interpreting the "actual damages" definition in Section 31–17–1(A)(2). The state argues that this definition does not require defendant's liability for restitution to be established by a full evidentiary hearing equivalent to a civil trial nor by a preponderance of the evidence. Because we have found that the relationship required for assessing victim restitution under Section 31–17–1 is not present here, we need not consider this assertion.

The state also contends that restitution was correctly assessed under Section 31–20–6(A), (F). When a sentence is deferred or suspended, Section 31–20–6 requires the imposition of reasonable conditions as are deemed necessary to the court to ensure a defendant's compliance with law. Section 31–20–6(F) permits requiring a defendant "to satisfy any other conditions reasonably related to his rehabilitation." With respect to restitution, however, Section 31–20–6(A) permits requiring a defendant "to make restitution pursuant to the provisions of Section 31–17–1."

In two prior instances, this court has considered whether restitution orders were appropriately authorized by Section 31–17–1. *State v. Hernandez,* 104 N.M. 97, 717 P.2d 73 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986); *State v. Taylor.* However, our analysis in these cases did not address the direct relationship requirement in Section 31–17–1 and relied instead on the provision and purposes of Section 31–20–6(F). Since the facts in this case differ from those in *State v. Hernandez* and *State v. Taylor,* we do not overrule them. They were concerned with the restitution of money received by the defendants during the course of the specific criminal activities for which they were convicted. In the present case, a direct relationship between the victim's damages and defendant's criminal activities is absent. Moreover, defendant's rehabilitation could not be furthered by making restitution for a crime for which she was not convicted.

CONCLUSION

The condition of probation requiring defendant to make restitution in the amount of $4,892 is not authorized by law and is therefore void and set aside. The remainder of the judgment, sentence and jail commitment is affirmed. An amended judgment, sentence and jail commitment is to be entered consistent with this opinion.

IT IS SO ORDERED.

BIVINS and MINZNER, JJ., concur.

733 P.2d 368

Jason BISHOP, Plaintiff-Appellant,

Denise Johnston, and Robert L. Bishop, Jr., Plaintiffs,

v.

LLOYD McKEE MOTORS, INC., Defendant-Appellee.

No. 8508.

Court of Appeals of New Mexico.

Jan. 27, 1987.

Gregory D. Griego, Roehl & Henkel, P.C., Albuquerque, for plaintiff-appellant.

Lydia A. Mangold, Dubois, Caffrey & Cooksey, P.A., Albuquerque, for defendant-appellee.

OPINION

DONNELLY, Chief Judge.

Plaintiff, Jason Bishop, appeals from an order dismissing his action against defendant Lloyd McKee Motors, Inc., arising out of the purchase of an automobile. On appeal, plaintiff asserts: (1) claim of error in dismissing plaintiff's cause of action; and (2) the trial court erred in denying his requested stay of proceedings under the Soldiers' and Sailors' Civil Relief Act. We reverse and remand.

Plaintiff, together with his wife and father, then residents of Bernalillo County, New Mexico, brought suit in district court seeking to recover damages for alleged breach of warranty, tortious misconduct, and violation of statute involving an automobile purchase. Plaintiff and his wife were purchasers of the vehicle and his father was a co-signer for the financing. The order of dismissal pertained only to plaintiffs Jason Bishop and Denise Johnston. Plaintiff's wife has not appealed the order.

Defendant sought to depose plaintiff and his wife and sent a notice that it would take their depositions on October 12, 1984. Plaintiffs filed a motion for a protective order alleging plaintiffs' counsel would be outside the United States and that plaintiffs would make themselves available for the taking of the depositions at a later date. Thereafter, defendant agreed to reschedule plaintiffs' deposition for November 16, 1984. Following receipt of this notice, plaintiff and his wife filed a second motion for protective order on November 9, 1984, alleging that they were now residing in Florida, that they were no longer residents of New Mexico, and that they anticipated returning to New Mexico "some time within the next 180 days." The plaintiff Robert L. Bishop, Jr., has remained in New Mexico at all pertinent times.

After a hearing on the motion for protective order, the trial court ordered that the

depositions set for November 16, 1984, be vacated and that plaintiff and his wife make themselves available for the taking of their depositions by defendant in Albuquerque "within six (6) weeks of the date of the hearing."

Defendant again sent notice of taking plaintiffs' deposition scheduled for December 28, 1984, the last day of the six-week period set by the court. Plaintiffs failed to appear at the time and place fixed for the deposition. Following plaintiffs' nonappearance, defendant filed a motion to dismiss plaintiffs' complaint.

On December 26, 1984, two days before the deadline set by the court order for plaintiff and his wife to appear for deposition, plaintiff, through his attorney, filed a motion to stay proceedings under the Soldiers' and Sailors' Civil Relief Act, reciting that the plaintiff Jason Bishop was a member of the United States Armed Forces.

A hearing was held on January 28, 1985, on plaintiffs' motion to stay proceedings and on defendant's motion to dismiss. The trial court denied plaintiffs' motion to stay the proceedings and granted defendant's motion to dismiss plaintiffs' complaint with prejudice based upon their failure to comply with the discovery order of the court.

Thereafter, on February 4, 1985, plaintiffs moved for reconsideration of the trial court's order of dismissal and attached an affidavit signed by Jason Bishop, pursuant to the Soldiers' and Sailors' Civil Relief Act, reciting that he was in the Navy and stationed in Florida, that his training and orders would not permit him to leave his post, and that "leave [was] unavailable until completion of training" in May 1985. Plaintiffs' counsel stated that the attached affidavit was not received until the day following the court hearing on the motion for stay and defendant's motion to dismiss. Plaintiffs' motion for reconsideration was denied.

NONCOMPLIANCE WITH DISCOVERY ORDER

Plaintiff contends that the trial court erred in dismissing his claim against defendant absent a finding that his noncompliance with the discovery deadline was willful. The trial court's order of dismissal contained two findings:

> 1. Plaintiffs * * * were ordered to make themselves available for deposition within the City of Albuquerque * * * within six (6) weeks from the date of the Court's order entered on November 15, 1984.
>
> 2. Plaintiffs, Jason Bishop and Denise Johnston, failed to comply with this Court's order[.]

NMSA 1978, Civ.P. Rule 37(B)(2)(c) (Repl. Pamp.1980), authorizes a court, where it finds that a party has failed to comply with an order directing discovery, to impose appropriate sanctions including, "dismissing the action or proceeding or any part thereof * * *." In *Sandoval v. United Nuclear Corp.*, 105 N.M. 105, 729 P.2d 503 (Ct.App. 1986), this court held that a specific finding of willful noncompliance is a prerequisite to the application of the dismissal sanction under Civ.P. Rule 37(D), and that absent a finding of willful noncompliance, bad faith, or fault in failing to comply with discovery, dismissing a party's rights is not proper. The same rule is applicable in the present case. *See also* Annots., 4 A.L.R.2d 348, 370 (1949); 56 A.L.R.3d 1109 (1974).

Under Civ.P. Rule 37(B)(2), a prerequisite to applying extreme discovery sanctions (such as entry of default or dismissal of a case), without a hearing on the merits, is a finding by the trial court that plaintiff's failure to comply involves a conscious or intentional failure, as distinguished from an accidental or involuntary noncompliance. *See Sandoval v. United Nuclear Corp.; see also United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980).

As noted in 8 C. Wright and A. Miller, *Federal Practice and Procedure*, Section 2284 at 766 (1970):

> Any failure to disclose, regardless of the reason for it, brings the sanctions of Rule 37 into play, but the reason for the failure is an important consideration in determining what sanction to impose. If

the failure is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the action may not be dismissed * * *.

Here, there was no finding of willful noncompliance. Accordingly, the order dismissing plaintiff Jason Bishop's complaint must be reversed.

DENIAL OF STAY

The granting of an application by a court for a stay of proceedings against an individual in the military service is not a matter of absolute right but resides in the sound discretion of the trial judge. *Norris v. Superior Court of Mohave County,* 14 Ariz.App. 183, 481 P.2d 553 (1971); *see also Jaramillo v. Sandoval,* 78 N.M. 332, 431 P.2d 65 (1967). "[T]he movant, in order to invoke the protection of the Act, must make a showing of his actual unavailability and that his rights would be adversely affected because of his absence from the trial." *Norris,* 14 Ariz.App. at 185, 481 P.2d at 555. The trial court's ruling granting or denying a stay under the Soldiers' and Sailors' Civil Relief Act will not be set aside on appeal in the absence of a showing of an abuse of the trial court's discretion. *Trujillo v. Wilson,* 117 Colo. 430, 189 P.2d 147 (1948) (en banc); *see also Jaramillo v. Sandoval; Stalcup v. Ruzic,* 51 N.M. 377, 185 P.2d 298 (1947).

In view of our ruling that the cause must be remanded, and because the trial judge who originally entered the order of dismissal is no longer a judge, on remand, the court should consider the reasons for plaintiff's noncompliance with the discovery order, including a determination as to whether plaintiff was prevented by reason of his military service from complying with the order of discovery. Because plaintiff's motion for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act and the issues concerning noncompliance with discovery appear to be interrelated, we therefore remand this cause for rehearing on plaintiff's motion for stay and defendant's motion to dismiss for adoption of findings, and for entry of such further order as is consistent with the evidence and the opinion herein. The order of dismissal as it applies to the nonappealing plaintiff, Denise Johnston, is affirmed. *See Watkins v. Local School Board of Los Alamos Schools,* 88 N.M. 276, 540 P.2d 206 (1975).

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

733 P.2d 370

Robert GRAHAM and Andrew Davis, Plaintiffs-Appellees,

v.

Robert COCHERELL, Jr., Individually and as Director of Zip Lube, Inc.; John R. Cocherell, Individually and as Officer of Zip Lube, Inc.; Charles Poyer, Individually and as Director of Zip Lube, Inc.; and Zip Lube, Inc., a New Mexico corporation, Defendants-Appellants.

No. 8325.

Court of Appeals of New Mexico.

Jan. 27, 1987.

Michael A. Gross, Johnson and Lanphere, P.C., Albuquerque, for plaintiffs-appellees.

Ronald Segel, Sutin, Thayer & Browne, P.C., Albuquerque, for defendant-appellant Zip Lube, Inc.

Ross B. Perkal, Albuquerque, for defendants-appellants Cocherell and Poyer.

OPINION

MINZNER, Judge.

This case has been submitted for decision by this court following its submission to an advisory committee pursuant to an experimental plan. *See Patterson v. Environmental Improvement Division,* 105 N.M. 320, 731 P.2d 1364 (1986); *Boucher v. Foxworth-Galbraith Lumber Co.,* 105 N.M. 442, 733 P.2d 1325 (Ct.App. 1986); *Stoll v. Dow,* 105 N.M. 316, 731 P.2d 1360 (1986). The committee rendered a unanimous decision, proposing affirmance in part and dismissal in part, and the parties were so notified. Appellants opposed the proposed disposition while appellees supported it. This court began considering the record and briefs in this case, together with the opinion of the advisory committee. Before determining whether to set the case for oral argument or to adopt any or all of the opinion of the advisory committee, this court was met with a question concerning its jurisdiction. It is an appellate court's first duty to determine whether it has jurisdiction. *See Rice v. Gonzales,* 79 N.M. 377, 444 P.2d 288 (1968).

This case involves a struggle for voting power among the stockholders of a closely-held corporation. The district court granted partial summary judgment, holding that the corporate president had no authority to issue a key block of disputed voting stock to his son. Although the trial court's order included the appropriate language to render a partial summary judgment final and appealable, *see* NMSA 1978, SCRA 1986, 1–054(C)(1), the partial summary judgment was not a final judgment as to any one claim for relief. Accordingly, we must dismiss this appeal as premature.

In order to appreciate why the partial summary judgment was not final, a recitation of the facts and procedural history is in order. The corporation was incorporated in 1976. Plaintiff Davis and defendants Robert Cocherell, Jr. and Poyer were the original directors. The directors voted to accept offers from themselves and also from Robert's son, defendant John R. Cocherell, to subscribe for common stock in the corporation.

The elder Cocherell, Poyer, and Davis paid for their stock soon thereafter, but John Cocherell did not. Thus, in the spring of 1976, each of the three directors owned one-third of the corporation's outstanding stock. Then, a new investor, plaintiff Graham, joined the group. According to the count in the complaint alleging fraud, Graham was told that he would be a one-fourth owner. A memorandum was signed by the three prior directors reciting that Graham was an equal shareholder and, by unanimous consent of the board, Graham was made a director.

By July of 1977, John Cocherell still had not paid for his stock. The directors voted

unanimously to rescind the 1976 authorization and offer the younger Cocherell an option to buy shares of non-voting stock. The minutes of this meeting reflect that the basis of the motion was to preserve plaintiff Graham's one-fourth ownership interest. John accepted the offer and bought the non-voting stock.

In 1983, John wanted to exercise his rescinded subscription rights. Corporate counsel, the Sutin firm, was asked to research the matter. Counsel opined that John was entitled to exercise his subscription rights. Defendant Poyer made a motion, seconded by defendant Robert Cocherell, to authorize the president to issue the stock. The motion failed on a tie vote, with plaintiffs opposing it. Notwithstanding the failure of the motion and the prior rescission, the corporate president, Robert Cocherell, issued his son the stock, and this suit followed.

The complaint was in four counts. Count I was a derivative action, alleging that the issuance of the stock was contrary to the directives of the board of directors and in violation of preemptive rights; it sought cancellation of the shares. Count II sought damages for conspiracy to control the corporation without authority. Count III sought a declaratory judgment that the issuance of the shares was void and without effect. Count IV sought damages on behalf of plaintiff Graham for fraud.

The Sutin firm initially appeared on behalf of all defendants, including the corporation. The individual defendants then retained separate counsel.

The record on appeal reflects that defendants filed a motion to dismiss Counts I, II, and III, based on NMSA 1978, Section 53–11–17 (Repl.Pamp.1983). It was and is their contention that defendant John Cocherell's subscription was still valid because there had been no call for payment. The record reflects that this motion was denied. Defendants answered, alleging that John's shares were properly issued because of the absence of a call, and that the board's rescission of the subscription was ineffective.

Following the denial of the motion, plaintiffs filed a motion for partial summary judgment, based on the undisputed facts of the board's rescission of the subscription and its failure to approve the motion to issue John his shares. The ground for the motion was that defendant Robert Cocherell issued shares to his son without the authority of the board of directors. The motion requested partial summary judgment "with respect to the lack of authority of Robert Cocherell" and sought a cancellation of the shares. The order on this motion states that Robert Cocherell did not have the authority of the board to issue the shares, that there is no issue of material fact as to this lack of authority, and that there is no just reason for delay in the entry of a final partial summary judgment. It was therefore ordered that John's shares would be placed in escrow until further order of the court, that monies attributable to the shares would also be placed in escrow until further order of the court, and that John would not have voting or other rights on this stock until final disposition of the case or until further order of the court. It is from this order that defendants appeal.

Both counsel for the individual defendants and the Sutin firm on behalf of the corporation joined in one notice of appeal. The Sutin firm did the preliminary work of ordering the record. A joint brief-in-chief was filed. It argues the point that the shares were properly issued because of the lack of a call and it argues that the court erred in enjoining the corporation from paying dividends to John because the order does not purport to cancel his shares.

Plaintiffs filed a motion to disqualify the Sutin firm from representing the corporation because of its conflict of interest. We remanded the case to the trial court for hearing on the motion. The trial court entered findings of fact and conclusions of law, ordering that the Sutin firm be disqualified in the trial court and deferring decision on the matter of appellate repre-

sentation to this court. Plaintiffs have not called the matter to our attention again and the Sutin firm has continued to represent the corporation in this case. Because of our disposition, we find it unnecessary to determine whether the Sutin firm can continue to represent the corporation on appeal.

Plaintiffs' answer brief took the position that the matter of subscription rights was not ruled on in the trial court and should not be ruled on in this appeal. Plaintiffs' position was that the trial court was correct in ruling that Robert Cocherell lacked the authority of the board to issue his son the shares. Plaintiffs' position concerning what was ruled on in the trial court is supported by a motion for reconsideration of the partial summary judgment filed by defendants in the trial court, alleging that defendants should have the opportunity to argue that the rescission of the subscription was void because it was contrary to law.

Defendants' reply brief and response memorandum to the advisory committee's opinion claim that the matter of continued validity of the original subscription and the consequent validity of the directors' rescission of it was inextricably intertwined with the issue of Robert Cocherell's authority. Defendants want a decision by this court reversing the summary judgment and dismissing Counts I, II, and III of the complaint.

The matter of what was or was not ruled on in the trial court is further complicated in this case by the fact that defendants-appellants did not request the transcript of the proceedings on the summary judgment motion. Defendants' appeal is solely on the record proper.

Thus, we have before us a situation in which the parties are vehemently at odds, not only as to the proper resolution of the issues between them, but also as to what those issues are. As an appellate court, we are a court of review and are limited to a review of the questions that have been presented to and ruled on by the trial court. *See Miller v. Smith,* 59 N.M. 235, 282 P.2d 715 (1955). Moreover, our review is limited to the record presented on appeal. *See Reliance Insurance Co. v. Marchiondo,* 91 N.M. 276, 573 P.2d 210 (1977).

Given the status of the record in this case, all we know is that plaintiffs moved for partial summary judgment on the issue of authority, that plaintiffs' motion was granted on this issue, and that, instead of cancelling the shares as plaintiffs' complaint and motion requested, the court ordered them placed in escrow pending final resolution of the matter. The advisory committee's proposed opinion in this matter states: "This limited appeal involves one issue within the * * * [complaint]." Defendants do not take issue with this statement except to say that the one issue is inextricably linked with the issue they want decided.

Because of the difficulty in determining what was or was not decided below, and because we are immediately struck with the absence of any definitive relief granted in the partial summary judgment, it appears to us that it would be inadvisable to decide any of the issues so forcefully urged on us by the parties. *See National Corn Growers Association v. Bergland,* 611 F.2d 730 (8th Cir.1980). *See also Acha v. Beame,* 570 F.2d 57 (2d Cir.1978). SCRA 1–054(C)(1) provides that, "* * * when more than one claim for relief is presented in an action, * * * the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay." However, "the Rule does not authorize the district court by certificate to make final a partial adjudication of a single claim * * *." 6 J.W. Moore, W.J. Taggart, J.C. Wicker, *Moore's Federal Practice,* ¶ 54.28[3.–1] (1986). Thus, "[t]he Rule cannot be used to sanction the appeal of a *partial* adjudication of a single claim or claims * * *." *Id.* at ¶ 54.27[2.–3].

Yet that is precisely what we have here. The trial court ruled on an issue common to plaintiffs' first three claims. It

did not finally dispose of those claims. Because of this and because of the difficulties inherent in otherwise deciding this case, we are constrained to hold that we have no jurisdiction. When an appeal is taken from a judgment which is not final, it must be dismissed. *Thornton v. Gamble,* 101 N.M. 764, 688 P.2d 1268 (Ct.App.1984).

Accordingly, the appeal is dismissed.

IT IS SO ORDERED.

This court acknowledges the aid of attorneys Charles D. Noland, David S. Cohen, and William McEuen in the preparation of this opinion. These attorneys constituted an advisory committee selected by the chief judge of this court, and this court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of work submitted.

ALARID and GARCIA, JJ., concur.

733 P.2d 854

INSURANCE COMPANY OF NORTH AMERICA and the Bankruptcy Estate of Ben Paul Jones, Plaintiff-Appellees, Cross-Appellees,

v.

WYLIE CORPORATION, Defendant, Third-Party Plaintiff-Appellee, Cross-Appellant,

v.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, Third-Party Defendant-Appellant.

No. 16295.

Supreme Court of New Mexico.

Feb. 25, 1987.

George Wright Weeth, Butt, Thornton, Baehr, P.C., Albuquerque, for plaintiff-appellees, cross-appellees.

Charles J. Noya, Villella, Skarsgard & Noya, P.A., Albuquerque, for defendant, third-party plaintiff-appellee.

Cynthia A. Fry, Civerolo, Hansen & Wolf, P.A., Albuquerque, for third-party defendant-appellant.

OPINION

WALTERS, Justice.

Plaintiffs Insurance Company of North America (INA) and the Bankruptcy Estate of Ben Paul Jones filed suit against defendant Wylie Corporation claiming subroga-

tion for damages to a truck owned by Jones. Wylie then filed a third-party complaint against its insurer, Mountain States Mutual Casualty Company (Mountain States), alleging damages for failure to provide a defense, and for indemnification of any judgment awarded to INA against Wylie.

The trial court, sitting without a jury, found in favor of INA against Wylie. The trial court also entered judgment against Mountain States requiring it to indemnify Wylie for the award to INA, and further awarded Wylie costs and attorney fees. From that judgment Mountain States appeals. Wylie cross-appeals, maintaining that the trial court erred in failing to find that Wylie was provided coverage under INA's policy with Jones. We reverse.

At the time of the accident, Jones was working for Wylie as an independent contractor. According to the trial court's findings, Jones, using his own trucks, would haul material from a pug mill to scales where his truck was weighed. He would then proceed to the road bed where his loaded truck would wait in line in front of a caterpillar/spreader. As the caterpillar/spreader reached each truck in line, the truck would raise its dump box to unload into the spreader box. The caterpillar would then use the spreader box to push each truck forward, spreading the contents of the truck's dump box. During this spreading process, the truck being pushed would be in neutral gear, and its driver would have no control over the distance or speed his truck was pushed.

On June 12, 1980, Jones was in the process of dumping the contents of his truck into the spreader box. The caterpillar, which was being operated by a Wylie employee, pushed the truck forward into the truck ahead of Jones, causing damage to Jones's truck.

INA, Jones's insurer, paid $6,613.49 to repair Jones's truck and claimed subrogation to Jones's rights against Wylie. Wylie notified Mountain States of the accident and demanded that Mountain States defend Wylie against the lawsuit which INA and the bankruptcy estate of Jones had filed. Mountain States refused to defend Wylie. On appeal Mountain States contends that, as a matter of law, the trial court erred in ruling that it must indemnify Wylie and pay Wylie's costs and attorney fees.

I.

Mountain State's insurance policy provided to Wylie comprehensive general liability coverage and comprehensive automobile liability coverage. In its cross-appeal it argues, and we agree, that neither the general coverage nor the automobile liability coverage apply to cover the damage to Jones's vehicle.

Under the comprehensive general liability provisions, Mountain States agreed to pay on behalf of Wylie "all sums which the insured shall become legally obligated to pay as damages because of * * * property damage to which the insurance applies * *" Excluded from that coverage, however, was "damage to * * * property used by the insured, or * * * in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control * * * *"

The comprehensive automobile liability provision contained essentially the same exclusion. That portion excludes from coverage "property damage to * * * property * in the care, custody or control of the insured, or to which the insured is for any purpose exercising physical control * * *"

On the other hand, the INA policy provided that, in addition to Jones, "[a]nyone else is an insured while using with your [Jones's] permission a covered auto you own * * * *" The trial court found that Wylie did not use the Jones vehicle, and that finding is challenged by Mountain States. Thus, as between the two insurers, Wylie's carrier excluded a vehicle used by or under the control of Wylie; Jones's insurer covered the user of a vehicle owned by Jones but used by one other than Jones with Jones's permission.

New Mexico expressly declared in *Maryland Casualty Co. v. Jolly,* 67 N.M. 101,

352 P.2d 1013 (1960), that where an insured is working directly on property which is damaged, that property is within the insured's care, custody or control. Where, however, the damaged property is incidental to the "contracted object upon which work was being performed by the insured, such property is not within the care, custody or control of the insured * * * *" *Id.* at 106, 352 P.2d at 1016.

The trial court made a conclusion of law that "[a]t the time of the accident both Wylie and Jones had care, custody, and control of the Jones truck." It found, however, that Wylie's caterpiller "pushed the Jones truck into the truck in front of Jones," resulting in damage to Jones's truck. In an anomalous finding and conclusion, the trial court decided that Wylie "did not * * * use the [Jones] vehicle" and "was not 'using' the Jones truck at the time of the accident within the meaning of the INA policy." In view of other findings of the court recited earlier in this Opinion, it is clear that the finding and conclusion on "use" are inconsistent, especially in view of extensive case law discussing the meaning of "use" in the context of automobile insurance law.

We have held that exclusionary clauses contained in an insurance policy will be enforced so long as the meaning of the language is clear and they do not conflict with statutory law. *Willey v. Farmers Ins. Group,* 86 N.M. 325, 523 P.2d 1351 (1974).

The exclusionary clauses in the Mountain States policy are unambiguous in their meaning. The language specifically excludes damage to property which is in the care, custody or control, or use of the insured. New Mexico has articulated what actions on the part of the insured give rise to property being in the insured's care, custody or control. *Maryland Casualty Co. v. Jolly.*

Additionally, the INA policy specifically made Wylie an insured if it, with permission, used Jones's truck. If Wylie had the care, custody and control, even partially, it must have had "use" of the truck. As was said in the Court's Syllabus 2, in *United States Fidelity & Guar. Co. v. Hokanson,* 2 Kan.App.2d 580, 580, 584 P.2d 1264, 1265 (1978):

> The term "use" in a coverage clause of an insuring agreement is given a broad, general and comprehensive meaning effecting broad coverage and it includes any exercise of control over the vehicle *regardless of its purpose, extent, or duration.* (Our emphasis.)

Other cases strikingly similar to the one at hand on their facts have declared that the activity of persons in pushing, towing, or otherwise manipulating a vehicle owned by another constituted "use" of the temporarily immobile or disabled vehicle. *E.g., St. Paul Fire & Marine Ins. Co. v. Hartford Accident & Indem. Co.,* 244 Cal.App.2d 826, 53 Cal.Rptr. 650 (1966); *Wiebel v. American Farmers Mut. Ins. Co.,* 51 Del. 151, 140 A.2d 712 (Del.Super.1958); *Michigan Mut. Liab. Co. v. Ohio Casualty Ins. Co.,* 123 Mich.App. 688, 333 N.W.2d 327 (1983); *Bituminous Casualty Corp. v. Aetna Life & Casualty Co.,* 599 S.W.2d 516 (Mo.App.1980); *Hall v. United States Fidelity & Guar. Co.,* 107 Ohio App. 13, 155 N.E.2d 462 (1957).

The trial court, having concluded that Jones's truck was in the care, custody or control of both Wylie and Jones, improperly concluded that Mountain States must indemnify Wylie for damage to Jones's truck. Since Wylie was working directly on Jones's truck and, contrary to the court's findings, Wylie was using the Jones truck, there is no doubt that damage to Jones's truck falls squarely into the exclusionary clauses of the Mountain States insurance policy and within the coverage clauses of INA's. *See Maryland Casualty Co. v. Jolly.* Those clauses, being unambiguous and not in conflict with a statute, must be enforced. *See Willey v. Farmers Ins. Group.*

Accordingly, we reverse the trial court's decision that Mountain States is liable to Wylie for indemnification.

II.

Mountain States maintains that the trial court erred in concluding that it breached its duty to defend Wylie.

Although we have held that Mountain States need not indemnify Wylie for damage to Jones's truck the duty to indemnify is distinct from Mountain States's duty to defend. *Foundation Reserve Ins. Co. v. Mullenix*, 97 N.M. 618, 642 P.2d 604 (1982).

New Mexico had adopted the following general rule regarding the duty to defend:

> If the allegations of the injured third party's complaint show that an accident or occurrence comes within the coverage of the policy, the insurer is obligated to defend, regardless of the ultimate liability of the insured. The question presented to the insurer in each case is whether the injured party's complaint states facts which bring the case within the coverage of the policy, not whether he can prove an action against the insured for damages. The insurer must also fulfill its promise to defend even though the complaint fails to state facts with sufficient clarity so that it may be determined from its face whether or not the action is within the coverage of the policy, provided the alleged facts tend to show an occurrence within the coverage.

America Employers' Ins. Co. v. Continental Casualty Co., 85 N.M. 346, 348, 512 P.2d 674, 676 (1973) (quoting 1 Long, *The Law of Liability Insurance* § 5.02 (1973)).

The language of the Mountain States policy provides that "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent * * * *"

Following the rule articulated in *American Employers'*, we look to see whether the complaint filed by INA against Wylie has stated facts that would bring Wylie within coverage of the Mountain States policy.

The relevant section of INA's complaint alleges:

> On or about June 12, 1980, Defendant hired Ben Jones and his truck to haul material necessary for a road construction project near Alamo, New Mexico. On instructions from Defendant, Jones backed his truck up to a spreader box and proceeded to dump the material which he was carrying into the spreader box. Defendant negligently operated a mechanism which moved the spreader box and Jones' vehicle so as to push Jones' vehicle into another truck, thereby causing damages to Jones' truck.

Mountain States took the position that, in alleging that the "Defendant *hired* Ben Jones and his truck," INA clearly brought the accident within Exclusion (b)(1) of its comprehensive general liability coverage.

According to Exclusion (b)(1), insurance coverage does not apply "to * * * property damage arising out of the ownership, maintenance, operation, use, loading or unloading of * * * any automobile or aircraft owned or operated by or *rented or loaned to any insured* * * * *" (Emphasis added.)

The term "hire" as used in the complaint, and in the ordinary sense of its meaning, is synonymous with the term "rent." Webster's Third New International Dictionary (1966). Such an allegation places the complaint, on its face, directly within the exclusionary clause of the Wylie-Mountain States policy. *See American Employers' Ins. Co. v. Continental Casualty Co.*

We reverse the trial court's decision that Mountain States breached its duty to defend Wylie.

III.

In its cross-appeal, Wylie argues that the trial court erred in concluding that "[a]ny coverage under the INA policy for Wylie Corporation is excluded by Part IV C(6) of the INA policy." We have determined that Wylie was "using" Jones's truck at the time of the accident and thus became insured by operation of the omnibus clause. Part IV C(6) of the INA policy

excludes from coverage "[p]roperty damage to property owned or transported by the insured or in the insured's care, custody or control." Wylie urges that since the INA insurance policy issued to Jones includes Wylie as an insured, Wylie cannot be held liable in subrogation for the damage to Jones.

The exclusion was relied upon in the court's conclusion, at least in part, to deny INA coverage to Wylie. However, Part IV C(6) must be read in its proper context to refer to other property of the insured, or to cargo of the insured being transported by the insured, rather than to the vehicle itself. It must also be read together with the coverage of Part VA(1)(C), which is INA's agreement to "pay for loss to a covered auto [defined as "a land motor vehicle, trailer or semi-trailer designed for travel on public roads"] * * * [c]aused by the covered auto's collision with another object * * * *" To ignore some of the policy's coverage provisions in construing Part IV C(6) to deny coverage would be to remove any insurance coverage at all for the "covered auto" under the coverage provisions of the INA policy. Such a result would be tantamount to allowing an insurance company to give coverage with the right hand and take the same coverage away with the left—which, of course, is not favored as a course to follow in construing insurance policies. *See Safeco Ins. Co. of America v. McKenna,* 90 N.M. 516, 565 P.2d 1033 (App.1977).

The trial court's judgment of reimbursement to INA and the payment to Wylie Corporation of costs, attorney fees and damages by Mountain States, is reversed. The matter is remanded to the trial court for entry of judgment accordingly.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and SOSA, Senior Justice, concur.

733 P.2d 858

FIRST NATIONAL BANK OF SANTA FE, Plaintiff-Appellee,

v.

Dan QUINTANA, et al., Defendant-Appellant.

No. 16262.

Supreme Court of New Mexico.

Feb. 25, 1987.

White, Koch, Kelly & McCarthy, P.A., Larry White, Santa Fe, for plaintiff-appellee.

Robert Suzenski, P.C., Santa Fe, for defendant-appellant.

OPINION

WALTERS, Justice.

The First National Bank of Santa Fe filed suit for foreclosure against defendants Charles and Desideria Manesa and Rosina and Ernesto Archuleta. The Manesas and Archuletas are not parties to this appeal. The bank subsequently filed an amended complaint for replevin and damages against defendant Dan Quintana. The bank largely prevailed on its claims in the trial court and Quintana appealed. We reverse.

It is necessary to state the facts in some detail in order to understand our disposition of this case. Defendants Manesa entered into an agreement with one Vigil whereby Manesas were to purchase a restaurant and equipment from Vigil. At the time of the agreement, Vigil was leasing the restaurant premises from Quintana. Defendants Manesa and Archuleta obtained a loan from the bank, $59,000 of which was secured by a mortgage on real estate, and by a security agreement and financing statement on the restaurant equipment which Manesas were intending to purchase from Vigil. The bank disbursed the loan on June 16, 1982, but did not file the financing statement on the equipment until October 29, 1982. It does not appear from the record that the security agreement was ever filed. Manesas never purchased the equipment from Vigil.

Before the bank approved the Manesa-Archuleta loan, Vigil requested Quintana to execute an "agreement by landlord" document. Thinking it was a verification that Vigil was current in rent payments, Quintana agreed to sign it. After Vigil turned that document over to the bank, the bank, without the knowledge or approval of Quintana, altered it in such a way as to make any claim by Quintana against property owned by Vigil subordinate to any claim the Bank might ultimately have on the same property.

On June 22, 1982, subsequent to the failure of the Manesa-Vigil purchase agreement, Quintana agreed to buy the restaurant and equipment from Vigil. Quintana, in turn, then agreed to sell the restaurant and equipment to Manesas and Archuletas, and on the same day Quintana entered into a purchase agreement with them to that effect. The purchase price was to be $63,500, and required Manesas and Archuletas to pay $29,000 upon execution of the purchase agreement. Subsequently, on June 25, 1982, Quintana, Manesas, and Archuletas entered into a lease agreement permitting Manesas and Archuletas to lease the premises for the restaurant from Quintana. Manesas paid Quintana $16,000 and Archuletas assigned to Quintana their rights to a $7000 debt owed to them by Manesas. Quintana never received any of the remaining money which was due to him by the Manesas and Archuletas.

The Archuletas and Manesas failed to make first payments either to the bank on the note, or to Quintana in the amounts required by the lease and by the purchase agreement. Quintana immediately gave

notice to Archuletas and Manesas to vacate the premises, and they failed or refused to do so. Quintana then asserted his landlord's lien against the collateral and went into possession of the premises.

The trial court granted partial summary judgment on the bank's claim, further ruling that the bank was entitled, at its election, either to judgment against Quintana for the value of the collateral or for repossession of the collateral. Pursuant to that order, the bank elected to receive the value of the collateral. The trial court dismissed Quintana's counterclaim for wrongful alteration of an instrument, constructive fraud, abuse of process, and unfair trade practices.

We do not agree with the bank that its security interest attached to the collateral, thereby placing it in a position superior to that of Quintana. In order for a security interest to attach, there must be an agreement that it attach, value must be given, and the debtor must have rights in the collateral. NMSA 1978, § 55–9–204(1).

The Bank erroneously relies on *Morton Booth Co. v. Tiara Furniture, Inc.*, 564 P.2d 210 (Okla.1977), as authority for its contention that the Manesas and Archuletas acquired "rights in the collateral" sufficient to effectuate attachment.

Where the debtor acquires possession of the collateral pursuant to a contract which grants the debtor an interest other than mere possession, the debtor has obtained rights in the collateral so as to allow the security interest to attach. *Morton Booth*, 564 P.2d at 214. But as the court in *Morton Booth* correctly observed, "[M]ere possession of goods is not enough under the Code to demonstrate that the debtor had 'rights' in the collateral." *Id.*

We agree with Quintana that the purchase agreement between Quintana and the Manesas and Archuletas contained a condition precedent which was never performed; therefore, as a matter of law, the contract was never consummated. *See Elephant Butte Resort Marina, Inc. v. Wooldridge*, 102 N.M. 286, 694 P.2d 1351 (1985).

Manesas and Archuletas failed to comply with the initial requirements of the contract, *i.e.*, payment of the full $29,000 required under the purchase agreement, which would have given them more than mere possession of the equipment. Naked possession of collateral provides an insufficient acquisition of rights in it upon which the bank's security interest might attach. *Morton Booth Co. v. Tiara Furniture, Inc.* As a matter of law, the bank had neither a valid security interest in the collateral, nor a claim against the property of Quintana, *see* NMSA 1978, § 55–9–204(1), much less a perfected security interest superior to Quintana's claimed landlord's lien. *See Chessport Millworks, Inc. v. Solie*, 86 N.M. 265, 522 P.2d 812 (Ct.App.1974).

Although we agree that the bank's practice of altering the "agreement by landlord" form was unconscionable, in light of the foregoing discussion and Quintana's previous award of damages in another lawsuit, we conclude that the trial court's dismissal of Quintana's counterclaim was not improper.

We reverse and remand for dismissal of the bank's complaint.

SOSA, Senior Justice, and RANSOM, J., concur.

733 P.2d 860

Ronald Marvin BROCK, Petitioner,

v.

George E. SULLIVAN, Warden, Penitentiary of New Mexico, Respondent.

No. 16679.

Supreme Court of New Mexico.

Feb. 25, 1987.

Jan Unna, Santa Fe, for petitioner.

Timothy W. Cornish, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

WALTERS, Justice.

On March 31, 1983, the trial court sentenced petitioner Ronald Brock after conviction of four fourth-degree felony offenses to a period of eighteen months for each offense, to be served consecutively. After deduction for presentence confinement and good-time credits earned since March 31, 1983, Brock is now eligible for release.

Brock, although eligible for release, is still incarcerated because of his refusal to accept the Parole Board's interpretation of the trial court's order of Judgment and Sentence. *See* NMSA 1978, Section 31-21-10(D) (Repl.Pamp.1986).

The Judgment and Sentence frames the parole portion of the sentence upon each count as follows: "IT IS FURTHER ORDERED that the Defendant be placed on mandatory parole for a period of one year after the service of the actual period of imprisonment for a total of two and one half [sic] years imprisonment and mandatory parole."

The Parole Board separated each parole period from the underlying sentence and period of imprisonment imposed thereon and, in effect, tolled commencement of the parole periods until the sentence on the last consecutive offense was served. As a consequence, the Parole Board is requiring Brock to serve four consecutive, one-year

periods of parole following his period of incarceration, as a condition of release.

Pursuant to NMSA 1978, Crim.P.R. 57 (Repl.Pamp.1985) and N.M. Const. art. VI, Section 3, Brock seeks relief from the trial court's dismissal of his Rule 57 petition.

We agree with Brock's contention, that "stacking" [1] of multiple parole periods after the final sentence of a consecutive sentence is not what the legislature intended when it enacted the New Mexico Criminal Sentencing Act. NMSA 1978, §§ 31–18–12 to –21 (Repl.Pamp.1981 and Cum.Supp. 1986).

We are not unmindful of *State v. Smith,* 102 N.M. 350, 695 P.2d 834 (Ct.App.), *cert. denied,* 102 N.M. 492, 697 P.2d 492 (1985); however, we disagree that NMSA 1978, Section 31–18–15(C) (Repl.Pamp.1981), requires the aggregate, consecutive sentences to be completed prior to the commencement of the parole period for each basic sentence.

In construing a statute, we must consider what the legislature is seeking to accomplish, and give effect to legislative intent, *Board of Education v. Jennings,* 102 N.M. 762, 701 P.2d 361 (1985); additionally, we must resolve any doubt concerning the construction of a sentencing statute in favor of the "rule of lenity." *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Keith,* 102 N.M. 462, 697 P.2d 145 (Ct.App.), *cert. denied,* 102 N.M. 492, 697 P.2d 492 (1985); *Cawley v. Arizona Board of Pardons and Paroles,* 145 Ariz. 387, 701 P.2d 1195 (Ct.App.1984), *modified on other grounds,* 145 Ariz. 380, 701 P.2d 1188 (1985) (the "rule of lenity" does not allow the tolling of parole time when an offender is paroled to the Department of Corrections to serve a consecutive sentence.)

The legislature has explicitly provided that "[t]he period of parole shall be *deemed to be part of the sentence* of the convicted person * * * * " NMSA 1978, § 31–18–15(C) (Repl.Pamp.1981) (emphasis added).

In the absence of some fault on the part of the prisoner, a sentence cannot be divided into fragments so as to compel the prisoner to serve the sentence in installments. 24B C.J.S. *Criminal Law* § 1995(1)(1962); *Shields v. Beto,* 370 F.2d 1003 (5th Cir.1967), *State v. Valrand,* 103 N.H. 518, 176 A.2d 189 (1961).

Because the legislature has deemed the parole period to be part of the sentence of a convicted person, NMSA 1978, Section 31–18–15(C), a separation of each parole period from its connected period of imprisonment necessarily requires that the sentence be fragmented and served in installments. *Cf. Shields v. Beto.* We are not persuaded that the legislature intended such a result when it enacted the Criminal Sentencing Act, NMSA 1978, Sections 31–18–12 to –21; in addition, to hold otherwise would be violative of the "rule of lenity." *State v. Keith.*

Our construction in this respect is buttressed by the manifestation of legislative intent in NMSA 1978, Section 31–21–11 (Cum.Supp.1986). In pertinent part that section provides that "[p]risoners who are otherwise eligible for parole may be paroled * * * to serve another sentence within the penitentiary * * * * " Section 31–21–11 is clear evidence that the legislature contemplated simultaneous service of parole with a subsequent sentence, and gave direction for handling such a situation as this case poses.

We therefore hold that the New Mexico Criminal Sentencing Act, NMSA 1978, Sections 31–18–12 to –21, requires that in the case of consecutive sentencing, the parole period of each offense commences immediately after the period of imprisonment for that offense, and such parole time will run concurrently with the

1. "Stacking" parole periods means: The cumulation of multiple parole of each consecutive sentence of imprisonment imposed in multiple-offense cases resulting in a compounded parole period which is executed after the total term of imprisonment on all of the sentences has been served.

running of any subsequent basic sentence then being served.

Accordingly, the decision of the trial court is reversed and the case remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SCARBOROUGH, C.J., SOSA, C.J., and RANSOM, J., concur.

STOWERS, J., dissents.

STOWERS, Justice, dissenting.

I cannot concur with the reasoning or the result of the majority opinion. In searching for the legislative intent embodied by our sentencing and parole statutes, the majority fail to address several statutory provisions that support the Parole Board's interpretation of petitioner Brock's judgment and sentence. In doing so, the majority disagree with the Court of Appeals' analysis of a similar sentencing question without expressly overruling its decision in *State v. Smith,* 102 N.M. 350, 695 P.2d 834 (Ct.App. 1985), *cert. denied,* Feb. 14, 1985. Finally, the majority incorrectly read as mandatory the permissive language of NMSA 1978, Section 31–21–11 (Cum.Supp.1986).

Assuming that our sentencing and parole statutes are ambiguous, I do not believe that they support the majority's interpretation. Even if Brock may have become eligible for in-house parole under Section 31–21–11 at the completion of his actual time of imprisonment for the first of his consecutive sentences, the record is devoid of evidence regarding whether he sought such parole at that time and whether the Parole Board denied it. Therefore, I find no reason in law or in fact to reverse the decision of the trial court, and I must dissent from the majority's opinion.

The majority's conclusion that the Legislature did not intend for periods of parole imposed upon a prisoner as part of consecutive sentences for several convictions to be cumulated and served after his cumulated basic sentences of imprisonment have been served is based primarily on a single phrase of one of our sentencing statutes. NMSA 1978, Subsection 31–18–15(C) (Repl. Pamp.1981) provides in part that "[t]he period of parole shall be deemed to be a part of the sentence of the convicted person." The majority opinion chooses to ignore the rest of Subsection 31–18–15(C), which clearly expresses the Legislature's intention that the period of parole is "to be served * after the completion of any actual time of imprisonment."

More inexplicably, the majority opinion chooses to ignore our only statute that expresses the Legislature's intention regarding multiple sentences. NMSA 1978, Section 33–2–39 (Repl.Pamp.1983) provides that "[w]henever any convict shall have been committed under several convictions with several sentences, they shall be construed as one continuous sentence for the full length of all sentences combined." In *State v. Smith,* the Court of Appeals sought to give effect to this statute as well as those cited by the majority here, and held that one must: consider the parole period to be an immutable part of each sentence; construe consecutive sentences as one continuous sentence; cumulate the basic sentences of imprisonment separately from the periods of parole; require service of the cumulated basic sentences of imprisonment; and then, after any time of actual imprisonment has been served, require service of the cumulated periods of parole. *See State v. Smith,* 102 N.M. at 353, 695 P.2d at 837. In addition, the Court of Appeals expressly rejected the contention, adopted by the majority here, that the period of parole for each felony conviction must be served while the prisoner is serving the basic sentence for his conviction.

The Parole Board construed Brock's consecutive sentences in accordance with the rule of *State v. Smith.* The majority's reversal of the Parole Board's interpretation without overruling that decision is, I believe, not correct. Furthermore, I believe that the majority's decision is inconsistent with the Legislature's intention that consecutive sentences be construed as one consecutive sentence and that parole be served after imprisonment.

Finally, I believe that the majority's decision is inconsistent with the legislative intent expressed by our in-house parole statute. Section 31–21–11 provides that "[p]risoners who are otherwise eligible for parole *may* be paroled to detainers to serve another sentence within the penitentiary." (Emphasis added). The majority opinion in effect reads as mandatory the clearly permissive language used by the Legislature. The rule of lenity notwithstanding, penal statutes should not be subjected to any strained or unnatural construction in order to work exemptions from their penalties. *See Ex parte DeVore,* 18 N.M. 246, 254, 136 P. 47, 49 (1913); *see also State v. Gilman,* 97 N.M. 67, 68, 636 P.2d 886, 887 (Ct.App.), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1981).

I therefore cannot agree with the majority's decision to award Brock in-house parole for periods of time already served. Under Section 31–21–11, the Legislature vested the Parole Board with the discretion to award such parole or not. *Cf.* NMSA 1978, § 31–21–11 (Cum.Supp.1986) (powers of the Parole Board). Even if Brock became eligible for in-house parole after he had served the basic sentence of imprisonment for his first consecutive sentence, there is no evidence in the record showing that he sought such parole at that time or the Parole Board denied it to him. I do not believe that he is entitled now to the relief granted by the majority.

For the foregoing reasons, I respectfully dissent.

733 P.2d 864

TEXAS AMERICAN BANK/LEVELLAND,
Plaintiff-Appellee,

v.

Mary MORGAN, Defendant-Appellant,

W.N. Halliburton, First Federal Savings & Loan Association of Clovis, Defendants.

No. 16368.

Supreme Court of New Mexico.

Feb. 25, 1987.

C. Barry Crutchfield, Templeman and Crutchfield, Lovington, for defendant-appellant.

David G. Grow, Walker, Tatum, Grow & McDowell, Clovis, for plaintiff-appellee.

OPINION

WALTERS, Justice.

On March 28, 1983, defendant Halliburton executed a warranty deed to himself and defendant Morgan, as joint tenants. The deed was recorded on April 6, 1983. At the time of the conveyance, defendant First Federal Savings and Loan Association held a mortgage covering the north 75.35 feet of the deeded property. The priority and amount of the mortgage held by First Federal Savings and Loan Association was stipulated to by plaintiff Texas American Bank (Bank), and defendants First Federal Savings and Loan Association, and Morgan.

On November 2, 1983, Bank loaned Halliburton $100,000 which was secured by a note and mortgage covering the real property jointly owned by Halliburton and Morgan. Morgan was not a party to the loan or the mortgage. The mortgage was recorded on November 16, 1983.

On July 30, 1984, Halliburton conveyed by warranty deed his remaining interest in the property to Morgan. That deed was recorded on August 3, 1984.

Following a default in payments, the Bank sued for foreclosure and the trial court entered a Judgment of Foreclosure and Sale covering all of the real property. Morgan appeals. We reverse and remand.

Morgan raises the question whether Halliburton, as a joint tenant, could execute a mortgage which would encumber her interest in the property without her consent. Additionally, she contends that the execution of the mortgage by Halliburton severed the joint tenancy and that the Bank stepped into Halliburton's shoes at the time of the mortgage; consequently, that the proper remedy is a partition with foreclosure on what was Halliburton's interest at the time the mortgage was executed.

New Mexico has never addressed whether one joint tenant may encumber the property interest of another cotenant without consent. The jurisdictions which have decided this question, however, have uniformly agreed that one cotenant may not encumber the other cotenant's interest without consent. *See, e.g., First National Bank of Southglenn v. Energy Fuels Corp.*, 200 Colo. 540, 618 P.2d 1115 (1980); *Harms v. Sprague*, 119 Ill.App.3d 503, 75 Ill.Dec. 155, 456 N.E.2d 976 (1983), *aff'd*, 105 Ill.2d 215, 85 Ill.Dec. 331, 473 N.E.2d 930 (1984); *American National Bank and Trust Co. v. McGinnis*, 571 P.2d 1198 (Okl. 1977); *Glenn v. Webb*, 565 S.W.2d 876 (Tenn.App.1977).

Illinois has said that " 'an act or contract by one joint tenant respecting the joint property without the authority or consent of his cotenants cannot bind or prejudically affect the latter.' " *Motz v. Central National Bank*, 119 Ill.App.3d 601, 608, 75 Ill.Dec. 137, 143, 456 N.E.2d 958, 964 (1983) (quoting 23 Ill. L. & Prac. *Joint Tenancy* § 23 (1979)). We agree with that appraisal.

A fundamental principal of property law is that a grantor can only give that which he owns. *See* 23 Am.Jur.2d *Deeds* § 336 (1983). Halliburton, being a joint tenant, was not free to execute a mortgage which would encompass a greater interest in the property than he owned himself. It stands to reason, therefore, that the mortgage which Halliburton executed could not encumber Morgan's interest in the property. *See Harms v. Sprague; First National Bank of Southglenn v. Energy Fuels Corp.; American National Bank and Trust Co. v. McGinnis; Glenn v. Webb.* Even so, that does not mean that the mortgage severed the joint tenancy.

In New Mexico, a mortgage is merely a lien and title does not pass to the mortgaged property, *Slemmons v. Massie*, 102 N.M. 33, 34, 690 P.2d 1027, 1028 (1984); hence, title and joint tenant unities are unaffected by the execution of a mortgage. *American National Bank and Trust Co.*

v. McGinnis, 571 P.2d at 1200. Since the joint tenancy unity remains intact, a necessary conclusion is that the execution of a mortgage which encumbers one joint tenant's interest in property does not sever the joint tenancy. *See, Harms v. Sprague; American National Bank and Trust Co. v. McGinnis; Brant v. Hargrove,* 129 Ariz. 475, 479, 632 P.2d 978, 982 (App.1981).

The Bank relies on *Everett v. Gilliland,* 47 N.M. 269, 141 P.2d 326 (1943), for its assertion that Morgan took Halliburton's interest in the property subject to the mortgage because Morgan, upon receiving Halliburton's remaining interest, became the sole owner of the property and all the interests and encumbrances in the property merged, causing the mortgage to encompass Morgan's as well as Halliburton's interest.

Everett, on its facts, is not helpful in deciding this case. Halliburton was not free to encumber Morgan's interest. Yet the Bank urges us, essentially, to expand the mortgage encumbering Halliburton's interest to encumber Morgan's property interest, too. We do not agree that the encumbrance on Halliburton's interest and the later deed will "merge" so that the Bank's lien can reach more than it had a right to foreclose upon at the time it took the mortgage.

The corollary of the rule that a grantor can only give that which he owns, *see* 23 Am.Jur.2d *Deeds* § 336 (1983), is that a grantee can only receive that which the grantor is entitled to convey. Morgan, by way of warranty deed, received Halliburton's encumbered property interest. Halliburton was unable to execute a mortgage encumbering the entire property; likewise, Morgan was unable to receive Halliburton's interest unencumbered by the mortgage. But the Bank, having received a mortgage only upon Halliburton's interest, is unable to enlarge that encumbrance, after the fact, to encompass the entire property.

Our decision is buttressed by the evidence that at the time Halliburton executed the mortgage, the Bank was on constructive notice, by reason of recordation, that Halliburton was merely a joint tenant. *See Angle v. Slayton,* 102 N.M. 521, 523, 697 P.2d 940, 942 (1985). The Bank did not require Morgan's approval of the mortgage, and we will not do for the Bank what it failed to do for itself. *See Clovis National Bank v. Harmon,* 102 N.M. 166, 692 P.2d 1315 (1984).

Accordingly, we reverse the trial court and remand for judgment consistent with the interests of the parties.

IT IS SO ORDERED.

SOSA, Senior Justice, and RANSOM, J., concur.

733 P.2d 866

In the Matter of Jose Luis ARRIETA, an Attorney Admitted to Practice before the Courts of the State of New Mexico.

No. 16402.

Supreme Court of New Mexico.

Feb. 26, 1987.

Virginia A. Ferrara, Chief Disciplinary Counsel, Albuquerque, for Board.

Jose L. Arrieta, Las Cruces, for respondent.

OPINION

PER CURIAM.

This matter comes before this Court after completion of disciplinary proceedings conducted pursuant to NMSA 1978, Rules Governing Discipline (Repl.Pamp.1985), wherein attorney Jose L. Arrieta was found to have committed violations of NMSA 1978, Code of Prof.Resp. (Repl. Pamp.1985) involving representation of conflicting parties, threatening criminal prosecution, failure to return client funds to the client, failure to cooperate with the Disciplinary Board, and other conduct prejudicial to the administration of justice and adversely reflecting on Arrieta's fitness to practice law. Since Arrieta has not requested a review by this Court of the Board's recommendation pursuant to the requirements of NMSA 1978, Rules Governing Discipline, Rule 17-316(A) (Recomp. 1986), we adopt the Disciplinary Board's findings, conclusions, and recommendation.

Arrieta was retained by Susan Bonar and accepted a retainer to serve as her attorney regarding an immigration matter as well as to assist her in the collection of certain monies owed to her by Mr. and Mrs. R.R. Hawkins and/or Toi-Ki Steele and/or Thomas Ray. Shortly thereafter Arrieta wrote demand letters to Hawkins, Steele and Ray, citing provisions of the Worthless Check Act, NMSA 1978, Sections 30-36-1 through -10 (Repl.Pamp.1980 and Cum. Supp.1985), and suggesting that the recipients of the demand letters would be prosecuted unless payment was made. After receiving Arrieta's demand letter, Hawkins made an appointment to discuss the matter with Arrieta. At the time Arrieta met with Hawkins, he was still representing Bonar.

Approximately one week after Arrieta's meeting with Hawkins, Bonar filed a lawsuit against Hawkins. Arrieta (who had been discharged by Bonar sometime between Arrieta's meeting with Hawkins and the filing of the lawsuit) interposed an answer on behalf of Hawkins. Arrieta also alleged several affirmative defenses on Hawkins' behalf, and the hearing committee found that the information necessary and sufficient to raise and/or substantiate the affirmative defenses had been provided to Arrieta by his former client Bonar or by Hawkins at a time when Arrieta was still representing Bonar. At no time did Bonar consent to Arrieta's representation of Hawkins or waive the attorney-client privilege.

The hearing committee found Arrieta's representation of Hawkins to be in violation of NMSA 1978, Code of Prof.Resp. Rule 5-105(A) (Repl.Pamp.1985). Arrieta's threat of criminal prosecution as contained in the demand letters he sent on behalf of Bonar violates NMSA 1978, Code of Prof. Resp. Rule 7-105(A) (Repl.Pamp.1985).

In June of 1984, Arrieta represented Mr. and Mrs. Frank Fenton concerning the purchase of a house by the Fentons from Blanco Construction Company. Payments under the contract were to be made to the title company on a percentage of completion basis in five (5) equal payments with fifteen percent (15%) of each to be retained and placed in escrow pending final completion of this project. Fenton mistakenly sent one payment (including retainage) to Blanco. Blanco then tendered a check to Arrieta for 15% of what he had been paid directly (the amount of retainage). The money was to be held in trust by Arrieta until the completion of the project.

Three months later, the house was completed; a certificate of completion was prepared and Fenton took possession. Fenton immediately instructed Arrieta to release the escrow monies to Blanco.

Arrieta refused to release the money to Blanco, however, as he claimed that Blanco

owed him money. The escrowed funds were removed from Arrieta's trust account (without permission from anyone) and the proceeds applied towards the fees allegedly owed to Arrieta by Blanco in other matters. The evidence produced by Arrieta at the hearing did not substantiate his claim that money was owed to him by Blanco.

Since Fenton was obligated to pay and had paid Blanco the amount of the retainage, Arrieta's removal of these funds to his own use constituted a conversion of his clients' funds in violation of NMSA 1978, Code of Prof.Resp. Rule 1–102 (Repl.Pamp. 1985). Arrieta also violated NMSA 1978, Code of Prof.Resp. Rule 9–102(B)(4) (Repl. Pamp.1985) by failing to release the entrusted funds to Blanco as directed by Fenton.

In a related case, Arrieta was retained to act as an escrow agent concerning a real estate contract between Mr. and Mrs. James Ahl and Blanco Construction Company. In July of 1984, Ahl tendered to Arrieta a check in the amount of three thousand dollars ($3,000), which represented a down payment on the purchase of a tract of land. Ahl was subsequently transferred to California and requested that Blanco agree to a recission of the real estate contract. Blanco agreed to rescind the contract and to refund to Ahl the down payment he had placed with Arrieta. He so advised Arrieta.

Arrieta refused to release the funds to Ahl, again claiming that he was entitled to the money since Blanco owed Arrieta for previous legal services. Arrieta subsequently removed the funds from his trust account (without anyone's permission) and applied the proceeds toward the fees allegedly owed to him by Blanco. To this date, Ahl has not received a refund of the escrowed $3,000 which was to have been returned to him.

By acting as an escrow agent, Arrieta assumed a fiduciary relationship to both Ahl and Blanco, and was thus required to release the escrowed funds to Ahl in accordance with the terms of the escrow agreement. Because of Arrieta's refusal to release the funds to Ahl, the hearing committee found that he violated NMSA 1978, Code of Prof.Resp. Rule 1–102(A)(1) (Repl.Pamp.1985). This conduct also violated NMSA 1978, Code of Prof.Resp. Rules 1–102(A)(4) and 9–102(B)(4) (Repl.Pamp. 1985).

Disciplinary counsel wrote to Arrieta regarding the allegations of Fenton, Ahl, and Mr. Joseph Kist. Arrieta failed to respond and a second request for information was sent by disciplinary counsel. Arrieta ignored the second request. Arrieta's conduct in this instance violated NMSA 1978, Code of Prof.Resp. Rule 1–101(C) (Repl. Pamp.1985). The Disciplinary Board also found Arrieta's cumulative conduct to be in violation of NMSA 1978, Code of Prof. Resp. Rules 1–102(A)(5) and 1–102(A)(6) (Repl.Pamp.1985).

This is not Arrieta's first encounter with the disciplinary process. *See Matter of Arrieta,* 104 N.M. 629, 725 P.2d 829 (1986); *Matter of Arrieta,* 104 N.M. 389, 722 P.2d 640 (1986).

Arrieta's conduct has been calculated, willful, and deliberate, and not a result of negligence or ignorance. As a result of Arrieta's intentional conduct, we are compelled to revoke his license to practice law in this state.

IT IS THEREFORE ORDERED that Arrieta be and hereby is disbarred and his license to practice law in New Mexico is revoked upon filing of this Order.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court forthwith strike the name of Jose L. Arrieta from the roll of those persons permitted to practice law in New Mexico and that this Order be published in the *New Mexico Reports* and in the State Bar of New Mexico *News and Views.*

The costs of this proceeding in the amount of $1,816.85 are hereby assessed against Arrieta.

IT IS SO ORDERED.

733 P.2d 870

Matias ARMIJO, Plaintiff-Appellant,

v.

ED BLACK'S CHEVROLET CENTER, INC., Defendant and Third-Party Plaintiff-Appellee,

v.

STUART TRUCK EQUIPMENT, INC., Third-Party Defendant-Appellee.

No. 8365.

Court of Appeals of New Mexico.

Jan. 27, 1987.

James E. Thomson, Jere C. Corlett, Santa Fe, for plaintiff-appellant.

David C. Davenport, Jr., W. Mark Mowery, Rodey, Dickason, Sloan, Akin & Robb, P.A., Santa Fe, for defendant and third-party plaintiff-appellee Ed Black's Chevrolet Center, Inc.

Howard R. Thomas, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for third-party defendant-appellee Stuart Truck Equipment, Inc.

OPINION

ALARID, Judge.

Plaintiff brought suit to recover damages for personal injuries suffered when a weld broke on a dump truck. The trial court granted summary judgment and judgment on the pleadings dismissing plaintiff's complaint; the district court denied plaintiff's motion for leave to amend the complaint. Plaintiff appeals and we reverse.

The issues raised are: (1) whether summary judgment in favor of defendant, Ed Black's Chevrolet Center, Inc., was proper on plaintiff's claim of negligence against it; (2) whether judgment on the pleadings in favor of defendant was proper on plaintiff's claim of breach of warranties; (3) whether plaintiff's claim was sufficient to raise the theory of strict liability and, if so, whether plaintiff's complaint should have been dismissed; and (4) whether the court erred in refusing to allow plaintiff to amend the complaint to expressly add a count stating a claim for strict liability. We hold that the trial court was correct in granting summary judgment on plaintiff's claims of negligence and breach of warranties, but that the court erred in dismissing the complaint because the complaint stated a claim for relief for strict liability. Accordingly, it follows that the court should have allowed plaintiff to amend to expressly state what was implicit in the original complaint.

FACTS

The complaint alleged that defendant sold a defective dump truck to plaintiff's employer. While plaintiff was operating the truck, the bed came off, causing the cab, in which plaintiff was sitting, to jerk violently. The cause of the incident was that the welds that attached the dump bed to the truck were negligently performed. Plaintiff suffered damages. For his first claim of relief, plaintiff claimed that defendant or its agents negligently performed the welding. For his second claim of relief, plaintiff claimed that defendant warranted that the truck was fit for dumping gravel and was safe, whereas it was neither fit nor safe due to the defective weld. The complaint was quite clear that plaintiff's first claim was negligence and his second claim was breach of warranty. He did not plead a theory of strict liability.

Defendant filed a third-party complaint against third-party defendant, Stuart Truck Equipment, Inc. (Stuart). When Stuart's answers to interrogatories revealed that it had performed the welding, defendant moved for summary judgment on plaintiff's first claim and for judgment on the pleadings on plaintiff's second claim. The court granted defendant's motion, despite plaintiff's argument that the complaint could be read to state a claim for strict liability. Twenty days thereafter, plaintiff sought to amend his complaint to add a third claim for relief, expressly containing the strict liability theory. Six days later, the court denied plaintiff's motion to amend and plaintiff took an immediate appeal.

NEGLIGENCE CLAIM

Plaintiff's complaint alleged that defendant or its agents performed the welding. Defendant's answer admitted that it sold the truck but denied that it or its agents had performed the welding. Defendant's motion for summary judgment on this claim was grounded on the fact that Stuart's answers to interrogatories admitted that it did the welding. Therefore, defendant maintained that there was no genuine issue of material fact as to its alleged negligence in performing the welding. Plaintiff did not submit any material whatsoever in opposition to defendant's motion. *See* NMSA 1978, Civ.P.R. 56(e) (Repl.Pamp.1980). Accordingly, defendant was entitled to judgment on this claim. *Oschwald v. Christie,* 95 N.M. 251, 620 P.2d 1276 (1980).

WARRANTY CLAIM

NMSA 1978, Section 55–2–318 states:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

Although plaintiff concedes that he is not a person in the family or household of his employer, who bought the truck, or a guest in his employer's home, plaintiff claims that the privity concept of Section 55–2–318 was abolished in *Perfetti v. McGhan Medical,* 99 N.M. 645, 662 P.2d 646 (Ct.App. 1983).

Plaintiff reads too much into the *Perfetti* case. The case dealt with vertical privity, as distinguished from horizontal privity. The distinction between the two types of privity is explained in J. White and R. Summers, *Uniform Commercial Code,* § 11–2 at 399 (2d ed. 1980):

> There are two basic kinds of "non-privity" plaintiffs. The "vertical" non-privity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant. For example, a man who buys a lathe from a local hardware store and then later sues the manufacturer is a "vertical" non-privity plaintiff. The "horizontal" nonprivity plaintiff is not a buyer within the distributive chain but one who consumes or uses or is affected by the goods. For example, a woman poisoned by a bottle of beer that her husband purchased from a local grocer is a horizontal non-privity plaintiff. So, too, is a son who is injured by the new

lawnmower his father bought, and the employee hurt by equipment purchased by her employer, and so on.

Section 55–2–318 only addresses horizontal privity, leaving vertical privity to judicial decision. Comment 3 to § 55–2–318; *Hemphill v. Sayers,* 552 F.Supp. 685 (S.D. Ill.1982). Thus, *Perfetti,* dealing with vertical privity, while a proper judicial determination, does not aid plaintiff in this case.

When the legislature adopted the Uniform Commercial Code, it had three alternatives from which to choose. Our legislature chose the most restrictive alternative. *See id.* We are persuaded by the reasoning of other courts that have discussed the Uniform Commercial Code implied warranty theory that employees of a purchaser are excluded from the manufacturer's warranty protections offered by provisions comparable to Section 55–2–318. *Hemphill; Watkins v. Barber-Colman Co.,* 625 F.2d 714 (5th Cir.1980); *Anderson v. Watling Ladder Co.,* 472 F.2d 576 (6th Cir. 1973); *Bailey v. ITT Grinnell Corp.,* 536 F.Supp. 84 (N.D.Ohio 1982); *Teel v. American Steel Foundries,* 529 F.Supp. 337 (E.D. Mo.1981); *In re Johns-Manville Asbestosis Cases,* 511 F.Supp. 1235 (N.D.Ill.1981); *Hester v. Purex Corp.,* 534 P.2d 1306 (Okla.1975). *See also Annot.,* 100 A.L. R.3d 743, § 5[b] (1980). Any other ruling by this court would be an unwarranted nullification of the legislature's prerogatives. *See e.g., Hemphill; Hester.* Accordingly, the court was correct in dismissing plaintiff's warranty claims.

STRICT LIABILITY CLAIM

Plaintiff's original complaint did not mention the words "strict liability" or seek to raise a third claim for relief apart from negligence and breach of warranty. After the trial court dismissed the complaint, and after the statute of limitations had run, plaintiff filed his motion to amend to add a theory of strict liability. Because we find that plaintiff's complaint was sufficient to state a claim for relief, defendant's arguments seeking to uphold the trial court's denial of plaintiff's motion to amend need not be reached.

NMSA 1978, Civ.P. Rule 8(a)(2) (Repl. Pamp.1980), requires the complaint only to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Our rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Hambaugh v. Peoples,* 75 N.M. 144, 153, 401 P.2d 777, 782 (1965), quoting *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). Our established policy requires that the rights of litigants be determined by adjudication on the merits rather than upon the technicalities of procedure and form. *Transamerica Insurance Co. v. Sydow,* 97 N.M. 51, 636 P.2d 322 (Ct.App.1981). A motion to dismiss is properly granted only if plaintiff cannot recover under any state of facts provable. *Id.; Las Luminarias of the New Mexico Council of the Blind v. Isengard,* 92 N.M. 297, 587 P.2d 444 (Ct.App.1978). Magic language is not required. *See Ciesielski v. Waterman,* 86 N.M. 184, 521 P.2d 649 (Ct. App.1974) (*res ipsa loquitur* need not be specifically pleaded when complaint alleges negligence and defendant's control).

In this case, plaintiff's complaint alleged that defendant sold a truck that plaintiff was using, that the truck had defective welds, and that plaintiff was injured because of those defective welds. Under similar situations, these allegations have been sufficient to state a claim in strict liability. *See Chavez v. Robberson Steel Co.,* 94 Nev. 597, 584 P.2d 159 (1978) (pleadings should be liberally construed to place in issue matter which is fairly noticed to adverse party); *Murphy v. General Motors Corp.,* 55 A.D.2d 486, 391 N.Y.S.2d 24 (1977) (pleadings are sufficient if they sufficiently notify the court and parties of the transactions, occurrences and material elements of each cause of action intended to be proved); *Read v. Safeway Stores, Inc.,* 264 Cal.App.2d 404, 70 Cal.Rptr. 454 (1968) (it was an abuse of the court's discretion to deny plaintiff's motion to amend complaint

to include negligence when complaint was sufficient to state a cause of action in strict liability); *Alvarez v. Felker Mfg. Co.*, 230 Cal.App.2d 987, 41 Cal.Rptr. 514 (1964) (strict tort liability may be pleaded in complaint alleging only negligence and breach of warranty). *Compare with Hemphill v. Sayers* (product liability claim dismissed where complaint failed to properly describe condition rendering product unreasonably dangerous), *and Brown v. Western Farmers Association*, 268 Or. 470, 521 P.2d 537 (1974) (no claim of recovery under a theory of strict liability where complaint failed to allege manner in which product was unreasonably dangerous).

Defendant's argument assumes that pleaders in New Mexico must categorize their theories or claims of relief and, if they pick the wrong category, they are out of court. This assumption is incorrect. 5 C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 1219 (1969); 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 8.14 (1986).

Plaintiff's complaint was sufficient to state a claim for relief and the court erred in dismissing it. The order dismissing the complaint is reversed. The matter is remanded to the trial court with instructions to reinstate it on its docket and to allow plaintiff to amend his complaint to state the correct legal theory. Costs to appellant.

IT IS SO ORDERED.

BIVINS and FRUMAN, JJ., concur.

733 P.2d 873

Marion HARRISON, Plaintiff-Appellant,

v.

ANIMAS VALLEY AUTO AND TRUCK REPAIR, Employer, and Bituminous Casualty Corporation, Insurer, Defendants-Appellees.

No. 9285.

Court of Appeals of New Mexico.

Jan. 29, 1987.

Certiorari Denied March 5, 1987.

Andrew L. Cameron, Denver, Colo., for plaintiff-appellant.

Howard R. Thomas, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Chief Judge.

The prior opinion of the court is withdrawn and the following opinion is substituted.

Plaintiff, Marion Harrison, appeals from a judgment denying his claim for workmen's compensation. The central issue raised by plaintiff on appeal is whether the trial court erred in concluding plaintiff was not an employee for purposes of qualifying for workmen's compensation benefits at the time of his injury. We reverse and remand with instructions to the trial court to address other essential issues raised by the pleadings.

FACTS

The factual issue of whether plaintiff was injured during the course and scope of his employment was bitterly disputed at trial. The trial court did not reach this issue because it found that at the time of plaintiff's injury, his employment contract had not been renewed or extended and plaintiff, therefore, did not have an enforceable right to receive any remuneration for his service to Animas Valley Auto and Truck Repair, Inc. (Animas).

Plaintiff was an automobile mechanic and, together with Dr. Ivan Sergejev and Carroll "Red" Achenbach formed Animas in December 1982. Plaintiff and Achenbach each owned 30% of the corporate shares and Dr. Sergejev owned 40%. Plaintiff, Achenbach, and Sergejev were the officers and directors of Animas and it was agreed that plaintiff and Achenbach were to work for the corporation; Achenbach was to be the general manager and plaintiff was to help manage and serve as a mechanic. Other mechanics worked on the premises but they were independent contractors.

Articles of incorporation were signed and filed for the company. In addition, the three principals signed a pre-incorporation agreement. This agreement contained a provision governing the employment of the principals and recited that plaintiff and Achenbach would agree to sign a contract of employment whereby they would both devote full time to the corporation for a salary of $500 per week. The agreement further provided that the contract was to begin in December and last for six months. If the corporation failed to show a net profit at the end of three months, then receipt of the salaries would be deferred until such time as there was a net profit sufficient to pay the salaries; and continued employment was contingent on the approval of the board of directors. The employment agreements were never signed, nor were any other corporate documents, such as buy-sell agreements and corporate meeting minutes, that were drafted. It is undisputed, however, that the business opened its doors and operated despite the unsigned documents.

Plaintiff and Achenbach worked for Animas, earning and collecting their $500 per week salaries until May or June 1983. After that, both testified that their wages were deferred and that they continued working until August 1983. In August, plaintiff and Dr. Sergejev decided to terminate Achenbach's employment. Achenbach left and plaintiff took over as general manager.

Plaintiff continued to work for the corporation until the end of September, when the incident giving rise to this suit occurred. The manner in which plaintiff was injured was the subject of conflicting testimony. Plaintiff alleged that on September 23, 1983, he was working late at night, attempting to put an engine into a car, when the car slipped off a jackstand, crushing his hand. He then fell through a plate-glass window while attempting to run for help. Plaintiff gave timely notice of the accident

and received workmen's compensation benefits for approximately fifteen months until defendants stopped paying them. Defendants terminated payments of benefits based upon allegations of fraud concerning how plaintiff's injuries were incurred.

Phillip Holman worked for Animas and was with plaintiff on the night of plaintiff's injury. Holman, however, quit following plaintiff's injury. About a month later, Animas closed its doors. Holman arranged to purchase equipment from plaintiff to open his own shop. Plaintiff and Holman became embroiled in a dispute concerning the payment for this equipment. Plaintiff's wife removed some equipment from Holman's shop.

Holman informed defendants that the facts surrounding plaintiff's injuries did not occur as related by the plaintiff. Holman said that on the night the injuries occurred, he and plaintiff had been at a party and had been drinking. Plaintiff got into a fight with an individual concerning plaintiff's race car. After the party, plaintiff, still angry, returned to the garage and put his fist through the window. Based on Holman's information, defendants stopped paying compensation benefits.

Thereafter, plaintiff filed suit to compel payment of workmen's compensation benefits. After hearing the evidence, the trial court determined that plaintiff had neither an employment contract nor an average weekly wage. In light of this ruling, the court did not make findings concerning the other issues in the case, e.g., whether plaintiff was injured as a result of an accident arising out of and in the course of his employment or was injured by intentionally putting his fist through the window due to his frustration and anger resulting from his earlier fight.

Defendants requested findings of fact to the effect that: plaintiff's employment contract was for six months; plaintiff's employment contract was never renewed, either expressly or impliedly; Animas never took the required corporate action to extend or renew the contract; after June 1983, Animas never had sufficient income with which to pay plaintiff and plaintiff has no enforceable right to receive remuneration; and at the time of plaintiff's injury he had no wage and thus no basis for computing an average weekly wage. Based on these requested findings, defendants requested a conclusion to the effect that the possibility that plaintiff might be paid in the future was not a receipt of a wage within the contemplation of NMSA 1978, Section 52–1–20, citing *Gilliland v. Hanging Tree, Inc.*, 92 N.M. 23, 582 P.2d 400 (Ct.App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978).

The trial court, apparently relying upon *Gilliland*, adopted defendants' requested findings and conclusions of law with minor modifications. The court also adopted the additional conclusions that an average weekly wage could not be computed and that the case should be dismissed.

GILLILAND

We determine that *Gilliland* is not controlling in the instant case. *Gilliland* was a case factually similar to the matter before us, but with an important difference: plaintiff in *Gilliland* never earned a wage and there was never any monetary amount of remuneration discussed. In other respects, the cases are quite similar: plaintiffs in each case worked for corporations in which they owned approximately a one-third interest; both corporations expected to pay the workers when circumstances would permit; and, at the precise time of the accidents, neither worker was actually collecting a wage.

Our decision in *Gilliland* turned on the fact that there was no money rate at which the worker's services were being recompensed at the time of the accident. There was, accordingly, no average weekly wage within the meaning of the statute. Subsidiary facts were that a salary would not be paid until business improved to the "satisfaction" of the owners and that the business had always operated at a loss.

In this case, the parties had agreed upon a monetary rate at which plaintiff's services were to be recompensed at the time of the accident—$500 per week. It is true

that plaintiff was not actually receiving wages of $500 per week at the time of the accident, but it is undisputed that in fact, plaintiff had previously been paid and that at the time of his injuries, testimony indicated employees' wages were being deferred. Moreover, the corporate documents contained a specific formula indicating when wages would cease being deferred. In contrast to the factual situation in *Gilliland,* the present case does not contain nebulous standards such as the payment of salaries when "the business improved to the 'satisfaction' " of the owners. Hence, under the facts herein, there was evidence upon which to compute an average weekly wage for plaintiff. Finally, here, there was evidence that accounts receivable were collected when Animas ceased doing business. Plaintiff claimed these were paid to him in partial satisfaction of his deferred wages.

There was evidence which conflicted with plaintiff's claim, e.g., defendants contended that the accounts receivable were collected as part of an agreement to wind down the corporation. However, without specific court findings as to whether plaintiff was entitled to payment of accounts receivable in partial satisfaction of deferred wages, it is necessary to remand this cause for adoption of further specific findings to resolve the key factual issues which have not yet been addressed.

COURT'S FINDINGS OF FACT

Defendants do not mention *Gilliland* in their brief. Instead, they seek to uphold the trial court's findings, using those findings to support the alternative theory that plaintiff was a gratuitous worker after June 1983. *See, e.g., Jelso v. World Balloon Corp.,* 97 N.M. 164, 637 P.2d 846 (Ct.App.1981). Defendants dispute that there was a contract of employment, asserting that there was no written contract, that continued employment was contingent upon board approval and that plaintiff worked only in order to further his own interests. Even though they maintain an extension was never approved, the undisputed testimony indicates the contrary.

The trial court found that plaintiff's employment contract was for six months, that plaintiff's employment contract was never expressly or impliedly renewed, and that Animas never took the required corporate action to extend or renew the contract. The pre-incorporation agreement referred to an initial term of six months for the employment of the principals; it further provided that continued employment was contingent upon the approval of the board. Two of the three board members testified, however, that they continued to work after the initial six-month period and that their wages were deferred during this period; the third board member did not testify. At a meeting in August, it was decided that Achenbach would cease employment while plaintiff would continue. There was nothing to contradict the inference from this evidence that the contracts were renewed under the provision allowing for deferral of wages. Moreover, it does not appear that any required corporate action was missing. *See Jennings v. Ruidoso Racing Association,* 79 N.M. 144, 441 P.2d 42 (1968).

Defendants' contention that the trial court's dismissal can be supported on a different basis, that plaintiff was a gratuitous employee, is flawed. Without evidence to support the trial court's findings of fact supporting a conclusion (not made) that plaintiff was a gratuitous employee, we cannot affirm on that ground. The trial court did not adopt an express finding determining that plaintiff was a gratuitous worker and its conclusions of law were not premised on such theory. A judgment cannot be upheld on appeal unless the conclusion upon which it rests finds support in one or more findings of fact. *Romero v. J.W. Jones Construction Co.,* 98 N.M. 658, 651 P.2d 1302 (Ct.App.1982).

ISSUE OF WORK-RELATED ACCIDENT

Defendants urge affirmance because the trial court was right for the wrong reason. *See H.T. Coker Construction Co. v. Whitfield Transportation, Inc.,* 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). Defendants

contend that the right reason is that plaintiff was not injured in a work-related accident; rather, he injured himself intentionally, out of anger stemming from an earlier personal argument. Defendants contend, inter alia, that their Exhibits A, B and C indicate that plaintiff was not at work on the day of the alleged injury and that Animas had insufficient net profits to pay any wages to plaintiff. Defendants also argue that there was substantial evidence in the record indicating that plaintiff neither received nor was entitled to any wages at the time of his alleged work-related accident. Defendants assert that the court's findings should be liberally construed in support of the judgment if a fair consideration justifies the result reached by the trial court. *See H.T. Coker Construction Co. v. Whitfield Transportation, Inc.*

These contentions overlook the fact that the trial court's decision was rendered on a narrow and specific basis, i.e., that plaintiff, based on *Gilliland,* was not receiving a wage within the statutory meaning at the time of his injury and that an average weekly wage cannot be computed. Moreover, the trial judge made no findings of fact on the key issue of whether plaintiff was injured in the course and scope of his employment, stating that he would rule on this contention in the event that an appellate court reversed the ruling as to the absence of an employment agreement and the lack of means of calculating payment of an average weekly wage. Hence, the issue on appeal is not substantial evidence but the propriety of the court's limited ruling.

Defendant asserts that the failure of the trial court to adopt plaintiff's requested findings regarding his employment and injury constitutes findings against plaintiff in these matters. This contention is negated by the trial court's express reservation of ruling and by our holding regarding the trial court's interpretation of *Gilliland. See Ledbetter v. Webb,* 103 N.M. 597, 711 P.2d 874 (1985).

When the findings adopted by the trial court fail to resolve the basic issues that are in dispute, an appellate court may remand for adoption of requisite additional findings. *Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976); *see also State ex rel. Human Services Dept. v. Coleman,* 104 N.M. 500, 723 P.2d 971 (Ct.App.1986). A trial court, if requested, must find one way or the other on a material issue of fact. *Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978); *Sanchez v. Sanchez,* 84 N.M. 498, 505 P.2d 443 (1973). Since the evidence was conflicting as to whether plaintiff was in fact injured in the course and scope of his employment, and the trial court erroneously concluded that an average weekly wage could not be computed, it did not reach the issue of whether plaintiff was disabled from a job-related accident. Hence, it is necessary to remand the cause for the adoption of additional findings and conclusions of law. Accordingly, we reverse and remand with instructions to the trial court to adopt specific findings of fact and conclusions of law on the circumstances of the accident and other material issues raised by the parties and for entry of judgment consistent therewith.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

733 P.2d 1313

HARPER OIL COMPANY,
Plaintiff-Appellant,

v.

YATES PETROLEUM CORPORATION, Yates Drilling Company, Abo Petroleum Corporation, and Myco Industries, Inc., Defendants-Appellees.

No. 15878.

Supreme Court of New Mexico.

Feb. 20, 1987.

Rehearing Denied March 23, 1987.

Hinkle, Cox, Eaton, Coffield & Hensley, Harold L. Hensley, Jr., Michael F. Millerick, Thomas D. Haines, Roswell, for plaintiff-appellant.

Dickerson, Fisk & Vandiver, Chad Dickerson, Rebecca Dickerson, Artesia, for defendants-appellees.

OPINION

SCARBOROUGH, Chief Justice.

Harper Oil Company (Harper) brought suit against Yates Petroleum Corporation, Yates Drilling Company, ABO Petroleum Corporation, and MYCO Industries, Inc. (Yates), seeking declaratory judgment, accounting and punitive damages. After trial, judgment was entered in favor of Yates. Harper appeals. We affirm.

Harper, Yates, Phillips Petroleum Co. (Phillips), and other parties entered into a joint operating agreement for the purpose of drilling oil wells. Although the joint operating agreement was dated December 18, 1978, it was not executed at that time. Rather, it was executed by each party on the date of the acknowledgment to that party's signature on the agreement. Negotiations with each party concerning the details of the agreement continued until the last party (Phillips) executed it and returned it to Yates on January 31, 1979. Harper executed the agreement and returned it to Yates on January 25, 1979.

Yates commenced drilling the initial well on January 14, 1979, because it was confident that all parties would in fact execute the joint operating agreement. Phillips insisted upon an amendment to the joint operating agreement whereby Phillips retained the option to either participate in subsequent wells or assign its interest in subsequent wells to Yates, reserving a royalty interest. Harper insisted upon an amendment specifically limiting its interest in "the initial test well or subsequent wells" to 7.608696% of 87.5%.

Upon successful completion of the initial well, Yates earned certain acreage interests of Phillips and other contributing parties.[1] Yates bore the entire burden of the cost necessary to earn the Phillips interest. Harper did not bear any portion of such cost. Phillips elected not to participate in subsequent wells and assigned a further interest to Yates pursuant to the terms of the Phillips amendment.

Harper contends that the joint operating agreement gave Harper the right to share pro-rata in the interest that was assigned to Yates by Phillips pursuant to the Phillips amendment. The trial court concluded that the joint operating agreement was ambiguous on this point.

The issues presented by this appeal are: (1) Whether the trial court's findings of fact numbers eighteen through twenty, twenty-two, and thirty-three are supported by substantial evidence; and (2) Whether the trial court's conclusions of law are supported by the findings of fact.

The function of an appellate court is to review evidence considered by a trial court, not to weigh it; if there is "substantial evidence" (i.e., evidence which a reasonable mind accepts as adequate to support a conclusion) to support the trial court's findings, the findings shall not be disturbed. *Sandoval v. Dep't of Employment Sec.*, 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). If the findings of fact are supported by substantial evidence, and if the findings of fact support the conclusions of law upon which the judgment rests, then the judgment will be sustained on appeal. *See Watson Land Co. v. Lucero*, 85 N.M. 776, 517 P.2d 1302 (1974).

There was substantial evidence to support challenged finding number eighteen. Finding number eighteen states: "Yates did not intentionally withhold any information regarding the terms of the Phillips Farmout Agreement from Harper." The trial court heard evidence that there was no conscious decision on the part of Yates' management to withhold information from Harper. The trial court also heard evidence that Yates was understaffed at the time Harper requested information concerning the Phillips amendment. Based upon this evidence, the trial court could have reasonably found that Yates did not intentionally withhold information from Harper.

There was substantial evidence to support challenged finding number nineteen. Finding number nineteen states: "Harper's decision to enter into the Operating Agreement was not influenced nor induced by Harper's failure to know every term of the Phillips Farmout Agreement." Yates offered Harper the opportunity to participate in acquiring Phillips farmout acreage. Harper understood that its participation in subsequent wells was tied to its participation in the farmout on the initial well. Moreover, Harper insisted that the joint operating agreement be amended to limit Harper's interest in the initial test well or subsequent wells to 7.608696% of 87.5%. Based upon this evidence, the trial court could have reasonably found that Harper's decision to enter into the joint operating agreement was not influenced nor induced by Harper's failure to know every term of the Phillips amendment.

1. When one party to a joint operating agreement of this kind agrees to bear more than its share of costs on a particular well in exchange for acreage interests of other parties, the exchange is referred to as a "farmout." Webster's Third New International Dictionary 824 (1976) defines "farmout" as "a sublease granted by an oil company to another for drilling on partially proven ground."

There was substantial evidence to support challenged finding number twenty. Finding number twenty states: "Harper's failure to know of the full terms of the Phillips Farmout Agreement was not caused by any intentional, fraudulent, reckless or negligent conduct on the part of Yates." The same evidence which supports finding number eighteen supports finding number twenty.

Challenged finding number twenty-two states: "The acreage farmed out by Phillips at the time of the drilling of subsequent wells was not an 'acreage contribution' to the drilling of such subsequent wells, but was a part of Phillips' contribution to the drilling of the initial test well." This finding should be read in conjunction with article VIII(C) of the joint operating agreement, a provision which Harper alleges was breached by Yates. Article VIII(C) contains the following pertinent language:

> While this agreement is in force, if any party contracts for a contribution [in the form of acreage toward the drilling of a well], the party to whom the contribution is made shall promptly tender an assignment of the acreage, without warranty of title, to the Drilling Parties in the proportions said Drilling Parties shared the cost of drilling the well. If all parties hereto are Drilling Parties and accept such tender, such acreage shall become a part of the Contract Area and be governed by the provisions of this agreement.

There was substantial evidence to support finding numer twenty-two. The trial court heard evidence that the contribution clause would only apply when an individual not a party to the joint operating agreement, but who owned land adjacent to the contract area, offered to make an acreage contribution. Moreover, the trial court relied on *Superior Oil Co. v. Cox,* 307 So.2d 350 (La.1975), where the Louisiana Supreme Court interpreted a similar clause to apply only to contributions "by outsiders—those not party to the joint operating agreement." *Id.* at 356.

Challenged finding number thirty-three states: "Phillips was not a 'nonconsenting' party under Article VI.B(2) of the Operating Agreement in the drilling of any of the subsequent wells." Article VI(B)(2) is entitled "[Subsequent] Operations by Less than All Parties" and states in part:

> If any party receiving such notice as provided in Article VI.B.1 or VI.E.1 elects not to participate in the proposed [subsequent] operation, then ... the party or parties giving the notice and such other parties as shall elect to participate in the operation shall, within sixty (60) days after the expiration of the notice period of thirty (30) days * * * actually commence work on the proposed operation and complete it with due diligence. Operator shall perform all work for the account of the Consenting Parties * * *
>
> If less than all parties approve any proposed operation, the proposing party, immediately after the expiration of the applicable notice period, shall advise the Consenting Parties of (a) the total interest of the parties approving such operation, and (b) its recommendation as to whether the Consenting Parties should proceed with the operation as proposed. Each Consenting Party, within forty-eight (48) hours ... after receipt of such notice, shall advise the proposing party of its desire to (a) limit participation to such party's interest as shown on Exhibit "A", or (b) carry its proportionate part of Non-Consenting Parties' interest.

By finding that Phillips was not a "Non-Consenting Party" under article VI(B)(2), the trial court in essence found that Harper was not entitled to participate in acreage farmed out to Yates pursuant to the Phillips amendment.

Substantial evidence supported finding number thirty-three. The Phillips amendment is substantial evidence that Phillips bargained to exclude itself from the operation of article VI(B)(2). The Phillips amendment provides in pertinent part:

> 3. In the event Yates shall elect to drill any additional well after completion of the initial well, a substitute well or the option well as set out in Articles VI,

XV–A, or XV–B of the Operating Agreement, it shall immediately notify Phillips in writing of such election and shall furnish Phillips [certain enumerated information].

Phillips shall have fifteen (15) days after the receipt of the notice of Yates' election to drill such well or wells, and the information set out above, to elect whether to join Yates in the drilling of such well or wells with a twenty-five percent (25%) interest or to relinquish its right to join in such well or wells.

Failure of Phillips to respond to Yates' notice of election to drill within fifteen (15) day period set out above shall be deemed an election not to join in the drilling of such well. In the event Phillips shall not elect to join Yates in the drilling of any such well, Phillips shall assign to Yates its interest in the proration unit, and shall reserve to itself an overriding royalty of 3.75% of all production allocated to such proration unit.

Since Phillips bargained to exclude itself from the operation of article VI(B)(2), it was not a "Non-Consenting Party" within the contemplation of that provision.

Harper also attacks the trial court's conclusions of law. They state respectively:

1. The Operating Agreement as executed by the parties is ambiguous.

2. Reading the Operating Agreement as a whole, including the conditions by Harper and Phillips, and considering the extrinsic evidence of the parties' intention, Yates did not breach the Operating Agreement.

3. Harper has not been damaged by Yates' conduct and is not entitled to damages.

We agree that the joint operating agreement is ambiguous. Whether ambiguity exists in an agreement is a matter of law. *Young v. Thomas,* 93 N.M. 677, 679, 604 P.2d 370, 372 (1979). When the language of a contract can be fairly and reasonably construed in different ways, the contract is ambiguous. *Vickers v. N. Am. Land Devs., Inc.,* 94 N.M. 65, 68, 607 P.2d 603, 606 (1980). Articles VI and VIII, read in conjunction with the Harper and Phillips amendments, are ambiguous. Findings of fact numbers thirteen (referring to the Harper amendment), fifteen (referring to the manner in which the joint operating agreement was executed), sixteen (referring to the Phillips amendment), twenty-two, and thirty-three support conclusion of law number one.

We also agree that Yates did not breach the joint operating agreement. In view of the fact that Articles VI and VIII are ambiguous, the trial court reasonably concluded on the basis of all the evidence that Harper was not entitled to participate in any Phillips farmout. Findings of fact eleven (referring to a statement that Harper did not wish to participate in the farmouts), thirteen, fifteen, thirty-three, and thirty-four (referring to the fact that Harper's interest in all wells is consistent with the terms of the Harper amendment) support conclusion of law number two. Conclusion of law number three follows from conclusion of law number two.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and STOWERS, J., concur.

733 P.2d 1316

SLIDE-A-RIDE OF LAS CRUCES, INC., et al., Plaintiffs-Appellants,

v.

CITIZENS BANK OF LAS CRUCES, Defendant-Appellee.

No. 16472.

Supreme Court of New Mexico.

March 4, 1987.

Rehearing Denied March 25, 1987.

Anthony F. Avallone, Glenn B. Neumeyer, Law Systems of Las Cruces, P.A., Las Cruces, for plaintiffs-appellants.

Lloyd O. Bates, Jr., Kyle Gesswein, Las Cruces, for defendant-appellee.

OPINION

WALTERS, Justice.

On January 21, 1981, the Small Business Administration authorized a $150,000 loan to plaintiff Slide-A-Ride of Las Cruces, Inc. (Slide) for the purchase of land and construction expenses. Defendant Citizens Bank of Las Cruces, Inc. (Citizens) an approved lender with the SBA, agreed to make an interim loan to Slide to be followed by a permanent loan guaranteed by the SBA. While construction on the ride was in progress, Citizens advanced $66,250 directly to Slide's contractor. Slide alleges this was done without its approval, without a joint payee check, and without a certificate that the work had been completed. According to Slide, the advancement was in contravention of the Slide-Citizens contract, and the contractor was not entitled to payment.

Slide sued Citizens, alleging breach of contract and breach of fiduciary duty. It was allowed to amend its original complaint to include corporate shareholders, Earl and Cornelia Nissen (Nissens) and Sydney and Marilynn Gould (Goulds), as individual plaintiffs. Slide then asked to amend its complaint again to include two additional claims of relief based upon negligence and bad faith. The trial court denied the second motion to amend and dismissed the claims of the individual plaintiffs, which rulings the plaintiffs appeal.

Citizens cross-appeals the trial court's denial of summary judgment to it on Slide's claims of breach of contract and breach of fiduciary duty.

It is pertinent to resolution of the appeal and cross-appeal to relate that prior to the instant case, Citizens had filed suit for payment on a note which had been guaranteed by the Nissens and Goulds. Those defendants answered and counterclaimed against the bank, alleging breach of contract and breach of fiduciary duty. Nissens and Goulds then amended their answer, omitting the counterclaims which had been included in their first answer.

Summary judgment was granted to Citizens on its claim against Nissens and Goulds, and the defendants appealed to this Court. By decision, we affirmed the trial court's ruling.

Citizens now maintains that either the doctrine of res judicata or the failure to prosecute a compulsory counterclaim bars Slide from bringing this lawsuit, and that dismissal of the individual plaintiffs' claims was correct.

We affirm all of the trial court's rulings.

I.

We agree with Citizens that the counterclaims set forth in Nissens' and Goulds' first answer in the first lawsuit were compulsory counterclaims. As shareholder-guarantors in that case they had the opportunity to, and in fact, did raise and later abandon the same claims they attempted to assert in this matter.

SCRA 1986, Civ.P.R. 1–013(A) [formerly NMSA 1978, Civ.P.R. 13(a)] in pertinent part provides:

> A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *. (Emphasis added.)

The purpose of Rule 1–013 is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Heffern v. First Interstate Bank,* 99 N.M. 531, 533, 660 P.2d 621, 623 (Ct.App.1983) (quoting *Southern Constr. Co., Inc. v. Pickard,* 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962)). Rule 1–013 is "particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." *Southern Constr.,* 371 U.S. at 60, 83 S.Ct. at 110.

In New Mexico, a transaction or occurrence is the same if a "logical relationship" exists between the opposing par-

ties' claims. *Heffern,* 99 N.M. at 534, 660 P.2d at 624. A logical relationship will be found if both the claim and counterclaim have a common origin and common subject matter. *Id.*

The counterclaims in the previous case which Nissens and Goulds alleged, and the claim which the bank there alleged, both sprang from a common origin, and concerned a common subject matter. Because there is a logical relationship between Citizens' claim of non-payment and Nissens' and Goulds' counterclaims concerning excuse from payment and resulting damages, the counterclaims were compulsory in the first action. They could not be raised in a later action. *See id.*

It is not disputed that in the Nissens' and Goulds' amended answer they did not set forth the compulsory counterclaims which had been included in the answer first filed. Slide contends here, however, without citation to any authority, that the counterclaims raised by Nissens and Goulds in their first answer in the previous case are still pending.

SCRA 1986, Civ.P.R. 1–015(E) [formerly NMSA 1978, Civ.P.R. 15(e)], requires that "[i]n *every* * * * answer * * * amendatory or supplemental, the party *shall* set forth in one * * * pleading all matters * * * which may be necessary to the proper determination of the action * * *." (Emphasis added.)

In *Biebelle v. Norero,* 85 N.M. 182, 510 P.2d 506 (1973), we held that the failure to incorporate a previously raised counterclaim in an amended answer is not grounds for dismissal of the counterclaim if the counterclaim actually has been litigated. But *Biebelle* is not helpful to the individual plaintiffs here because the counterclaims asserted in their original answer in the first suit were never litigated. Plaintiffs' contention that the counterclaims are pending is not supported by any law that we have been able to find. Because they failed to incorporate their compulsory counterclaims in their amended answer and the counterclaims were not actually litigated, the Nissens and Goulds are deemed to have abandoned them. *Cf. Biebelle v. Norero. See Griego v. Roybal,* 79 N.M. 273, 442 P.2d 585 (1968).

We affirm the dismissal of the individual plaintiffs' claims in the instant suit.

II.

Slide argues next that the trial court abused its discretion in denying leave to amend its complaint a second time in this case.

Slide filed suit on August 14, 1984, and Citizens answered on September 20, 1984. Almost two years later, on April 1, 1986, Slide filed its motion to amend the complaint to allege the two additional claims of relief. At that time discovery was almost complete, a pretrial order had been entered, and the case had been set for trial three times. The trial court, at that time, had also brought the entire pleadings in the earlier case into the file of the pending case.

Under SCRA 1986, Civ.P.R. 1–015(A) [formerly NMSA 1978, Civ.P.R. 15(a)], once a responsive pleading has been served, amendments to pleadings will be allowed only by leave of court. Although recognizing that amendments to pleadings are favored, and should be allowed when justice so requires, *id., Camp v. Bernalillo County Medical Center,* 96 N.M. 611, 633 P.2d 719 (Ct.App.1981), we also acknowledge the rule that denial of a motion to amend will be reversed only upon a showing of clear abuse of discretion. *See, e.g., State v. Electric City Supply Co.,* 74 N.M. 295, 393 P.2d 325 (1964); *Newman v. Basin Motor Co.,* 98 N.M. 39, 644 P.2d 553 (Ct.App.1982). Nothing has been offered by Slide to explain why justice required allowance of the amendment, or in what manner the trial court abused its discretion. Simply alleging an abuse of discretion does not make it so.

Considering the time that had elapsed between the filing of the complaint and the filing of the second request to amend, and the history of the first case, we are satisfied that the trial court did not abuse its

discretion in denying the second amendment. *See Pope v. Lydick Roofing Co.,* 81 N.M. 661, 472 P.2d 375 (1970).

III.

On cross appeal, Citizens raises the doctrine of res judicata as a bar to Slide's prosecution of this lawsuit.

Res judicata is applicable when the parties to a first and second lawsuit are the same or are in privity, the cause of action is the same in both suits, and there has been a final decision on the merits in the first suit. *Myers v. Olson,* 100 N.M. 745, 676 P.2d 822 (1984). Ordinarily, the doctrine of res judicata will preclude a subsequent claim if there has been an opportunity to fully litigate issues arising out of that claim. *Id.*

Citizens takes the position that privity of parties occurs when a person individually or cooperatively controls the litigation of the first lawsuit. *See Meeker v. Walker,* 80 N.M. 280, 454 P.2d 762 (1969). That contention rests upon its perception that the individual stockholders, who were the defendants in the previous action, controlled the instant suit to such an extent that they placed the stockholders and the corporation in privity for purposes of res judicata. The record does not support that argument. *Cf. Meeker v. Walker.*

There was substantial evidence to negate any claim that the corporation controlled the litigation in the first lawsuit or that the individual stockholders controlled the litigation in this suit. Indeed, the sequence of events in both lawsuits would indicate the opposite. We note that in the previous action, Slide's request to intervene was denied; in the present suit the individual stockholders, as party plaintiffs, were dismissed. The requirement that the parties to the first lawsuit and the second lawsuit be the same or in privity has not been met, and the causes of action are not the same. Consequently, the doctrine of res judicata will not apply against the plaintiffs here.

The trial court did not err in denying summary judgment in favor of Citizens on grounds of res judicata.

IV.

Although stated as five additional points, Citizens really urges that summary judgment in its favor should have been granted because there was no issue of material fact regarding Slide's authorization of payment by the bank to Slide's contractor.

In our role as a reviewing court, we cannot hold as a matter of law that the trial court incorrectly determined that the pleadings, depositions, and affidavits, viewed most favorably in Slide's favor, raised no conflict in that material issue of fact. *See Coe v. City of Albuquerque,* 81 N.M. 361, 467 P.2d 27 (1970). We affirm the trial court's denial of the bank's motion for summary judgment.

The case is remanded for further proceedings on Slide's complaint. IT IS SO ORDERED.

STOWERS and RANSOM, JJ., concur.

[redacted]

733 P.2d 1322

NEW MEXICO ENVIRONMENTAL IMPROVEMENT DIVISION,
Petitioner-Appellee,

v.

CLIMAX CHEMICAL COMPANY,
Respondent-Appellant.

No. 9136.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Certiorari Denied March 5, 1987.

Paul G. Bardacke, Atty. Gen., Duff H. Westbrook, Sp. Asst. Atty. Gen., Santa Fe, for petitioner-appellee.

Paul M. Bohannon, Deborah R. Wollen, Albuquerque, for respondent-appellant.

OPINION

JAMES T. MARTIN, District Judge.

The New Mexico Environmental Improvement Division (EID) requested that

Climax Chemical Company (Climax) allow one of its field inspectors to go into the Climax plant in Lea County to inspect certain portions of the premises for compliance with the Hazardous Waste Act. Climax permitted an inspection of part of its premises but denied access to other portions, claiming that the part of the plant to which the inspector was denied access was not subject to the provisions of the Act or the rules and regulations of EID. Climax took the position that entry to those portions of the plant would be denied unless EID first obtained a search warrant.

EID thereafter filed an application for an inspection order or an administrative search warrant in the District Court of Santa Fe County. The verified application was made by a field inspector of the Hazardous Waste Section of EID, who was also an environmental scientist. The application stated, in part, that the field inspector had attempted to inspect Climax's acid production facilities on which hazardous waste is generated, treated, stored or disposed of; that he was denied access to certain portions of the facilities; that he had observed a large puddle of liquid from an undetermined source or sources; that the puddle had been tested with indicator (litmus) paper which indicated that the liquid was at a pH of less than 2.0, below the threshold for definition of corrosive hazardous waste; and that the point of generation and method of control of these wastes needed to be verified in order to ensure that the Hazardous Waste Act and associated regulations were being complied with. The district court found that probable cause had been shown by the verified application for issuance of an administrative search warrant. The district court, however, directed that Climax be informed of the issuance of the warrant prior to its service to afford Climax sufficient time to challenge the warrant.

Thereafter, Climax filed a motion to quash the search warrant alleging that the premises sought to be inspected were not subject to regulation and that there was no authority for the district court to issue a "walk-through" search warrant. In the alternative, Climax filed a motion to dismiss or to transfer for lack of proper venue in Santa Fe County.

An evidentiary hearing was held, and the district court again determined that probable cause had been shown for issuance of an administrative search warrant. It was also found that EID, as a state agency, was a resident of Santa Fe County; that the issuance of the search warrant was a transitory type of action, and that venue was, therefore, proper in Santa Fe County.

The Hazardous Waste Act, NMSA 1978, Sections 74–4–1 to –13 (Repl.1986), provides, in part, that its purpose "is to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants." The Act requires registration and issuance of a permit by any person producing, storing, or disposing of hazardous waste. Climax admits that it manufactures hydrochloric acid; that it is registered with the EID and holds a permit. Hydrochloric acid, in its pure state, or if diluted when the measured pH is less than 2.0, is classified as a hazardous waste. N.M. Hazardous Waste Management Reg. 201.B.3.

The Act further provides that the owner of a regulated premises shall permit entry for an inspection to an EID representative at reasonable times to any establishment or place where hazardous wastes are or have been generated, stored, or treated. § 74–4–4.3. There is no provision in the Hazardous Waste Act for issuance of an inspection order or administrative search warrant. However, a nonconsensual warrantless administrative inspection of business premises can only be made in very limited circumstances, which are not present in this proceeding. *See State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co.*, 91 N.M. 125, 571 P.2d 117 (1977). In the event consent to enter and inspect is denied, an administrative search warrant is required. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). EID's

statutory right of entry provides EID with sufficient authority for obtaining such a warrant. *See Bunker Hill Co. Lead & Zinc Smelter v. United States Environmental Protection Agency,* 658 F.2d 1280 (9th Cir.1981) (right of entry in Clean Air Act provides sufficient authority for obtaining an inspection warrant); *Outboard Marine Corp. v. Thomas,* 610 F.Supp. 1234 (N.D.Ill.1985) (where statute provides right of entry but no mechanism to accomplish it, an ex parte administrative search warrant may be used); *In Re Order Pursuant to Section 3013(d) RCRA,* 550 F.Supp. 1361 (W.D.Wash.1982) (EPA may obtain ex parte warrant under provisions identical to those in the Hazardous Waste Act). Obtaining a search warrant, as was done in this case, is the proper procedure. *See State v. Galio,* 92 N.M. 266, 587 P.2d 44 (Ct.App.1978).

At the hearing on the motion to quash, Climax produced evidence that its product was manufactured in a fluidized bed reactor. The liquid is then circulated through a wet scrubber into a tank, from which it is then pumped to a sump. It is then transferred from there to the area in which it is to be impounded. Climax maintained that the generating unit was a totally enclosed treatment facility, as defined in the EID regulations, and, therefore, it was exempt from the regulations until the product exited the facility. Climax conceded that the waste would be considered as having exited the enclosed facility at the sump area and in the impoundment tanks. It then argued that this was the only area which could be inspected. In other words, Climax claims that if EID cannot regulate the area, it cannot inspect it. This contention overlooks the provisions of Section 74-4-4.3 which allow EID to enter "any establishment or other place" where hazardous wastes are or have been generated, stored, or treated.

In addition, even though Climax admits engaging in a regulated activity, it is its contention that it is entitled to identify the areas in which hazardous wastes are subject to regulation, thereby requiring the state to take Climax's word on this point. This position of Climax is without merit. Regardless of whether each specific part of the premises is subject to regulation, the statute clearly allows an inspection of all areas where the hazardous waste is being generated, whether it is in an enclosed facility or not. In an inspection, pursuant to the Hazardous Waste Act, as with a federal Occupational Safety and Health Act inspection, "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). If the EID did not have the right to have a "walk-through" inspection of the areas in which hazardous wastes are being generated, stored, or treated, there would be no way that it could reasonably determine whether its regulations were being violated, thus frustrating the purpose of the Hazardous Waste Act.

During the limited inspection which was permitted by Climax, a litmus paper test was made of some liquid waste which was found to have a corrosivity that would bring it within the definition of a hazardous waste. Climax objected to evidence concerning this test on the grounds that a litmus paper test is not recognized by the EID regulations. There was evidence submitted that the approved method of testing is with a pH meter, and that the use of a litmus paper test had been proposed but not adopted by regulation. The thrust of this argument is that EID failed to establish probable cause for the issuance of the administrative search warrant.

Probable cause in the criminal law sense is not required before an administrative search warrant may be issued. *Marshall v. Barlow's, Inc.* The test for administrative probable cause based on specific evidence is whether the application is based on a reasonable belief that a violation may exist on the premises. *See Marshall v. Horn Seed Co.,* 647 F.2d 96 (10th Cir.1981). *See also West Point-Pepperell, Inc. v.*

Donovan, 689 F.2d 950 (11th Cir.1982) (the application must contain reasonable evidence sufficient to support a suspicion of a violation). Generally, applications for search warrants are tested by much less rigorous standards than those governing the admissibility of evidence at trial, and probable cause may be determined on the basis of evidence which would not be legally competent at trial. *See State v. Perea,* 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973). For example, under the more stringent standards applicable to a criminal search warrant for controlled substances, a sufficient basis for a finding of probable cause has been supplied by the statement of an unidentified informant that he was able to identify heroin because he was a heroin addict. *State v. Cervantes,* 92 N.M. 643, 593 P.2d 478 (Ct.App.1979).

In the instant case, the district court was presented with the sworn statement of an environmental scientist that the litmus paper test indicated that the liquid in the puddle had a pH of less than 2.0 and was a corrosive hazardous waste. This evidence supplied a sufficient reasonable belief that the material was a hazardous waste. The fact that the litmus paper test may be inadequate for other purposes is immaterial.

The presence of a large puddle of hazardous waste from an undetermined source also provided a plausible basis for a belief that there may be a violation of the Hazardous Waste Act at Climax's facilities. Therefore, the application provided probable cause for the issuance of an administrative search warrant.

The trial court found that venue would lie in Santa Fe County, and we agree. The right to go upon and inspect real property, buildings, or premises located thereon does not mean that the proceeding involves title to land or an ownership interest in land which would require institution of the action in the county where the land is located. NMSA 1978, § 38-3-1(D) (Cum.Supp.1986); *Naumburg v. Cummins,* 98 N.M. 274, 648 P.2d 313 (1982).

This action is a transitory action and venue is controlled by Section 38-3-1(A), which allows an action to be brought in a county where the plaintiff resides. Climax has offered neither evidence nor argument suggesting that EID does not have its principal offices and a residence for venue purposes in Santa Fe County. Climax has failed to show that venue in the District Court of Santa Fe County was improper.

The judgment of the trial court in issuing the administrative search warrant and in refusing to quash the same is affirmed.

IT IS SO ORDERED.

HENDLEY, C.J.,. and TRUMAN, J., concur.

733 P.2d 1325

Dennis R. BOUCHER and Cindy Boucher, Plaintiffs-Appellants,

v.

FOXWORTH-GALBRAITH LUMBER COMPANY, a foreign corporation, Defendants-Appellees.

No. 8116.

Court of Appeals of New Mexico.

Dec. 30, 1986.

Certiorari Denied March 5, 1987.

Roy G. Hill, Smalley & Hill, Deming, for plaintiffs-appellants.

Frederick H. Sherman, Sherman and Sherman, P.C., Deming, for defendants-appellees.

OPINION

HENDLEY, Chief Judge.

This tort appeal has been pending on our docket and ready for submission since January of 1985. In August of 1986, upon the recommendation of, and with the assistance of the State Bar of New Mexico, which assistance is greatly appreciated, this Court adopted an experimental plan pursuant to which cases would be assigned to advisory committees of experienced attorneys. Pursuant to our order adopting the plan, once the advisory committee rendered an opinion, that opinion would be served on the parties with an order to show cause why the opinion should not be adopted as the opinion of the Court. The parties would then have the opportunity to submit response memoranda to the Court.

This case was submitted to an advisory committee and the parties were so notified. That committee rendered a unanimous opinion. The parties were notified of the opinion and of their right to submit response memoranda. No response memoranda have been filed and the time for such filing has expired. This Court has considered the transcript and briefs in this case, together with the opinion of the advisory committee. It is the decision of this Court that the result of the opinion of the advisory committee should be adopted. Our reasoning follows.

Plaintiffs Dennis R. Boucher and Cindy Boucher sued Defendant Foxworth-Galbraith Lumber Company, a foreign corporation. Suit was based upon two legal theories. Count I was a theory of invasion of privacy. Count II was a theory of abuse of process. The trial court dismissed both counts. Bouchers appeal. On appeal, they contest only the dismissal of their invasion of privacy theory.

We affirm.

Foxworth sought dismissal of the complaint based upon absolute privilege. In reaching its decision, the trial court reviewed, in addition to the complaint, the district court record in Cause No. CV-82-166 in the District Court of Luna County. Thus, this is technically an appeal from a grant of summary judgment. *Tompkins v. Carlsbad Irrigation District,* 96 N.M. 368, 630 P.2d 767 (Ct.App.1981).

Foxworth complains on appeal that Bouchers failed to order the record in Cause No. CV-82-166 for inclusion in the record on appeal. We agree, and find such failure fatal to a review of the trial court's decision. *Richardson Ford Sales v. Cummins,* 74 N.M. 271, 393 P.2d 11 (1964), is so much like this case that we adopt much of the language therein, omitting the citations and paraphrasing only to refer to current rules and the facts of this case. *Cummins* was also a motion to dismiss, treated as a summary judgment because the trial court considered proceedings in two prior cases. What was said in *Cummins* is equally applicable here:

The facts necessary to present a question for review by an appellate court are established only through the record on appeal as provided in NMSA 1978, Civ.App. Rules 7 and 8 (Repl.Pamp.1984), and NMSA 1978, Recording of Judicial Proceedings Rule 2 (Repl.Pamp.1983). Any fact

not so established is not before the Court on appeal; nor will we take judicial notice of proceedings in a lower court. We cannot be expected to originally search the records of the various lower courts.

We, therefore, do not have before us the proceedings of the case which apparently formed the basis of the trial court's disposition of this case by summary judgment. Absent the record of those facts, no question is presented to this Court for review. *Cummins.*

Accordingly, we affirm.

IT IS SO ORDERED.

This Court acknowledges the aid of Attorneys Carl J. Butkus, Mario E. Occhialino, and Thomas J. McBride in the preparation of this opinion. These attorneys constituted an advisory committee selected by the Chief Judge of this Court and this Court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of work submitted.

ALARID and MINZNER, JJ., concur.

733 P.2d 1327

MONCOR TRUST COMPANY, Personal Representative of Cheryl Flynn, Deceased, on Behalf of Robert Joshua FLYNN and Maria Elana Flynn, Minors, Plaintiff-Appellant,

v.

Paul A. FEIL, M.D. and Argia Ciccarelli and William L. Merrill, Joint Special Administrators of the Estate of Stephen Goodman, Deceased, Defendants-Appellees.

No. 8469.

Court of Appeals of New Mexico.

Jan. 27, 1987.

Certiorari Denied March 5, 1987.

William G. Gilstrap, William G. Gilstrap, P.C., Albuquerque, for plaintiff-appellant.

Margo J. McCormick, Alice Tomlinson Lorenz, Miller, Stratvert, Torgerson & Brandt, P.A., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Chief Judge.

Plaintiff Moncor Trust Company, as personal representative of the estate of Cheryl Flynn, deceased, appeals from an order granting defendants' motion to dismiss its wrongful death action. The single issue presented herein involves the construction of NMSA 1978, Section 41–5–13 (Repl. 1986), and whether the tolling provision for minor children contained in the statute of limitations for medical malpractice is applicable to decedent's surviving children. We affirm.

Decedent underwent an operation to implant a pacemaker in an operation on February 20, 1978, in El Paso, Texas. Thereafter, she was treated by Drs. Paul A. Feil and Steven Goodman in Deming, New Mexico, for heart problems. On March 3, 1978, decedent died. On June 20, 1984, over six years later, Moncor filed a wrongful death action against defendants, alleging, in part, that decedent's death was due to defendants' alleged acts of medical malpractice. Plaintiff's suit also alleged that the beneficiaries under the Wrongful Death Act were her two surviving children, Robert Joshua Flynn, born August 26, 1975, and Maria Elana Flynn, born December 16, 1977.

The eldest of decedent's two surviving children attained the age of nine on August 26, 1984, over two months after the filing of the complaint. Thereafter, defendants moved to dismiss the suit, alleging that because the complaint recited that the alleged acts of malpractice occurred between February 20, 1978 and March 3, 1978, the applicable statute of limitations, Section 41–5–13, barred any recovery.

Following a hearing on the motion, the trial court entered an order dismissing plaintiff's claims against defendants.

APPLICABILITY OF TOLLING PROVISIONS.

Plaintiff argues on appeal that its wrongful death action premised upon malpractice claims brought against defendants was not barred by the statute of limitations because the statute was tolled under the minority disability provision of Section 41–5–13. The statute provides:

> No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

Under the Medical Malpractice Act, NMSA 1978, Sections 41–5–1 to –28 (Repl. 1986), Section 41–5–13 is controlling as to whether an action grounded upon a claim of medical malpractice has been timely filed. *Armijo v. Tandysh,* 98 N.M. 181, 646 P.2d 1245 (Ct.App.1981). *Cf. Kern v. St. Joseph Hospital,* 102 N.M. 452, 697 P.2d 135 (1985). The limitations period under Section 41–5–13 accordingly begins to run from the date of the alleged act of malpractice. *Keithley v. St. Joseph's Hos-*

pital, 102 N.M. 565, 698 P.2d 435 (Ct.App. 1984).

The trial court found that plaintiff's cause of action was required to be filed within three years from the date of the alleged act of medical malpractice and that the tolling provision contained in Section 41–5–13 does not benefit a minor who was not a patient within the contemplation of the Medical Malpractice Act.

Resolution of the issue presented turns upon the interpretation of Section 41–5–13 and its application to the wrongful death statutes, NMSA 1978, Section 41–2–1 to –3 (Repl.1986). The court is guided in this task by certain principles of statutory interpretation. As a general rule, exceptions to statutes of limitations are required to be construed strictly. *Slade v. Slade,* 81 N.M. 462, 468 P.2d 627 (1970). The cardinal rule of statutory construction is to determine and effectuate the actual intention of the legislature. *Smith Machinery Corp. v. Hesston, Inc.,* 102 N.M. 245, 694 P.2d 501 (1985). The primary source from which we glean the legislative intent is from the wording of the statute itself. *First National Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.,* 101 N.M. 431, 684 P.2d 517 (1984). Statutes must be construed according to the purpose for which they were enacted, the wrong sought to be remedied, *Patterson v. Globe American Casualty Co.,* 101 N.M. 541, 685 P.2d 396 (Ct.App.1984), and the court may consider the background of the statute in question. *First National Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.*

■ The legislative purpose in enacting the Medical Malpractice Act was to promote "the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." § 41–5–2. An obvious goal of the legislature in enacting this legislation was to address certain factors adversely affecting the cost of medical malpractice insurance, to encourage continued availability of professional medical services, and to provide incentives for the furnishing of professional liability insurance. *See Otero v. Zouhar,* 102 N.M. 493, 697 P.2d 493 (Ct.App.1984) (citing R. Kovant, *Medical Malpractice Legislation in New Mexico,* 7 N.M.L.Rev. 5, 7 (1976–77)), *rev'd on other grounds,* 102 N.M. 482, 697 P.2d 482 (1985). *Cf. Steketee v. Lintz, Williams & Rothberg,* 38 Cal.3d 46, 210 Cal.Rptr. 781, 694 P.2d 1153 (1985) (en banc).

■ The underlying purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the party against whom the action is brought will have a fair opportunity to defend. *See Gaston v. Hartzell,* 89 N.M. 217, 549 P.2d 632 (Ct.App.1976) (citing and quoting *Thomas v. Richter,* 88 Wash. 451, 153 P. 333 (1915)); *see also Parrish v. McDaniel,* 101 N.M. 257, 680 P.2d 638 (Ct. App.1984).

■ In light of the background underlying enactment of the Medical Malpractice Act and the language of Section 41–5–13, we conclude that the legislature sought to require any litigation involving medical malpractice allegations to be brought within such time as to enable the parties to prove the material facts while they were reasonably fresh and before such proof has become stale, memories have dimmed, or material evidence has been entirely lost.

■ A wrongful death action in New Mexico is required to be brought by and in the names of the personal representatives of the decedent on behalf of those beneficiaries designated by statute; these beneficiaries, as such, are not proper plaintiffs. § 41–2–3. *See also Stang v. Hertz Corp.,* 81 N.M. 348, 467 P.2d 14 (1970); *Kilkenny v. Kenney,* 68 N.M. 266, 361 P.2d 149 (1961). The right of recovery, however, belongs to the statutory beneficiary for whose benefit the suit has been brought. *Varney v. Taylor,* 77 N.M. 28, 419 P.2d 234 (1966).

■ Notwithstanding the beneficiary's right of recovery, minority disability saving a person from the operation of the statute of limitations is a personal privilege limited

to the minor under the disability only and cannot confer rights on other persons asserting actions. *Armijo v. Regents of University of New Mexico,* 103 N.M. 183, 704 P.2d 437 (Ct.App.1984) (citing *Slade v. Slade*), *rev'd as to another issue,* 103 N.M. 174, 704 P.2d 428 (1985).

In *Gomez v. Leverton,* 19 Ariz.App. 604, 509 P.2d 735 (1973), the Arizona Court of Appeals considered a claim similar to that asserted by the plaintiff herein. There, the trial court dismissed, under the bar of the statute of limitations, a wrongful death action brought by plaintiff as surviving spouse and administratrix of the estate of her deceased husband. The court of appeals affirmed, holding that the minority of decedent's children did not toll the running of the statute of limitations against the wrongful death action. The court stated, in applicable part: "[O]ur wrongful death statutes clearly differentiate between the right to be a plaintiff and the right to be a beneficiary of a wrongful death action. Since the decedent's children are merely in the latter category and are not entitled to bring an action, the tolling statute does not apply." *Id.* at 606, 509 P.2d at 737.

Similarly, in *Short v. Flynn,* 118 R.I. 441, 374 A.2d 787 (1977), the Supreme Court of Rhode Island rejected a contention, analogous to that advanced by plaintiff herein, that the tolling provision applicable to minors applied to the personal representative who brought a wrongful death action on behalf of decedent's beneficiaries, including several minors. *Contra Bradley v. Etessam,* 703 S.W.2d 237 (Tex. Civ.App.1986) (interpreting the Texas statute of limitation on health care liability claims without citing precedent or delineating reasons therefor).

Considering the objectives and underlying purpose of the Medical Malpractice Act, and the language of the statute itself, we interpret the tolling provisions applicable to minors under the age of nine years contained in Section 41–5–13 to apply only to minors who suffer an alleged act of malpractice and not to minors who are beneficiaries under the Wrongful Death Act. *Cf. Regents of University of New Mexico v. Armijo,* 103 N.M. 174, 704 P.2d 428 (1985) (where court held that minority of *decedent,* who can be neither proper party nor beneficiary in wrongful death action, should not inure to benefit of adult personal representative who is under no legal disability); *cf. also* § 41–5–3(C).

The trial court's order dismissing plaintiff's complaint under the bar of the statute of limitations is affirmed.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

734 P.2d 226

B & W CONSTRUCTION COMPANY, a New Mexico corporation, Donald Paul Wood and Robert Bowers, Plaintiffs-Appellees,

v.

N.C. RIBBLE COMPANY, a New Mexico corporation, Defendant-Counterclaimant-Appellant,

v.

B & W CONSTRUCTION COMPANY, a New Mexico corporation, Donald Paul Wood and Robert Bowers, Counterdefendants-Appellees.

No. 16066.

Supreme Court of New Mexico.

March 5, 1987.

Rehearing Denied April 1, 1987.

Miller, Stratvert, Torgerson & Schlenker, Alan Konrad, Stephen M. Williams, Albuquerque, for defendant-counterclaimant-appellant.

Marchiondo & Berry, Michael E. Vigil, Albuquerque, for plaintiff-appellee Bowers.

OPINION

SOSA, Senior Justice.

This appeal arises out of a dispute over the rental of rock crushing machinery for highway construction. The jury found in favor of defendant N.C. Ribble Company (NCR) against B & W Construction Company (B & W) on the basic contract questions, but against NCR's effort to enforce a personal guarantee allegedly executed by plaintiffs-counterdefendants, Robert Bowers (Bowers) and Donald Paul Wood (Wood). NCR contends that three errors of the trial court led to the verdict in favor of Bowers and Wood. We affirm the trial court.

NCR raises three issues:

I. Whether the trial court erred in submitting the question of economic duress to the jury;

II. Whether the trial court erred in admitting the testimony of a polygrapher; and

III. Whether the trial court erred in refusing to give an instruction requested by NCR and a clarification when asked by the jury.

BACKGROUND

The facts pertinent to this appeal are that B & W is a corporation, owned by Bowers and Woods, which subcontracted with a general contractor, Herzog Contracting Corporation (Herzog), to crush rock for construction of a highway near Alamogordo. B & W rented the necessary equipment from NCR and began working on September, 1981. On previous jobs, the parties had entered into lease agreements which provided that rental payments could contribute to the purchase price of the equipment. Apparently B & W anticipated a similar deal on the rock crushers at issue here.

From the outset, however, the agreement foundered. B & W failed to tender installment payments, while some of the machinery did not perform as promised. By January 7, 1982, B & W was approximately $700,000 in arrears on its lease, maintenance and parts payments. On that date the president of NCR, Norman Ribble (Ribble), notified B & W that NCR would exercise its lien rights and shut the job down unless other arrangements could be made to secure the present and future indebtedness. At this time Herzog, too, became impatient with the performance of B & W and threatened to terminate the subcontract. It appeared that the impasse could best be avoided by keeping B & W on the job so as to assure payment by Herzog, provided that such payment would ultimately come to NCR.

Ribble went to the offices of B & W on the morning of January 20, 1982 to present a proposal that the leasing would continue only if Bowers and Wood executed a personal guaranty covering the indebtedness. Bowers refused.[1] Ribble returned in the afternoon, but the testimony differs as to the agreement arrived at orally. Bowers maintains that he suggested instead that he would guarantee B & W's payment to NCR only after Herzog had paid B & W and after the bank's first assignment had been satisfied. Bowers also insisted on a provision to cover refinancing on a purchase rather than a lease basis. Ribble's attorney had drafted a document, which Wood's secretary retyped supposedly to incorporate Bowers' suggestions. Wood signed one page and Bowers the other. Bowers' secretary notarized the signatures the next morning.

B & W kept the equipment and finished the job, but never paid NCR. Instead B & W filed this suit, alleging numerous deficiencies in NCR's performance of the rental contract. NCR counterclaimed against B & W for the amount owed, and against Bowers and Wood personally on the guaranty they had signed.

At trial, Bowers and Wood claimed that they had not signed the guaranty, or, if they had, it was as a result of economic duress and coercion. The jury found for NCR and against B & W on the debts, but in favor of Bowers and Wood individually. On appeal, NCR argues that the trial court should have directed a verdict for NCR on the personal guaranty. We address each component of the argument raised by NCR.

I. Economic Duress

The jury instruction stating the case indicated that Bowers and Wood denied liability on the personal guaranty because:

(1) It was obtained under economic coercion or duress; or

(2) It was forged or altered from the document that they signed.

It cannot now be determined upon which ground the jury based its verdict. NCR maintains that reversal is required if it would be improper to base a verdict on one of the alternative theories, citing *Perfetti*

1. Bowers was the principal financial contributor to the corporation, while Woods oversaw the operational side.

v. McGhan Medical, 99 N.M. 645, 662 P.2d 646 (Ct.App.), *cert. denied,* 99 N.M. 644, 662 P.2d 645 (1983).

NCR contends that the trial court erred in submitting this issue to the jury instead of directing a verdict in NCR's favor, arguing that there is no basis in law for giving the instruction on economic duress because economic duress cannot result from the exercise of a legal right. *Terrel v. Duke City Lumber Co.,* 86 N.M. 405, 524 P.2d 1021 (Ct.App.1974), *aff'd in part, rev'd in part,* 88 N.M. 299, 540 P.2d 229 (1975). There is no question that NCR had the legal right to request security for the indebtedness.

Bowers and Wood counter this authority with the contention that NCR's legal rights extended only to B & W as a corporation and not to themselves as individuals. In *First National Bank v. Wood,* 93 N.M. 467, 601 P.2d 437 (Ct.App.1979), the court did find economic duress where the bank refused to continue defendant's line of credit unless he signed a guaranty on the separate account of his son.

NCR responds that it had the right to repossess the equipment or impose a lien on the job, both of which options it abandoned as consideration for Bowers and Wood executing the personal guaranty. Thus it would distinguish the facts of this case from those in *First National Bank v. Wood,* where the lending party gave up nothing as it insisted on an additional promise from the borrower. We point out, however, that the holding in *Wood* rests on the principle that duress can be found if the party in the superior bargaining position uses its power to deny the weaker party a reasonable choice of alternatives. *Id.* at 469, 601 P.2d at 439.

In the case at bar, NCR was the party possessing superior power. Bowers' theory throughout was that he never intended to sign any guaranty of B & W's indebtedness without a provision that Herzog would first have to pay B & W. A factual question was thus raised by the evidence as to whether NCR's actions were coercive or not. NCR does not challenge the instructions given to the jury on the elements of economic duress. These properly stated that duress cannot result from the exercise of a legal right, as well as that proof of duress must be made by clear and convincing evidence.

From the foregoing, we conclude that the trial court acted properly in submitting the question of economic duress to the jury, and that it was not error to deny NCR's motion for a directed verdict.

II. Testimony of Reilly Taitte

In support of his position that he did not recall signing the personal guaranty, Bowers proffered the testimony of Reilly Taitte, a polygraph examiner. This came after the court had refused to admit the testimony of Bill Cox, the polygrapher who had examined Wood. At the hearing, outside the presence of the jury, counsel for NCR objected to Taitte's testimony because not all of the pretest interview had been recorded, as required by NMSA 1978, Evidence Rule 707(e) (Repl.Pamp.1983) (Now SCRA 1986, 11–707–E). Counsel for Bowers stated that Taitte had recorded the interview. Counsel for NCR declined voir dire of the witness.

Rule 707 does not define "pre-test interview." Taitte testified that he recorded the interview according to his understanding of the rule. The tape of the interview and the test itself was introduced into evidence. On appeal NCR repeats its assertion that the pre-test interview was not recorded.[2]

Taitte went on to testify that Bowers gave truthful answers concerning the subject of a personal guaranty: that he did not sign anything to make himself personally liable to NCR for B & W's debts, but that he did sign something to assign payments from Herzog to NCR. He was not asked

2. At oral argument it came out that the cassette in question was not included in the record on appeal. The burden is upon appellant to provide the complete record. SCRA 1986, 12–211; *Nichols v. Nichols,* 98 N.M. 322, 648 P.2d 780 (1982). We have no basis, therefore, for reviewing NCR's claim; so we must conclude that the representation of Bowers' attorney and NCR's waiver of voir dire satisfied the requirements of Rule 707–E.

whether he signed the specific document in dispute.

In response, NCR called as an expert witness, Dr. David Raskin, whose testimony discredited the validity of the test performed by Taitte. The conflict between the two experts as to how the test should be conducted simply contributes to the controversy surrounding the subject of polygraph evidence. This court has repeatedly wrestled with the problem in the criminal context. *See Tafoya v. Baca,* 103 N.M. 56, 702 P.2d 1001 (1985).

Consistent with the other rules regulating the admission of expert testimony, Rule 707–C entrusts the admissibility of polygraph evidence to the sound discretion of the trial court. SCRA 1986, 11–707–C. *See Sturgeon v. Clark,* 69 N.M. 132, 364 P.2d 757 (1961) (court's ruling on qualification of expert not disturbed absent abuse of discretion). Given the inconclusiveness of the colloquy concerning the pre-test interview in the civil case before us, we determine that appellant's objections are not so clear and uncontroverted as to require reversal. The reliability of Taitte's testimony relates to the weight to be given the evidence, not to the question of its admissibility. We hold that the trial court did not abuse its discretion in allowing the testimony into evidence.

III. Jury Instructions

The two issues above assume that the guaranty was signed, but invalid, or that it was never signed. NCR's last point on appeal is that the jury might have disregarded or misconstrued its instructions and disallowed the personal guaranty on the basis that Bowers or Woods signed the document but meant something different by it than its terms would indicate. Instructions numbered 10, 11 and 12, respectively, defined the subjects of express contract, implied contract and mutual assent. "Meeting of the minds" was the concept contained in Number 10, while Number 12 distinguished between subjective and objective intent in contract formation. NCR tendered an instruction, Number 32, refused by the trial court, that the parties to a contract are bound by its terms.

During its deliberations, the jurors sent a note to the court which read, "Please clarify the language in instructions No. 10 and 12. We need the lay terms." The trial court properly concluded that it would be error to speculate about the thought process of the jury, and that, therefore, the question would be answered by a direction to consider the instructions given as a whole.

NCR argued then, as now, that the jury was misled by the suggestion of Bowers' attorney that one could not be bound by contract terms one did not understand. Thus the jury might have failed to enforce the personal guaranty because they would have found no "meeting of the minds." Furthermore, NCR intimates that this confusion caused the jury to request clarification.

Even if NCR's supposition were true, the relief it requested would not have cured the confusion, because its Instruction No. 32 goes to the duties of the parties once a contract has been formed, whereas, "meeting of the minds" goes to the question of whether a contract was formed in the first place. Secondly, in its brief, NCR agrees that "meeting of the minds" means mutual assent as reflected by the objective manifestations of the parties. Instruction No. 12, as given, properly states this standard. Finally, the question submitted by the jury does not reflect any conflict between Nos. 10 and 12, but at most an unfamiliarity with the terminology therein. We find no error in the instructions submitted to the jury nor in the rejection of NCR's requested No. 32.

For the foregoing reasons, the judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and WALTERS, J., concur.

STOWERS, J., dissents.

RANSOM, J., not participating.

STOWERS, Justice, dissenting.

I dissent.

I cannot concur in the majority opinion because I believe that the trial court erred, first, in submitting to the jury the defense of economic duress and, second, in submitting to the jury polygraph evidence inadmissible under NMSA 1978, Evid.Rule 707 (Repl.Pamp.1983) (now codified at SCRA 1986, 11–707). Because the jury may have based its verdict upon a legal theory that should not have been before it and also received polygraph evidence that should have been excluded, I would reverse the judgment in favor of Bowers and Wood on NCR's personal guaranty counterclaim and would remand for a new trial on that counterclaim alone.

I. Economic Duress

This Court long has recognized that a party coerced into a transaction by the wrongful act of another party may void that transaction. *See Pecos Constr. Co. v. Mortgage Investment Co.,* 80 N.M. 680, 682–83, 459 P.2d 842, 844–45 (1969); *see also Cadwell v. Higginbotham,* 20 N.M. 482, 508–11, 151 P. 315, 322–23 (1915). The doctrine of economic compulsion or economic duress protects the party in a weaker bargaining position from the unreasonable exercise of economic power or advantage by the party in a stronger position by imposing upon the latter a duty to offer the weaker party a reasonable choice of alternatives. *See Terrel v. Duke City Lumber Co.,* 86 N.M. 405, 422–23, 524 P.2d 1021, 1038–39 (Ct.App.1974), *aff'd in part, rev'd in part,* 88 N.M. 299, 540 P.2d 229 (1975). Economic duress therefore cannot be established if a reasonable choice of alternatives was available to the weaker party. *See id.,* 86 N.M. at 419, 524 P.2d at 1035; *see also First National Bank v. Wood,* 93 N.M. 467, 469, 601 P.2d 437, 439 (Ct.App.1979). Nor can it be established if the conduct threatened by the stronger party consisted merely of the exercise of a legal right, under circumstances in which that conduct would have been justified if the weaker party had refused to accept the stronger party's contractual offer. *See Terrel v. Duke City Lumber Co.,* 86 N.M. at 423, 526 P.2d at 1039; Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis,* 53 Iowa L. Rev. 892, 910 (1968); *cf. Long Island Lighting Co. v. Bokum Resources Corp.,* 40 B.R. 274, 294–96 (Bkrtcy.N.M.1983) (legal right and reasonable alternatives defenses; decided under N.M. law); *Electrical Products Co. v. Combined Communications Corp.,* 535 F.Supp. 356, 360 (D.N.M.1980) (legal right defense; decided under N.M. law); *First National Bank v. Wood,* 93 N.M. at 469–70, 601 P.2d at 439–40 (Wood, C.J., specially concurring) (legal right defense).

As the majority opinion observes, there is no question that NCR had the legal right to request security for B & W's obligations. There is also no question that NCR had the legal right to repossess the leased equipment and to file liens against the job to secure payment of B & W's indebtedness of approximately $700,000. Furthermore, the record clearly indicates that the parties negotiated at length, alternatives were offered, and NCR gave valuable consideration for the personal guaranty agreement by waiving its right to file liens. On the evidence and the facts of this case, reasonable minds cannot differ in concluding that NCR merely threatened to exercise a legal right and that its threatened conduct would have been justified had Bowers and Wood not acceded to NCR's demand for personal guaranties. The trial court therefore had a duty to direct a verdict against Bowers and Wood on their economic duress defense to NCR's counterclaim on the personal guaranty agreement. *See Owen v. Burn Construction Co.,* 90 N.M. 297, 301–02, 563 P.2d 91, 95–96 (1977). It erred in instructing the jury on that defense.

II. Polygraph Evidence: Testimony of Reilly Taitte

The "twisted history" of the admission of polygraph test evidence in New Mexico has been recounted elsewhere. *See Tafoya v. Baca,* 103 N.M. 56, 57–59, 702 P.2d 1001, 1002–04 (1985); *State v. Anthony,* 100

N.M. 735, 737–38, 676 P.2d 262, 264–65 (Ct.App.1983); *and cases cited therein.* In 1983, this Court promulgated Rule 707 in order to supersede our troublesome case law criteria and to standardize the admission of polygraph evidence by establishing detailed minimum requirements for polygraphs examiners and examinations. *See Tafoya v. Baca,* 103 N.M. at 59–60 & n. 2, 702 P.2d at 1004–05 & n. 2; *State v. Anthony,* 100 N.M. at 737–39 & n. 1, 676 P.2d at 264–66 & n. 1. One of those requirements is that the "pretest interview and actual testing * * * be recorded *in full.*" *See* NMSA 1978, Evid.R. 707(e) (Repl.Pamp. 1983) (now codified at SCRA 1986, 11–707(E)) (emphasis added).

The record indicates that the trial court was informed that Reilly Taitte, the polygraph examiner who tested Bowers, had not recorded the portions of the pretrial interview during which the examination questions were formulated. Nevertheless, the trial court admitted Taitte's testimony and the results of that examination over NCR's objection. Although the trial court may, in its discretion, admit evidence of polygraph examinations conducted in accordance with the provisions of Rule 707, the trial court here had no authority to admit evidence of an examination conducted in violation of the clear and express recording requirement of Rule 707(e). *See State v. Anthony,* 100 N.M. at 739, 676 P.2d at 266 (dicta); NMSA 1978, Evid.R. 707(c) (Repl.Pamp.1983) (now codified at SCRA 1986, 11–707(C)). It erred in submitting Reilly Taitte's testimony to the jury.

III. Conclusion

If the jury's verdict in favor of Bowers and Wood on the personal guaranty issue was based upon the defense that the guaranty agreement was forged or altered from the document they signed, that verdict should be reversed because the trial court erroneously admitted polygraph evidence prejudicial to the substantial rights of NCR. If the jury's verdict was based upon the defense of economic duress, that verdict should be reversed because the trial court erroneously instructed the jury on that defense when it should have directed a verdict in favor of NCR. Because we do not know which theory underlay the jury's verdict, the judgment in favor of Bowers and Wood on the personal guaranty counterclaim should be reversed and the case remanded for a new trial on this issue. *Cf. Perfetti v. McGhan,* 99 N.M. 645, 655, 662 P.2d 646, 656 (Ct.App.), *cert. denied,* 99 N.M. 644, 662 P.2d 645 (1983) (remand where alternative theory erroneously submitted).

For the foregoing reasons, I respectfully dissent.

734 P.2d 231

Alfred Wayne MARCH, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 16691.

Supreme Court of New Mexico.

March 9, 1987.

Rehearing Denied March 25, 1987.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Public Defender, Santa Fe, for petitioner.

Hal Stratton, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

WALTERS, Justice.

Defendant was convicted of burglary, and he appealed. The court of appeals affirmed his conviction; we granted certiorari. We reverse the court of appeals on the issue of abuse of discretion in the trial court's denial of a continuance which allegedly deprived defendant of his right to present a meaningful defense. We affirm the court of appeals on the remaining issues.

This was defendant's second trial, his previous conviction having been reversed and a new trial granted. Upon remand, an attorney from the public defender's office entered an appearance as new defense counsel, on March 4, 1986. The new trial was scheduled for April 3, 1986. On April 2nd, defense counsel moved for a continuance to permit a forensic evaluation to determine whether or not defendant had the viable defense of lack of capacity to form a specific intent. Incapacity had not been

raised by defendant's previous counsel in the first trial.

The State, in its response to defendant's petition for certiorari, asserts that "[d]efendant's motion for a continuance was late and correctly denied on that basis alone."

As in the case of *State v. Ramirez,* 92 N.M. 206, 585 P.2d 651 (Ct.App.1978), the State ignores the fact that the trial court denied the motion on the merits, not because it was untimely. In ruling on defendant's request, the judge remarked:

> Well, my brief impression of this case from reading the Memorandum Opinion from the court of appeals is that ... well, I can understand how this issue would have gone past the previous defense counsel because I did not see any indication that there was some reason to be concerned that the defendant was not in full possession of his faculties at the time this earlier offense occurred. I think under the circumstances I am going to deny the motion for continuance * * *

The State also claims that there is "not a suggestion of merit" to defendant's claim. We disagree. Defendant's medical records from an earlier period of confinement had been received by new defense counsel between the time of counsel's appointment and the filing of the motion for continuance. Those records reflected that in 1982 and 1983 defendant had suffered uncontrollable behavioral outbreaks and undifferentiated schizophrenia, and had been treated with Thorazine to control his conduct. Evidence presented at the continuance hearing disclosed that defendant also suffered from hypoglycemia, and just three months before the scheduled trial date he had undergone surgery for removal of a cancerous brain tumor. The medical records are sufficient to suggest that defendant might have had the tumor at the time he committed the offense charged. Because of the recent surgery and doctor's appointments outside of the penitentiary, defendant had had difficulty in scheduling a psychiatric evaluation with the penitentiary psychiatrist; consequently, there had been no recent forensic evaluation of defendant.

The presumption in criminal cases is that the defendant is sane, *see, e.g., State v. Najar,* 104 N.M. 540, 724 P.2d 249 (Ct. App.), *cert. denied,* 104 N.M. 460, 722 P.2d 1182 (1986), and to establish the defense of lack of capacity to form a specific intent, the defendant has the burden of introducing some evidence to support that defense. *Id.*

By denying the motion for a continuance, the trial court denied the defendant the opportunity to introduce some competent evidence, at the same time denying the opportunity for an examination. In offering defendant's past medical records to the trial court at the motion hearing, the defendant attempted to demonstrate that there was a sufficient basis for his motion. The State suggests that it was "an eleventh hour" request for continuance, and so it was. But the "eleventh hour" within the context of less than 30 days' trial preparation time for personnel of an already overburdened public defender's office, is not really meaningful if the claim is intended to suggest unwarranted delay or something equally opprobrious.

While it is true that a denial of a motion for continuance rests in the sound discretion of the court, and the defendant has the burden of showing an abuse of that discretion, *State v. Pruett,* 100 N.M. 686, 675 P.2d 418 (1984), it is also true that the defendant has a fundamental, constitutional right to due process of the law. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18. The due process right carries with it the right to a reasonable amount of time to prepare a defense and, when the issue of incapacity has been fairly raised, to have "a psychiatric examination ... provided at public expense, coupled with the right to compulsory process for the attendance of necessary witnesses." *State v. Webb,* 67 N.M. 293, 297, 354 P.2d 1112, 1114 (1960), *cert. denied,* 365 U.S. 804, 81 S.Ct. 470, 5 L.Ed.2d 461 (1961). To deny those rights is more than an abuse of the trial court's discretion; it is a denial of due process. *See State v. Sain,* 34 Wash.App. 553, 663 P.2d 493 (1983).

The trial court not only overruled defendant's motion for continuance so that a forensic evaluation could be made; it also ruled that defendant's doctor could not be subpoenaed to authenticate medical records made by him, nor would the medical records be admissible at trial. On the other hand, the court granted the State's motion to exclude any reference to schizophrenia and the brain tumor. The end result of the trial court's rulings was to completely deprive defendant of any potential defense of incapacity.

The State urges us to accept the argument that defendant was not prejudiced by the court's rulings. Denial of a likely defense cannot be anything other then prejudicial. A basic tenet of American jurisprudence is that a defendant is entitled to a fair trial with the right to appear and defend himself. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, §§ 14, 18. Moreover, the prejudice which must be raised in a case such as this is minimal. "No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant." *State v. Orona,* 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979). The *Orona* standard accords with both the federal and the state constitutional requirements.

In deciding whether denial of a continuance violates due process, an appellate court looks to the circumstances of each case as those circumstances appear from the reasons presented to the trial judge at the time the request was made and denied. *People v. Crovedi,* 65 Cal.2d 199, 204–05, 53 Cal.Rptr. 284, 289–90, 417 P.2d 868, 873–74 (1966) (quoting *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964)). Failure to grant a continuance here to allow the defendant a reasonable time to prepare and present a defense, *see People v. Courts,* 37 Cal.3d 784, 210 Cal.Rptr. 193, 693 P.2d 778 (1985); denial of his rights to subpoena witnesses and to have medical records produced; and granting the State's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial.

The defendant's conviction is reversed and this case is remanded for a new trial.

IT IS SO ORDERED.

SOSA, Senior Justice, and Ransom, J., concur.

SCARBOROUGH, Chief Justice, dissenting.

I respectfully dissent.

I agree with the panel of the Court of Appeals that the trial court did not err in denying the motion for continuance. The grant or denial of a motion for continuance rests in the sound discretion of the trial court. *State v. Pruett,* 100 N.M. 686, 675 P.2d 418 (1984). The trial court does not abuse its discretion when it denies a motion for continuance which is based upon speculation and conjecture concerning what might turn up upon further investigation. Moreover, defense counsel received defendant's medical records three to four weeks prior to trial but did not request a continuance until the day before trial.

STOWERS, Justice, dissenting.

I dissent.

I concur in the dissent filed by Chief Justice Scarborough and further with the opinion filed by the Court of Appeals and request that the Court of Appeals' opinion be filed in its entirety as a further part of my dissent.

734 P.2d 235

George PASSINO, Plaintiff-Appellant,

v.

CASCADE STEEL FABRICATORS, INC., an Oregon Corporation, Defendant-Appellee.

No. 9160.

Court of Appeals of New Mexico.

Aug. 12, 1986.

Certiorari Quashed March 17, 1987.

William E. Snead, Tanya L. Scott, Ortega & Snead, P.A., Albuquerque, for plaintiff-appellant.

Mary E. McDonald, Sutin, Thayer & Browne, Santa Fe, for defendant-appellee.

OPINION

ALARID, Judge.

This is an interlocutory appeal from a post-default order of the district court which allowed defendant Cascade Steel Fabricators, Inc. (Cascade) to present evidence to establish its proportionate share of the damages suffered by plaintiff George Passino (Passino). This order contained language allowing the parties to seek an immediate appeal. On March 21, 1981, Passino sought permission for an interlocutory appeal, which permission was granted. On appeal, he raises a single issue alleging that the trial court erred in allowing Cascade to present evidence regarding its relative culpability at a hearing on damages. We reverse the trial court, and remand the case for a damages hearing consistent with this opinion.

FACTS

In June 1975, Passino was employed by the Amalia Lumber Company in Taos, New Mexico as a welder and pipe fitter. As part of his duties at Amalia, he was required to repair broken paddles, or slats, on a conveyor belt which removed sawdust from one of the buildings. The conveyor belt on which Passino was working was without the benefit of a guard, safety switch, or any other safety mechanism which would prevent the conveyor belt from being switched on while Passino was working on it. While Passino was making repairs to the conveyor belt in June 1975, the belt was inadvertently switched on, at which time he was caught in the sprockets driving the conveyor belt. He suffered multiple amputations of his toes.

The lumber mill was owned and operated by Amalia Lumber Company, the employer of Passino. However, Amalia had contracted with both defendants Cascade and Tim-

berman's for the design, purchase, delivery and set-up of a complete lumber mill.

After suffering his injuries, Passino initiated suit against both Timberman's and Cascade, alleging that both defendants were liable to Passino because of their respective negligence in failing to properly manufacture, design, implement and install a reasonably safe lumber mill with reasonably safe component parts. Liberty Mutual entered the suit to protect its reimbursement right under the Workmen's Compensation Act. Passino also alleged the strict liability in tort of both defendants in that the component parts of the lumber mill were defective. Finally, Passino alleged a cause of action for the breach of the implied warranty of merchantability in that the conveyor belt assembly was not fit for its ordinary purpose.

Timberman's answered the complaint and proceeded to defend the lawsuit. Cascade, however, totally failed to answer or otherwise plead to Passino's complaint, and a default order was entered on Passino's complaint on July 27, 1981. In his motion for a default order, Passino specifically requested, in accordance with prevailing law, that the amount of the damage award be determined in the same proceeding in which the issues of liability and damages pertaining to the remaining defendants would be tried. This language was incorporated into the order of the court. In the time subsequent to the entry of the default order against Cascade, plaintiff settled his differences with Timberman's and Liberty Mutual. An order was entered dismissing both defendants from the lawsuit, thus obviating the need for a full trial on the merits and on damages. After entry of the order dismissing the remaining defendants from the suit, plaintiff asked the court for an order setting an evidentiary hearing during which evidence would be presented as to the amount of damages to be assessed against Cascade. Notice of the evidentiary hearing was provided to Cascade so that Cascade could take whatever action it deemed necessary to protect its interests during that hearing. At that time, Cascade made its first appearance in the lawsuit. It filed a motion to set aside the default order or to allow it to present evidence regarding its claimed relative culpability in causing the injuries suffered by Passino.

In its order following the hearing, the court found that the default order entered against Cascade intended that Cascade's damages would be determined in accordance with the doctrine of pure comparative negligence. The court further found that the principles of comparative negligence in New Mexico required a determination of the apportionment of damages among all persons whose fault proximately caused the injuries to Passino, and that any other result was unfair and unjust, and not consistent with New Mexico law. It is this order and these findings from which plaintiff appeals. Cascade does not appeal the propriety of the grant of the default judgment.

DISCUSSION

The issue raised in this case is whether defendant may present evidence on its culpability at a damages hearing after a default judgment has been entered against it and all other defendants have settled. We hold that defendant may not present such evidence.

It is uncontested that defendant Cascade defaulted in this case by failing to answer or otherwise plead. The law regarding the consequences of a default in this jurisdiction is clearly articulated in *Gallegos v. Franklin,* 89 N.M. 118, 547 P.2d 1160 (Ct. App.1976). Under *Gallegos,* once default judgment has been entered, liability is not an issue, and the allegations of the complaint become findings of fact. After its default, all that remained with regard to the liability of Cascade was a hearing on the dollar amount of damages suffered by Passino. This hearing was to be held at the same time as the hearing on liability and damages to be borne by the other defendants. In this case, the codefendants settled with plaintiff. Therefore, they are out of the case completely. Defendant now seeks to avoid the consequence of its default by litigating its culpability in the damages hearing. Defendant may not do so.

To allow such a result would negate the default and permit defendant to contest that which it has already admitted. *Gallegos* is clear and Cascade is bound by the law set forth in that case. The liability of all defendants but Cascade is completely settled. There is no apportionment of damages to litigate at the hearing on damages. Therefore, both *Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981), and *Bartlett v. New Mexico Welding Supply, Inc.,* 98 N.M. 152, 646 P.2d 579 (Ct.App.1982), are inapplicable in this case. It does not matter whether damages should be apportioned jointly and severally or purely when there is only one defendant paying damages.

Although the result may seem harsh, any other holding would seriously weaken, and could even abolish the efficacy of default judgments. That we are not prepared to do. By defaulting, defendant has waived its rights to the application of comparative negligence and the apportionment of damages under *Scott v. Rizzo* and *Bartlett.*

The order below is reversed. The case is remanded for a hearing solely on the amount of damages due plaintiff from Cascade.

IT IS SO ORDERED.

HENDLEY, C.J., concurs.

BIVINS, J., concurs specially.

BIVINS, Judge (specially concurring).

I concur with the majority except the statement, "[a]lthough the result may seem harsh, any other holding would seriously weaken, and could even abolish the efficacy of default judgments." That statement is correct in terms of apportioning fault following default, as was attempted here, but incorrect if interpreted to mean the trial court must award multiple recovery. While I am certain the majority does not intend multiple recovery since the case is remanded for hearing solely in "the amount of damages due plaintiff from Cascade," I deem it necessary to file this separate opinion not only to make clear my understanding but also to state why I believe the result is not harsh.

The issue was presented as one involving the principles of comparative fault when, in fact, we are only concerned with damages. Following default, plaintiff is entitled to an award from the defaulting defendant, but the question is whether plaintiff can recover more than once for his injuries.

Our appellate courts have held that an injured party may recover only once for his loss. *See Vaca v. Whitaker,* 86 N.M. 79, 519 P.2d 315 (Ct.App.1974) and cases cited at page 82, 519 P.2d 315 thereof; W. Prosser, *Law of Torts* § 48 (4th ed. 1971). Applying that principle here means that the trial court, at the damage hearing, first determines the total amount of plaintiff's damages. Since plaintiff can recover only once, the amount paid in settlement by other parties must be deducted. The difference then is what the defaulting defendant pays.

By following this procedure we have not compared fault, but we have allowed only one recovery. This permits plaintiff to have the benefit of the default and, at the same time, prevents the unfairness of double recovery which the trial court sought to avoid. Compare the result here with *Wilson v. Galt,* 100 N.M. 227, 668 P.2d 1104 (Ct.App.1983), which allows an injured party to retain the benefits of his bargain with a settling tort-feasor without reduction of the amount of damages ultimately determined.

On remand, the trial court should follow the procedure as outlined.

734 P.2d 237

Mayra P. HOPKINS,
Petitioner-Appellee,

v.

James L. GUIN, Respondent-Appellant.

No. 8524.

Court of Appeals of New Mexico.

Sept. 18, 1986.

Certiarari Quashed Feb. 26, 1987.

Martin E. Threet, B. Paula Kavanagh, Threet & King, Albuquerque, for petitioner-appellee.

Pedro G. Rael, Rael & Jarner, Los Lunas, for respondent-appellant.

OPINION

MINZNER, Judge.

Respondent appeals from the trial court's decision to increase his child support obligations and modify visitation rights. We affirm.

The original divorce decree, which was entered in January 1982, incorporated an agreement to which the parties had stipulated. The agreement provided that:

> Child support shall be set at the amount of Two Hundred Dollars ($200.00) per month, commencing January 1, 1982, and said child support shall increase each year by a percentage to be determined by any increase in Husband's pay. If Husband receives a ten percent (10%) raise in pay, then child support shall increase by ten percent (10%) for the year following such raise.[1]

In August 1983, on respondent's petition for an order to show cause and after petitioner had moved for discovery of respondent's income during 1981 and 1982, the trial court entered an order clarifying respondent's child support obligations during summer visitation, specifying the dates for summer visitation, and allowing petitioner to have the children from July 15 to July 29. Additionally, the order construed the child support paragraph. In addition to explaining the relationship between an increase in net pay and an increase in child support and requiring notice of pay increases, the trial court defined "net pay" as "gross salary less FICA taxes and federal and state income taxes. It shall not include disability benefits of any kind nor any increase thereof." The order recited that it was entered after the parties had "settled their differences."

During the next year, other differences between the parties apparently arose. The record includes various motions with respect to visitation, discovery of respondent's income, and other matters which are not relevant to the present appeal. In November 1984, petitioner moved for an increase in child support and for additional summer visitation.

After a hearing, both parties submitted requested findings of fact and conclusions of law. The trial court increased respondent's support obligation from approximately $244.00 per month to $400.00 per month; the court did not grant petitioner's request for additional weeks in June and August but, in specifying dates for respondent's summer visitation, reduced by several days the amount of time respondent had formerly enjoyed. No attorney fees were awarded.

The court made the following findings of fact relevant to this appeal:

> 2. That the Settlement Agreement, filed herein on January 14, 1982 and approved and confirmed by the Court in the Final Decree filed herein on January 15, 1982, was entered into by the parties at a time when the Respondent had a net monthly income of $1617.00, consisting of a salary of $917.00 and Veterans Administration disability benefits of $700.00.
>
> 3. That the amount of child support agreed upon by the parties in the said Settlement Agreement, to-wit: the sum of $100.00 per month per child, was based solely on the Respondent's salary and did not take into consideration the Respondent's said disability benefits.
>
> 4. That this failure on the part of the parties to take into consideration the Respondent's disability benefits in arriving at the amount of child support to be paid by the Respondent was not in the best interests and welfare of the children and did not treat the children's support needs fairly.
>
> 5. That the Respondent's current net monthly income is in the amount of $1,842.00, consisting of a salary of $1,103.00 and Veterans Administration disability benefits of $739.00.
>
> 6. That the Court finds that the amount of child support should be in-

1. Although not at issue in this case, we note that our courts have implicitly approved of escalator clauses in awards of child support. *Henderson v. Lekvold,* 95 N.M. 288, 621 P.2d 505 (1980). *Cf. Dunning v. Dunning,* 104 N.M. 295, 720 P.2d 1236 (1986).

creased to the sum of $200.00 per month per child, effective February 1, 1985.

7. That in arriving at this increased amount of child support the Court has taken into consideration all of the guidelines enunciated in *Spingola v. Spingola,* 91 NM 737, 743–744, [580 P.2d 958] (1978), particularly the Child Support Guidelines as established in the Second Judicial District of the State of New Mexico.

8. That during the time the children are with the Respondent during the summer months, the Respondent's support obligation will be reduced by 75%.

The court reached the following conclusions:

2. That the Settlement Agreement is not in the best interests and welfare of the children, is against the public policy of the State of New Mexico, and should be modified.

3. That settlement agreements between husband and wife are greatly favored by the Court, but where child support and visitations are concerned such agreements are not binding upon the Court.

4. That to make stipulated agreements concerning child support and visitations nonmodifiable is not in the best interests and welfare of the children and is against the public policy of the State of New Mexico.

5. That it is appropriate to consider the net monthly income of each parent in order to properly establish the correct amount of child support.

6. That child support be and the same hereby is increased to the sum of $200.00 per month per child, effective February 1, 1985.

* * * * * *

9. That summer visitations be and the same hereby are established as follows: visitations with the Respondent from June 1 through July 14 and from July 30 through August 14; and visitation with the Petitioner from July 15 through July 29.

With respect to the increased child support, respondent claims that the findings are insufficient, that there is insufficient evidence of a substantial change in circumstances, that the trial court's prior interpretation of the settlement agreement incorporated into the final decree barred consideration of some of respondent's income, and that the trial court abused its discretion in considering child support guidelines adopted for use in a different judicial district. With respect to the modification in visitation rights, respondent claims that the trial court abused its discretion because, in specifying the dates for summer visitation, the number of days allotted to respondent decreased.

WHETHER THE TRIAL COURT ERRED IN AWARDING AN INCREASE IN CHILD SUPPORT.

It is well-established law that the award of child support rests within the sound discretion of the trial court. *Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978). The issue before the trial court is whether there has been a substantial change in circumstances, which materially affects the child's welfare. *See Brannock v. Brannock,* 104 N.M. 385, 722 P.2d 636 (1986); *Spingola v. Spingola.* "On appeal, the scope of review is limited to examining the record only to determine if the trial court abused its discretion by fixing an amount contrary to all reason." *Id.,* 91 N.M. at 742, 580 P.2d at 963. The respondent thus faces a heavy burden in challenging the award of child support on the basis of an abuse of discretion. In this case, however, respondent raises arguments other than a claim that an abuse of discretion occurred. We address these arguments first.

(1) Sufficiency of the Findings.

Respondent contends that the trial court erred in not finding a specific need or change in circumstances. While it is true that a trial court must make findings of ultimate facts, *Jaramillo v. Jaramillo,* 103 N.M. 145, 703 P.2d 922 (Ct.App.1985), we conclude that the trial court's findings are sufficient for appellate review. *See Brannock v. Brannock.*

In the case of doubtful or uncertain findings, the appellate court is to indulge every presumption in favor of the judgment. *Ledbetter v. Webb,* 103 N.M. 597, 711 P.2d 874 (1985). In addition, an appellate court may look to the oral remarks of the trial court for clarification of a finding of fact, provided the remarks are not made the basis for error on appeal. *Id.*

In the present case, the trial court orally considered each guideline enumerated in *Spingola* with respect to the facts of this case. These remarks make it clear that the trial court properly determined whether substantial changes had occurred. *Cf. Brannock v. Brannock* (trial court failed to consider any of the *Spingola* factors). Under these circumstances, the trial court's finding that it considered the guidelines in *Spingola* is a sufficient finding of ultimate fact. *Id.*

Under NMSA 1978, Section 40–4–11 (Repl.1986), the trial court must make "a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent...." § 40–4–11(A). In the present case, it is clear that the trial court made the requisite statutory findings.

(2) Sufficiency of the Evidence as to Change in Circumstances.

Respondent also contends that there was not substantial evidence to support the findings. The relevant standard of review is a limited one. *See Brannock v. Brannock.* The question for us is not whether the trial court might have made different findings; rather, this court must indulge all reasonable inferences in favor of the judgment and disregard all contrary evidence. *Id.* Under this standard, we must conclude that there is sufficient evidence to support the findings.

Evidence was presented at the hearing that the children's needs are greater now because they are older. There was also evidence that one child requires extra tutoring, and there have been medical expenses for both children which were not covered by insurance. The respondent's argument that it is unfair to hold him responsible for additional child support because the petitioner has moved with the children to Texas, or has remarried a spouse who earns significantly more than the respondent, ignores this evidence.

(3) The Effect of the 1983 Order.

Respondent next contends that the August 1983 order, which specifically excluded the respondent's disability benefits from consideration in determining child support, precluded the trial court from considering his disability benefits in computing child support. Respondent contends that the relevant issue was fully litigated at the prior hearing, and that under the doctrine of res judicata the trial court could not entertain it again.

If the petitioner has never had a full and fair hearing on the merits of whether disability benefits should be considered part of the respondent's financial resources, it is clear that the doctrine of res judicata would not bar the court from considering the issue. *See Berlint v. Bonn,* 102 N.M. 394, 696 P.2d 482 (Ct.App.1985). *Cf. Smith v. Smith,* 98 N.M. 468, 649 P.2d 1381 (1982) (the doctrine of res judicata precluded consideration of changes in circumstance that occurred prior to a previously adjudicated decrease).

Respondent has the burden of establishing that res judicata applied. This he has not done. *See Shultz v. Ramey,* 64 N.M. 366, 328 P.2d 937 (1958); *Paulos v. Janetakos,* 46 N.M. 390, 129 P.2d 636 (1942). *Cf. Mundy & Mundy, Inc. v. Adams,* 93 N.M. 534, 602 P.2d 1021 (1979) (a right, question, or fact distinctly put in issue and directly determined cannot be disputed in a subsequent suit). The record indicates only that the trial court interpreted the original decree, which represented the parties' agreement at that time.

In *Brister v. Brister,* 92 N.M. 711, 594 P.2d 1167 (1979), the supreme court upheld a modification of alimony despite an agreement entered into by the parties and incorporated into the divorce decree. The court

noted the public policy on modification of alimony awards, presently codified in NMSA 1978, Section 40–4–7(B)(2) (Repl. 1986), which allows modification whenever the circumstances render such change proper. The court went on to state, "[t]he court may disregard the agreement and make an award that the court deems fair." *Id.* at 713, 594 P.2d 1169.

■ Since the public policy regarding modification of child support is the same as for modification of alimony, *see* Section 40–4–7(C), we hold that the trial court was permitted to disregard the parties' agreement in the present case. Because there was substantial evidence of changed circumstances since the prior adjudication, the trial court might reasonably consider increasing future child support.

Once it had determined that a substantial change in circumstances existed, the court was required to take into consideration the financial resources of the parent in determining a reasonable amount of support. § 40–4–11(A). Assuming that the parties had previously agreed not to consider the disability benefits, and that the court later made this agreement explicit in the August 1983 order, we nevertheless hold that the trial court was not precluded from considering these benefits as part of respondent's financial resources. *Cf. Henderson v. Lekvold,* 95 N.M. 288, 621 P.2d 505 (1980) (it was error for the trial court to refuse to enforce a stipulation where the effect was to modify the obligation retroactively).

Respondent does not contend that the disability benefits are not part of his financial resources, only that the prior adjudication bars the court from considering them in computing the amount of child support. Because this reasoning would allow parties, by agreement, to circumvent the mandatory provisions imposed on the court by Section 40–4–11(A), we conclude that the argument must be rejected, and the trial court affirmed.

(4) The Trial Court's Consideration of Bernalillo County Child Support Guidelines.

Citing *Spingola,* respondent next argues that the trial court erred in considering another district court's child support guidelines. *Spingola* does not prohibit one district court from considering another's guidelines; rather, it dealt with the issue of whether the appellate court was able to take judicial notice of the Second Judicial District's Child Support Guidelines, which were not properly made part of the evidence in that case. Nothing in *Spingola* prohibits another district court from considering those guidelines.

■ Assuming but not deciding that the use of the guidelines was improper, however, we would not reverse. The evidence in the case supports the increase in child support without applying the disputed guidelines. *Mascarenas v. Kennedy,* 74 N.M. 665, 397 P.2d 312 (1964) (judgment not reversed even though erroneous rule applied, in worker's compensation case, where evidence substantially supported the findings without applying the erroneous rule).

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING VISITATION RIGHTS.

■ Finally, respondent contends that nothing in the evidence justifies the additional time the children are to spend with the petitioner in the summer. We disagree.

In the present case, respondent's own counsel requested that the court change the visitation provisions to provide for specific dates of visitation. The record contains evidence of the discord that led to his request. After consideration, the court modified the visitation provision, noting that the more specific time schedule was slightly in favor of the petitioner, but not much. This determination, which altered the visitation schedule no more than several days, was not an abuse of discretion. *Cf. Montero v. Montero,* 96 N.M. 475, 632 P.2d 352 (1981) (the record showed no substantial change bearing on the necessity or justice of modifying the visitation provision).

CONCLUSION.

Although respondent raised other issues in his statement of the issues, these issues were not raised again in the argument; no authorities were cited in the statement as support. These issues are deemed abandoned. *Novak v. Dow,* 82 N.M. 30, 474 P.2d 712 (Ct.App.1970).

The order is affirmed in all respects. Each party shall bear its own costs.

IT IS SO ORDERED.

HENDLEY, C.J., and FRUMAN, J., concur.

734 P.2d 243

STATE of New Mexico, Plaintiff-Appellee,

v.

John Willy JONES, Defendant-Appellant.

No. 9628.

Court of Appeals of New Mexico.

Jan. 6, 1987.

Certiorari Denied Feb. 23, 1987.

Paul G. Bardacke, Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Sheila Lewis, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

ALARID, Judge.

Defendant appeals his conviction for criminal contempt. We affirm. Defendant raised five issues on appeal; however, defendant's issues are repetitive and may be consolidated into two issues. The issues on appeal, then, are whether NMSA 1978, Section 35–3–9 controls over NMSA 1978, Metro. Rule 12 (Repl.1985), and whether the metropolitan court's jurisdiction referred to in Rule 12(c) is restricted to the jurisdiction of magistrate courts in contempt matters as specified in Section 35–3–9.

FACTS

On August 21, 1986, defendant was held in contempt by the metropolitan court for failure to pay fines or do community service in lieu of the fines. Defendant was sentenced to six days incarceration in the Bernalillo County jail. He appealed to district court, where a hearing on the matter was held on September 29, 1986. At the hearing, defendant made a motion to dismiss the metropolitan court order, or in the alternative, to reduce the jail time from six days to three days pursuant to Section 35-3-9. Section 35-3-9 provides that magistrate courts may punish a contemnor by a fine not exceeding twenty-five dollars ($25.00) or by imprisonment for not more than three days, or both. Defendant's six-day sentence was, therefore, three days in excess of the allowable punishment as provided for by Section 35-3-9. However, Rule 12 allows the metropolitan court to sentence a contemnor within the limits of its jurisdiction. Defendant's motion was denied, the district court determining that Rule 12 authorized the metropolitan court to imprison a contemnor for up to one year.

The metropolitan court appeal disposition was filed on October 24, 1986. The district court found defendant guilty of contempt and affirmed the judgment and sentence of the metropolitan court.

I. Whether Section 35-3-9 Controls Over Rule 12

Defendant argues that Section 35-3-9 should control over Rule 12 for several reasons. He argues that Section 35-3-9 should control because only the legislature has authority to establish the punishment for a crime, citing *State v. Peters,* 78 N.M. 224, 430 P.2d 382 (1967); the Supreme Court Rules Committee may not extend or limit the jurisdiction of the court, citing NMSA 1978, Magis.Crim. Rule 1 (Repl. 1985), and NMSA 1978, Metro. Rule 1 (Repl.1985); courts of limited jurisdiction are restricted in the exercise of their contempt power by the legislature and to allow Metro. Rule 12 to control would undermine the concept of separation of powers and the concept of criminal notice. And, finally, defendant asserts that Section 35-3-9 must be held unconstitutional if Metro. Rule 12 is to control.

The power to punish for contempt is inherent in the court; its exercise is the highest form of judicial power. *State ex rel. Bliss v. Greenwood,* 63 N.M. 156, 315 P.2d 223 (1957); *see also State v. Case,* 103 N.M. 574, 711 P.2d 19 (Ct.App.), *rev'd on other grounds, Case v. State,* 103 N.M. 501, 709 P.2d 670 (1985). We agree with defendant that the legislature has some authority to restrict the exercise of the contempt power. However, defendant's reliance on the legislature's sole authority to establish punishment for a crime is misplaced. The primary purpose of criminal contempt is to preserve the court's authority and to punish for disobedience of its orders. *State ex rel. Bliss v. Greenwood; State v. Case.* We are concerned here with defendant's disregard of a court order, not of a crime against the state.

Section 35-3-9 need not be held unconstitutional for Rule 12 to control. Rule 12 reflects the supreme court's desire not to restrict the metropolitan court's ability to punish for contempt to the limits set by Section 35-3-9, and we are unable to overrule the supreme court. *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973). Thus, Rule 12 controls over Section 35-3-9.

II. Whether Metropolitan Court Contempt Jurisdiction Is Restricted To That Of Magistrate Courts In Contempt Matters As Specified In Section 35-3-9.

Defendant questions the district court's determination that the metropolitan court's contempt jurisdiction for punishment pursuant to Metro. Rule 12(c) is imprisonment up to one year. However, the outer limit of the metropolitan court's jurisdiction need not be determined here. *See Reeder v. Bowman,* 64 N.M. 7, 322 P.2d 339 (1958). Defendant was only sentenced to six days incarceration, three days more than allowed by Section 35-3-9. Thus, we need only decide whether this three-day period exceeded the metropolitan court's authority. *Id.*

Defendant concedes that the metropolitan court is a magistrate court. *See*

NMSA 1978, § 34-8A-2 (Repl.Pamp.1981). Defendant also notes that NMSA 1978, Magis.Crim. Rule 35 (Repl.Pamp.1985) allows punishment for contempt of up to thirty days imprisonment and he questions whether Section 35-3-9 controls over Rule 35. Our reasoning as to why Metro. Rule 12 controls over Section 35-3-9 applies equally to Magis.Crim. Rule 35. Thus, we cannot overrule the supreme court's desire not to restrict the magistrate court's ability to punish contempt to the limits set by Section 35-3-9. *Alexander v. Delgado.* Therefore, Magis.Crim. Rule 35 also controls over Section 35-3-9. Since the metropolitan court is a magistrate court, defendant's sentence was properly within the limits of the Magis.Crim. Rule 35. Defendant's sentence was not in excess of the metropolitan court's authority.

For these reasons, we affirm the district court.

IT IS SO ORDERED.

DONNELLY and GARCIA, JJ., concur.

734 P.2d 245

Gerald B. TRUJILLO, Tony Albert Sanchez, Pablo N. Bachicha, Alonzo Carrell, Scott William Greenup, Danny Nieto, and Jose A. Villegas, Petitioners-Appellees,

v.

EMPLOYMENT SECURITY DEPARTMENT, Respondent,

and

Associated Grocers of Colorado, Inc., Respondent-Appellant.

No. 8231.

Court of Appeals of New Mexico.

Jan. 13, 1987.

Jeffrey J. Dempsey, Albuquerque, for petitioners-appellees.

D. James Sorenson, Johnson and Lanphere, P.C., Albuquerque, for respondent-appellant.

OPINION

HARRIS, District Judge (by designation).

Appellant, Associated Grocers of Colorado, Inc., appeals from an order of the district court following a review by certiorari, reversing an administrative order of the Employment Security Department (ESD), and directing that appellees be awarded unemployment compensation benefits. Two issues are raised on appeal: (1) whether the district court abused its discretion in allegedly substituting its judgment for that of the ESD; and (2) whether the actions of appellees constituted misconduct so as to disqualify them from unemployment compensation benefits. We reverse and remand.

On August 10, 1983, appellees were employed by appellant, Associated Grocers of Colorado, Inc., and worked the 12:00 noon to 8:30 p.m. shift. At approximately 7:45 p.m., the night shift supervisor notified the appellees that overtime would be needed. Because the notice of overtime was given less than one hour before the end of their shift, the appellees, by union contract, were entitled to and did decline to remain overtime. The supervisor then met with the shift personnel at about 8:20 p.m., admitted that his overtime call was in violation of the union contract but asked them to work overtime anyway.

Some of the shift remained to work overtime, but others chose not to do so. The supervisor again met with the majority of the shift at approximately 8:30 p.m., and the supervisor testified that at that time he told them he was drafting them for overtime and wanted them back at 4:30 a.m. He also testified that, in his opinion, the employees present understood what he had said, and that there was no misunderstanding or confusion. However, three of the appellees testified, and they stated that they and others were confused as they understood the supervisor to have said that some employees were going to be called to come in at 4:30 a.m. for overtime. They were never called, so they did not report for work at 4:30 a.m. Their employment was terminated shortly thereafter because they failed to appear for work at 4:30 a.m. All thirteen terminated employees applied for unemployment compensation benefits, but the ESD Appeal Tribunal disqualified them from benefits finding that they were discharged for misconduct connected with their work. The employees appealed, and the ESD Board of Review affirmed the Appeal Tribunal. Seven of the terminated employees then petitioned the district court for a writ of certiorari, and the district court entered its judgment reversing the ESD and awarding benefits to the seven petitioners.

The issue before us is whether the failure of appellees to report for work at 4:30 a.m. constituted misconduct under NMSA 1978, Section 51-1-7 (Repl.Pamp.1983).

I. STANDARD OF REVIEW

Appellant contends that the trial court abused its discretion in overturning the decision of ESD and in adopting findings of fact and conclusions of law contrary to those found by the administrative agency.

Appellees argue initially that appellant waived its contention that the findings of fact of the district court are not supported by substantial evidence because appellant's brief failed to contain a summary of facts accompanied by references to the record on appeal showing a finding of proof of each factual allegation contained therein. Appellees stated that the violation of NMSA 1978, Civ.App. Rule 9(a)(3)(iii) (Supp.1985) should result in a waiver of that issue. While appellant did not cite every relevant portion of the transcript on the issues raised, it did refer to a substantial portion of material evidence. The facts

here are very similar to those in *Danzer v. Professional Insurors, Inc.*, 101 N.M. 178, 679 P.2d 1276 (1984), and in that case the court stated the deficiencies in citing to the evidence in the record were not immoderate. The Rules of Appellate Procedure are construed liberally so that causes on appeal may be determined on their merits. *Maynard v. Western Bank*, 99 N.M. 135, 654 P.2d 1035 (1982). Therefore, appellant has not waived its contention as to the substantial evidence issue.

Section 51–1–7 of the Unemployment Compensation Act specifies the basis for disqualification for eligibility to receive unemployment compensation benefits. Subsection (B) thereof provides:

> B. if it is determined by the department that he has been discharged for misconduct connected with his work or employment. The disqualification shall continue for the duration of his unemployment and until he has earned wages in insured work or such bona fide employment other than self-employment as provided by regulation of the department in an amount equivalent to five times his weekly benefit amount otherwise payable * * * *

The parties agree that the scope of judicial review of findings of fact made by administrative agencies is the "whole record review." *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 101 N.M. 291, 681 P.2d 717 (1984); *Alonzo v. New Mexico Employment Security Department*, 101 N.M. 770, 689 P.2d 286 (1984). This requires the courts to review and consider not only evidence in support of one party's contention to determine whether there was substantial evidence to support the agency finding, but courts are to look also to evidence which is contrary to the finding; and the reviewing court must then decide whether, on balance, the agency's decision was supported by substantial evidence.

Duke City expressly sought to remedy New Mexico's outdated standard of review, which was contrary to that followed in federal courts and the majority of other jurisdictions. (That standard required the reviewing court to view evidence in the light most favorable to support the Board's findings, ignoring all evidence unfavorable to the decision.) Although the supreme court confirmed the "most favorable light" standard for orders and judgments of trial courts, it expressly adopted the "whole record" standard for administrative appeals. Under the new standard, the reviewing court must now look at evidence which is contrary to the agency's finding instead of disregarding it as before.

Duke City expressly patterned the whole record standard after *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The reviewing court can introduce its own findings if it determines the Board's findings are not supported by substantial evidence. *Abernathy v. Employment Security Commission*, 93 N.M. 71, 596 P.2d 514 (1979). Neither *Universal Camera* nor *Duke City*, however, changed the standard of review so as to permit the reviewing court to enter its own findings if the administrative agency's decision is supported by substantial evidence.

There are two areas within *Duke City* that could account for confusion. First, in explaining the whole record standard, the court quotes from an earlier case in which the court attempted to apply that standard: "Because of the minor departure from the customary substantial evidence rule in reviewing administrative decisions where the record as a whole must be considered, the reviewing court may act on other convincing evidence in the record and may make its own findings based thereon." *New Mexico Human Services Dept. v. Garcia*, 94 N.M. 175, 177, 608 P.2d 151, 153 (1980). Taken alone, this appears to authorize independent findings just because the record as a whole must be considered. It is questionable, however, whether the court intended to convey that meaning. Immediately following the above quotation, the *Garcia* court affirms its prior holding permitting independent findings only if the Board's findings are *not* supported by substantial evidence. *Compare Id.* at 177, 608 P.2d at 153 *with Abernathy*, 93 N.M. at 72, 596 P.2d at 515. The true meaning of the passage, therefore, seems to be that the independent findings by the reviewing

court are authorized if the Board's findings, after considering all conflicting evidence, are unsupported by substantial evidence. We note that the *Duke City* opinion does not contain that portion of *Garcia* which refers to the rule governing independent findings.

Second, *Duke City* also quoted from *Garcia* that, " 'In order to determine whether the decision by HSD is supported by substantial evidence in the record as a whole, we must view the evidence in the light most favorable to the decision by HSD.' " *Duke City* at 294, 681 P.2d at 720 (*quoting Garcia* at 177, 608 P.2d at 152). *Universal Camera,* on the other hand, interpreted the whole record standard as mandating review of the evidence opposed to the Board's position in the light that the record in its entirety furnishes. *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 464.

It is therefore unlikely, given *Duke City's* reliance on *Universal Camera,* that the court intended on one hand to require the reviewing court to consider all conflicting evidence and not just favorable evidence and on the other hand to continue to view the evidence in the light most favorable to the agency. In fact, in an opinion after *Duke City,* the supreme court noted, "Substantial evidence in an administrative agency review requires whole record review, not a review limited to those findings most favorable to the agency order." *Groendyke Transport, Inc. v. New Mexico State Corporation Commission,* 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984).

There are, however, at least three supreme court opinions written after *Duke City* that use the old "view the evidence in the light most favorable to the decision" standard: *Attorney General of State of New Mexico v. New Mexico Public Service Commission,* 101 N.M. 549, 553, 685 P.2d 957, 961 (1984) (*citing Garcia*); *Mutz v. Municipal Boundary Commission,* 101 N.M. 694, 699, 688 P.2d 12, 17 (1984) (*citing Duke City Lumber*); and *Jimenez v. Dept. of Corrections,* 101 N.M. 795, 796, 689 P.2d 1266, 1267 (1984) (*citing Duke City* as *quoting Garcia*).

It appears, therefore, that *Garcia* may be a root cause of confusion. *Garcia* preceded *Duke City* and sought to implement the whole record review which the court believed was required by statute. *See* NMSA 1978, § 27-3-4(F) (Repl.Pamp.1984). The court's analysis made no reference to *Universal Camera.*

The latest appellate decision discussing the whole record standard of review is *Grauerholtz v. New Mexico Labor & Industrial Commission,* 104 N.M. 674, 726 P.2d 351 (1986). In *Grauerholtz,* the court stated that in *Duke City* "we adopted the whole review announced in *Universal Camera Corp. v. NLRB,* 340 U.S. 474, [71 S.Ct. 456, 95 L.Ed. 456] (1951)." Quoting from *Duke City,* the court in *Grauerholtz* noted the reviewing court must look at the record to determine whether there was substantial evidence to support the agency finding, but also must look " 'to evidence which is contrary to the finding. *The reviewing court would then decide whether on balance, the agency's decision was supported by substantial evidence.*' " *Id.* at 676, 726 P.2d at 353 (emphasis added).

In sum, it appears that the whole record standard of review is as follows:

A. The whole record review means considering all the evidence, whether it is favorable or unfavorable;

B. The evidence should be considered in light of the entire record; and

C. Independent findings by the reviewing court reaching a contrary result from that of the administrative agency are permissible where the decision of the administrative agency is not supported by substantial evidence, it is arbitrary or capricious or it is contrary to law.

Finally, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966); *Attorney General of New Mexico v. New Mexico Public Service Commission. See also* Utton, *The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico,* 10 N.M. L.Rev. 103 (1979-80).

In *Duke City*, 101 N.M. at 294, 681 P.2d at 720, the court (*quoting* from *Garcia*), stated:

> [T]he substantial evidence rule must be applied to the *entire record* and that segments of the record may not be ignored in applying the rule. The statute does not mean that upon judicial review of the findings by HSD, the Court may reweigh the evidence and reassign the preponderance of evidence. [Emphasis in original.]

In our present case, the decision of the agency was supported by substantial evidence and not contrary to law, and the trial court erred in reweighing the evidence.

II. CLAIM OF MISCONDUCT

The ESD Appeal Tribunal found that appellees should be disqualified from receiving unemployment compensation benefits because of misconduct in failing to report for overtime work.

The critical issues before the agency were issues of fact, and the evidence in the record as a whole would have supported conflicting conclusions. Under these circumstances, the whole record standard does not permit the reviewing court to substitute its judgment for that of the agency.

> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence * * * * Nor does it mean that ... a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*

Universal Camera Corp. v. NLRB, 340 U.S. at 488, 71 S.Ct. at 465.

On certiorari, the district court found that appellees' failure to report for work was due to confusion "regarding the instructions given them and did not understand that they were required to appear for overtime without being called off the senority [sic] list." There was testimony from the appellees that they were confused about the overtime issue, but there was also testimony from the night shift supervisor that his orders directing the employees to report were explicit and not confusing. The testimony from the night shift supervisor is substantial evidence.

Appellees argue that the evidence reveals a single isolated incident in the course of satisfactory employment of appellees by appellant. Appellees cite the case of *Alonzo v. New Mexico Employment Security Dept.* In that case, the court found that the refusal to wear a smock on one occasion was an isolated incident in an otherwise good performance record during almost three years of employment, and that such refusal did not rise to a level of wilful or wanton misconduct that would harm her employer's business interests.

It should be noted that even though Alonzo refused to wear a smock, she fully did her job; and the refusal to wear a smock while doing the job did not significantly affect her employer's business. In the present case, the alleged confusion did cause some difficulty in coordinating, receiving and shipping.

In *Mitchell v. Lovington Good Samaritan Center, Inc.*, 89 N.M. 575, 577, 555 P.2d 696, 698 (1976) (*quoting Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259–60, 296 N.W. 636, 640 (1941)), the supreme court adopted the following definition for misconduct:

> "[M]isconduct" * * * is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee * * * * On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Whether the failure of the appellees to report for work at 4:30 a.m. constituted misconduct is a question of fact to be determined from all the attendant circumstances

in each case. There was testimony that there was confusion as to overtime, and there was testimony that there did not appear to be any such confusion. It is not the function of reviewing courts to determine the credibility of witnesses. *New Mexico Human Services Dept. v. Garcia.* Also, under the employment contract, the employer had a right to draft employees to work overtime in emergency situations significantly affecting the employer's interests. Appellees do not challenge the reasons appellant determined overtime work was necessary.

CONCLUSION

There was substantial evidence to support the finding of misconduct by the administrative agency, and the trial court improperly reweighed the evidence and substituted its judgment for that of the administrative agency. For these reasons, the decision of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DONNELLY and MINZNER, JJ., concur.

734 P.2d 250

In the Matter of the ESTATES OF Nicolas SALAS and Edita G. Salas, his wife, Deceased.

Emilio T. GARCIA, Stella Garcia, Kathleen Y. Perea, Emilio Garcia, Jr., Rudy A. Garcia, Terri Garcia, Pablo Perea, and Stanley Garcia, Appellants,

v.

Willie GARCIA, Personal Representative, Appellee.

No. 8615.

Court of Appeals of New Mexico.

Jan. 29, 1987.

Avelino V. Gutierrez, Albuquerque, for appellants.

OPINION

DONNELLY, Chief Judge.

Appellants Emilio T. Garcia, Stella P. Garcia, his wife, five of their children, and Pablo Perea, a son-in-law of Emilio T. Garcia, appeal from an order of the district court in probate denying the claims filed by them against the estate of Edita G. Salas and from denial of appellants' motion to reconsider their claims. Two issues are presented on appeal: (1) whether appellee, Willie Garcia, is estopped from asserting title to decedents' property; and (2) whether the trial court erred in failing to award appellants the sum of $12,313.88 for improvements to realty deeded to appellee and in disallowing reimbursement for funeral expenses of decedent Edita G. Salas, paid by Emilio T. Garcia. We reverse and remand.

On November 2, 1983, appellant Emilio T. Garcia filed an application for appointment as personal representative and to probate the estates of Nicolas Salas, who died September 9, 1968, and Edita G. Salas, who died on March 14, 1983, in Albuquerque, New Mexico. Nicolas and Edita G. Salas were husband and wife; appellant, Emilio T. Garcia, was a brother of Edita G. Salas. Nicolas Salas died intestate. Edita G. Salas executed two last wills and testaments. The first, dated August 10, 1982, specified that after payment of the costs and expenses of her estate, the remainder of her estate would pass to the appellant Emilio T. Garcia. Neither Nicolas Salas nor Edita G. Salas left any surviving children.

An order appointing Emilio T. Garcia as the personal representative of decedents' estates was entered on November 3, 1983, authorizing the administration of decedents' estates. Thereafter, on November 16, 1983, appellee, a nephew of the decedent Edita G. Salas, filed an application for informal probate of will seeking appointment as personal representative of the estate of Edita G. Salas. Appellee also filed with his petition a copy of a different will alleged to have been executed by Edita G. Salas, dated September 20, 1982. Under the terms of the latter will, Edita G. Salas designated appellee as the personal representative of her estate and further specified that "I give, devise and bequeath to my nephew, WILLIE GARCIA, all of my property * * * absolutely." In addition, copies of two warranty deeds signed by Edita G. Salas and dated September 20, 1982, were attached to the application for appointment. Each deed conveyed separate parcels of land in Bernalillo County, Atrisco Precinct No. 28, to the appellee as grantee. Recording data on the deeds indi-

cates that the deeds were recorded on February 9, 1983, prior to the death of Edita G. Salas.

Following a hearing, the trial court entered an order dated November 31, 1984, finding "That the last will and testament of EDITA G. SALAS dated September 20, 1982, is the last will and testament of EDITA G. SALAS, deceased[,]" and appointed appellee as the personal representative of the estate of decedent Edita G. Salas.

Thereafter, appellants herein filed individual claims against the estate of Edita G. Salas totalling $21,761.53. The claims of appellants alleged that they performed labor on decedents' real estate; appellant Emilio T. Garcia also claimed that he paid certain medical and funeral expenses of Edita G. Salas, and paid for labor and materials to repair and improve decedents' real estate.

Following a hearing, the trial court entered an order dated April 16, 1985, providing, among other things, that the two conveyances executed by Edita G. Salas on September 20, 1982, were valid and conveyed her interest in the realty to appellee; that the remaining estate of Edita G. Salas consisted of three (3) shares of stock in the Westland Development Corporation and certain items of personal property; and that Emilio T. Garcia is entitled to judgment personally and not as personal representative against appellee, in the sum of $2,000, representing improvements made to the real estate conveyed to appellee.

Appellants filed a motion to reconsider the court's order and on May 13, 1985, the trial court, without disturbing the prior award of $2,000, denied the motion.

I. CLAIM OF ESTOPPEL

Appellants assert that the trial court erred in failing to find that appellee was precluded under the doctrine of equitable estoppel from asserting title to the realty deeded by Edita G. Salas to him prior to her death, by reason of his standing by and allowing the appellants to make improvements and expenditures on the property without protesting and asserting his own title.

Appellants contend that Emilio T. Garcia took possession of the real estate shortly after the death of Edita G. Salas, believing that he had a clear right thereto as sole beneficiary under a prior will of the decedent. Emilio T. Garcia testified that he moved into a house located on decedents' property and that he and the other claimants, consisting of his wife and family, performed labor and incurred expenses in repairing and improving the realty.

Appellants argue that the trial court erred in failing to find that appellee was estopped from obtaining title to decedents' real estate because he allegedly knew of the prior will dated August 10, 1982, leaving the estate of Edita G. Salas to Emilio T. Garcia, and did not inform them of the subsequent will until it was filed for probate. Appellants also allege that appellee remained silent while Emilio T. Garcia paid for the funeral of Edita G. Salas, and paid taxes on the realty.

The procedure for probating wills and testaments in New Mexico is strictly statutory and is an action in rem. *In re Towndrow's Will,* 47 N.M. 173, 138 P.2d 1001 (1943). The district court sitting in probate and the probate courts are not invested with general civil jurisdiction. *In re Porter's Estate,* 47 N.M. 122, 138 P.2d 260 (1943); *see also In re Conley's Will,* 58 N.M. 771, 276 P.2d 906 (1954); N.M. Const. art. VI, § 23; NMSA 1978, § 45–1–302 (Cum.Supp.1986). The courts do, however, have the power to apply the principles of equity in aid of its functions as probate courts unless specifically displaced by particular provisions of the Code. NMSA 1978, § 45–1–103; *see also In re Estate of Bissinger,* 60 Cal.2d 756, 36 Cal.Rptr. 450, 388 P.2d 682 (1964) (en banc).

Appellee has not assisted the court herein by filing an answer brief to the brief-in-chief of appellants. Examination of the record, however, indicates that the trial court's refusal to apply the doctrine of equitable estoppel against the appellee as personal representative was not an abuse of discretion or contrary to law. Appellants have not challenged the validity of

the last will and testament of Edita G. Salas, dated September 20, 1982, or the two conveyances given by her to appellee.

Appellee testified that he was aware that his uncle Emilio T. Garcia had moved into the house on the property and cleaned up the premises, but did not know that they were spending money on the property. He also testified that he had not been more aggressive in moving his uncle from the property because he was "family, and I have a lot of respect for these people, and I don't want any feuds." He further testified that he finally took action and had his lawyer notify appellant Emilio T. Garcia of the later will and deeds when he received copies of the petition filed by his uncle seeking informal administration of his aunt's estate.

"Estoppel" is the preclusion by reason of the acts or conduct of a party, from asserting a right which might otherwise have existed, to the detriment or prejudice of another, who has acted thereon in reliance on such acts and conduct. *Reinhart v. Rauscher Pierce Securities Corp.*, 83 N.M. 194, 490 P.2d 240 (Ct.App.1971). An essential element of estoppel, as related to appellants' contentions, is a lack of knowledge and of means of knowledge of the truth as to the facts in question. *Capo v. Century Life Insurance Co.*, 94 N.M. 373, 610 P.2d 1202 (1980); *see also Bowlin's, Inc. v. Ramsey Oil Co.*, 99 N.M. 660, 662 P.2d 661 (Ct.App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983).

Determination of whether a claim of equitable estoppel has been proven is a question of fact for the trier of fact. *Cf. Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982) (where court held that issue of whether affirmative defense of waiver is proven is question of fact for trial judge); *Reinhart v. Rauscher Pierce Securities Corp.* A party alleging and relying on a claim of estoppel has the burden of establishing all facts necessary to prove the claim. *Patten v. Santa Fe National Life Insurance Co.*, 47 N.M. 202, 138 P.2d 1019 (1943).

The two deeds given by Edita G. Salas to appellee were both filed and recorded in Bernalillo County on February 9, 1983, hence appellants had constructive notice that title to the real estate upon which they allegedly performed labor had been previously conveyed to appellee. *See* NMSA 1978, § 14–9–2; *Romero v. Sanchez*, 83 N.M. 358, 492 P.2d 140 (1971). Moreover, the true owner of real property is not estopped from asserting ownership solely because another, lacking any claim to the property, is allowed to exercise control over the true owner's property. *First National Bank in Albuquerque v. Enriquez*, 96 N.M. 714, 634 P.2d 1266 (1981).

Under these facts, we find no error in the ruling of the district court refusing to apply the doctrine of equitable estoppel as sought by appellants.

II. CLAIMS AGAINST THE ESTATES

As previously noted, the trial court allowed appellants $2,000 of their claim for improvements to the real estate and denied the claim for reimbursement for certain medical and funeral expenses. Appellants claim error in these rulings.

(a) Claims for Improvements to Real Estate

Appellants assert that the trial court erred in denying their claims against decedents' estate in the amounts testified to by them, and instead limiting their claims to the sum of $2,000. Appellants also contend it was error for the court to disregard the uncontradicted testimony of claimants regarding the basis and amount of their claims.

In considering this contention, we are confronted with the threshold jurisdictional issue involving the trial court's award of damages against appellee, individually. Under the Probate Code, NMSA 1978, Section 45–3–808(B), a personal representative may be held individually liable under the following circumstances:

> A personal representative is individually liable for obligations arising from ownership or control of the estate or for

torts committed in the course of administration of the estate only if he is personally at fault.

The claims of appellants were asserted only against decedents' estate and not against appellee individually. The real estate, upon which the improvements claimed by appellants were made, was not part of decedents' estate because it was conveyed by Edita G. Salas to appellee prior to her death. Nonetheless, the judgment appealed herein, rendered by the district court sitting in probate, purports to impose personal liability against appellee, individually, and not against decedents' estate or appellee in his capacity as personal representative.

A trial court may not grant relief which is neither requested by the pleadings nor within the theory of the case. *Holmes v. Faycus,* 85 N.M. 740, 516 P.2d 1123 (Ct.App.1973). The district court lacked jurisdiction to enter an order awarding damages against appellee, individually, where no claim was originally pleaded or asserted against him individually and where the assets, consisting of realty, against which the majority of the claims were asserted were not part of decedents' estate. *See id.* In order to assert a claim against appellee individually, and which arose out of improvements to realty which were not a part of decedents' estate, claimants would be required to initiate an action outside the probate proceedings. *Cf. Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.; Bowlin's Inc. v. Ramsey Oil Co.*

(b) Claims for Funeral and Related Expenses

As shown by the record, the assets of the estate are insufficient to satisfy the claims of appellants against decedents' estate. Where the assets of an estate are limited and the claims against the estate exceed the remaining assets, the claims are required to be paid as determined by their nature and priority. NMSA 1978, § 45–3–805. The claim for funeral and medical expenses of decedent Edita G. Salas is a valid claim against the estate and is accorded priority in accordance with the provisions of Section 45–3–805. *See* Annot., 35 A.L.R.2d 1399 (1954).

The judgment appealed from is reversed and the cause remanded with instructions to enter an amended judgment setting aside the judgment against the personal representative individually, and adjudging the amount of appellants' claims for funeral expenses against the assets, if any, remaining in decedents' estates.

IT IS SO ORDERED.

BIVINS and ALARID, JJ., concur.

734 P.2d 254

JoElla Lynn PEMBERTON, a minor, and Sherry L. Pemberton, Guardian and Next Friend of JoElla Lynn Pemberton, Plaintiffs-Appellees,

v.

Theresa CORDOVA, a minor, Mr. and Mrs. Pat Cordova, Guardians and Next Friends of Theresa Cordova, Defendants,

and

Moriarty Municipal Schools Board of Education, a/k/a Moriarty Municipal Schools, Defendant-Appellant.

No. 9619.

Court of Appeals of New Mexico.

Feb. 5, 1987.

Joseph Rocca, Law Office of Joseph Rocca, Chester A. Bowerman, Albuquerque, for plaintiffs-appellees.

Terry R. Guebert, Civerolo, Hansen & Wolf, Albuquerque, for defendants Cordova.

Louise Gibson, Butt, Thornton, Baehr, P.C., Albuquerque, for defendant-appellant Moriarty Municipal Schools.

OPINION

GARCIA, Judge.

This is an interlocutory appeal from an order denying a motion to dismiss defendant Moriarty Municipal Schools. We reverse.

FACTS

Plaintiffs filed a damage action for personal injuries resulting from an incident where defendant Theresa Cordova, a student, allegedly struck and injured plaintiff JoElla Lynn Pemberton, also a student, while on school property. The suit named both Cordova and Moriarty Municipal Schools as defendants. Defendant Moriarty Municipal Schools argued that it could not be sued under the New Mexico Tort Claims Act, NMSA 1978, Sections 41–4–1 to –29 (Repl.1986). The trial court denied defendant's motion to dismiss because it believed NMSA 1978, Section 22–10–5(D) (Repl.1986), imposed a duty on the school administration that superceded the Tort Claims Act.

DISCUSSION

The sole issue on appeal is whether Section 41–4–6 provides a remedy for an injured student to sue a school board on the theory of negligent supervision. We hold that it does not.

Section 41–4–2 of the Tort Claims Act provides in part: "[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act * * *." Additionally, the Act provides, in Section 41–4–4, that governmental entities and public employees, while acting within the scope of their duties, shall be immune from liability for any tort except as waived by the Act. *Begay v. State,* 104 N.M. 483, 723 P.2d 252 (Ct.App.1985) *rev'd on other grounds, Smialek v. Begay,* 104 N.M. 375, 721 P.2d 1306 (1986); *Tompkins v. Carlsbad Irrigation District,* 96 N.M. 368, 630 P.2d 767 (Ct.App.1981). Thus, plaintiffs' cause of action, as against a governmental entity or a public employee, must fit within one of the exceptions to the immunity granted, or it may not be maintained.

Plaintiffs rely on Section 41–4–6, arguing that immunity has been waived. Section 41–4–6 waives immunity for damages resulting from the negligent operation or maintenance of a building. In *Wittkowski v. State Corrections Dept,* 103 N.M. 526, 530, 710 P.2d 93, 97 (Ct.App.1985), we held that when "the injuries alleged did not occur due to a physical defect in a building, the provision is not applicable * * *." *See also Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980). Plaintiffs ask us to expand the scope of the provision to include negligent supervision of students. Where the areas of waiver of immunity are specifically presented, we have no authority to read other exceptions into the statute. *Begay v. State.* To allow plaintiffs to sue under this exception would be to read into the Act language which is not there. This we will not do. *See Carter v. Mountain Bell,* 105 N.M. 17, 727 P.2d 956 (Ct.App. 1986).

If no specific waiver of immunity can be found in the Tort Claims Act, plaintiffs' complaint must be dismissed as to the governmental defendant. *See Begay v. State.* Consent to be sued may not be implied, but must come within one of the exceptions to immunity under the Tort Claims Act. *Id., see Redding v. City of Truth or Consequences,* 102 N.M. 226, 693 P.2d 594 (Ct.App.1984). Here, plaintiff's injuries occurred as the result of a third party acting on school grounds. The provisions of the Tort Claims Act grant no specific waiver of immunity for this type of occurrence. *See generally* §§ 41–4–1 to –29. Moreover, plaintiff's injuries were obviously not the result of a defect in the premises pursuant to Section 41–4–6. *See Wittkowski.*

Additionally, plaintiffs urged at trial, and the trial court agreed, that Section 22–10–5(D) provided a remedy for plaintiffs notwithstanding the Tort Claims Act. This section requires teachers to "exercise supervision over students on property belonging to the public school." We are not persuaded by this argument. The right to sue governmental entities and public employees is limited to the rights and procedures outlined within the Tort Claims Act. § 41–4–2; § 41–4–4; *Methola.* Since Section 41–4–6 does not allow an injured student to sue on the theory of negligent supervision, sovereign immunity has not been waived.

Thus, the trial court's refusal to dismiss Moriarty Municipal Schools was in error. We reverse and remand with instructions to dismiss defendant Moriarty Municipal Schools from the action.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

734 P.2d 259

Dolores H. MATTOX,
Petitioner-Appellee,
Cross-Appellant,

v.

Donald M. MATTOX,
Respondent-Appellant,
Cross-Appellee.

No. 8319.

Court of Appeals of New Mexico.

Feb. 10, 1987.

Elizabeth Gabriel, Albuquerque, for respondent-appellant cross-appellee.

Sandra Morgan Little, Atkinson & Kelsey, P.A., Albuquerque, for petitioner-appellee cross-appellant.

OPINION

BIVINS, Judge.

Respondent-appellant (husband) and petitioner-appellee (wife) appeal the decision of the trial court in this divorce proceeding. Husband raises five issues: (1) whether the trial court properly valued his pension plan; (2) whether the trial court properly valued his employee stock option plan; (3) whether the trial court properly valued his employee savings plan; (4) whether the trial court erred in the award of a coin collection as husband's separate property when its value was already included in the award of household goods; and (5) whether the trial court abused its discretion in awarding lump sum alimony in addition to alimony of $500 a month for one year. We affirm on issues 1 and 2 and remand as to issue 3 with instructions. As to issue 4, we grant the parties' request to correct the arithmetic error on the personal property list. We discuss issue 5 in conjunction with wife's cross-appeal since the parties appeal the common issue of alimony.

Wife raises two issues on cross-appeal: (1) whether the trial court erred in awarding alimony for one year only; and (2) whether the trial court erred in not awarding wife attorney fees at trial. We affirm on both issues.

The parties married on September 6, 1953. Husband, aged fifty-two at the time of appeal, has worked at Sandia National Laboratories since 1961 and currently earns approximately $68,500 per year. Wife taught school sporadically during the marriage, but remained at home during most of the marriage. The parties have one married daughter. Since separating in September 1983, wife, aged fifty-two at the time of appeal, has become recertified to teach elementary school in New Mexico. Starting salary for teachers is approximately $13,000 for a nine-month period.

On May 31, 1984, the trial court heard issues regarding the property settlement, valuation of property and alimony. On December 27, 1984, the trial court issued its findings of fact, distributing $203,820 of community assets to wife and $187,459 of community assets to husband. The trial court awarded temporary alimony of $500 per month to wife for one year plus the difference in the value of the property award as lump sum alimony. Although the trial court found economic disparity between the parties, it ordered each party to pay his or her own attorney fees. The trial court entered its judgment and final decree of dissolution of marriage on December 27, 1984. We address husband's issues first.

PENSION

Husband contends that the trial court erred in valuing his vested, but unmatured, pension plan. Specific errors alleged include: a) the valuation date; b) the retirement date; c) the discount rate; d) the non-withdrawal of contributions option; and e) failure to consider tax consequences. We address each point separately.

a) Valuation Date

The community's interest in a pension plan that is vested but unmatured is the amount of benefits earned during coverture. *Copeland v. Copeland,* 91 N.M. 409, 575 P.2d 99 (1978). "The significance of *Copeland* * * * is that the Court was willing to divide the husband's future retirement benefits at the time of the divorce even though the right to receive them had not yet actually [matured] completely." *Hughes v. Hughes,* 96 N.M. 719, 723, 634 P.2d 1271, 1275 (1981). To value unmatured pension benefits, the trial court must determine their present value. *Ridgway v. Ridgway,* 94 N.M. 345, 610 P.2d 749 (1980). Present value is " 'the amount which must be invested at present to produce a required number of annual payments of a given amount, or a required future total investment, including retained interest, at a stated rate of interest over a specified number of years.' " *Id.* at 346–47 n. 1, 610 P.2d at 750–51 n. 1 (quoting D. Clark & B. Gottfried, University Dictionary of Business & Finance (1967)). "Whether or not the pension is matured, the first step is to determine its future value, expressed as a lump sum. Discount factors are then employed to calculate the present cash value of this sum." *In re Marriage of Pilant,* 42 Wash.App. 173, 179, 709 P.2d 1241, 1245 (1985).

New Mexico cases state clearly that a spouse is entitled to a community share of the portion of retirement that is vested but unmatured at the date of divorce. *Copeland; Madrid v. Madrid,* 101 N.M. 504, 684 P.2d 1169 (Ct.App.1984). *Accord Hurley v. Hurley,* 94 N.M. 641, 615 P.2d 256 (1980), *overruled on other grounds, Ellsworth v. Ellsworth,* 97 N.M. 133, 637 P.2d 564 (1981). In *Madrid,* however, husband was already receiving pension benefits; only the status of post-divorce increases was in question. In our case, neither the parties nor the trial court considered further payment by husband after the divorce.

Husband's pension plan is a defined benefit plan.

> In a defined benefit plan[,] "the company obligates itself to pay a specified monthly pension at retirement * * *. The employee's present interest * * * is derived from the amount of monthly pension promised at retirement. * * * [We value this] interest * * * by first determining the value of the pension measured at the future retirement date, and then discounting that value back to the present date of valuation * * *."

In re Marriage of Stephenson, 162 Cal. App.3d 1057, 1082–83, 209 Cal.Rptr. 383, 400 (1985) (quoting Projector, *Valuation of Retirement Benefits in Marriage Dissolutions,* 50 L.A.Bar Bull. 229, 231 (1975)).

The valuation date used in our case was the date of trial. The experts considered only husband's monetary contributions during the marriage. The only uncertainty was whether husband would live twenty-two months until April 1986, the maturity date of the plan. Discounting to present value accounts for the possibility that the pension will not mature. The record indicates that wife's expert valued husband's future right to receive the pension as of the

trial date and discounted the pension to present value. This was a proper method. *See Stephenson.*

We are concerned only with valuing the pension for purposes of dividing the community property, not with apportioning deferred benefits to the parties on a "pay as it comes in" basis. In our case, the trial court found that the present value of husband's pension was $101,239. Neither the findings nor the judgment mentions a valuation date used in reaching this figure. Husband contends that a letter opinion issued by the trial judge on September 13, 1984, uses April 1984, rather than April 1986, as a valuation date. While the letters, remarks, or opinion of a trial judge may be looked to in clarifying ambiguities or inconsistencies in the findings, the formal findings must prevail. *Sanders v. Carmichael Enterprises,* 57 N.M. 554, 260 P.2d 916 (1953). Here, since the trial court's findings were silent on the valuation date used, the findings contain no ambiguities or inconsistencies,[1] and so prevail over the letter of the trial court.

The trial court's findings, of course, must be supported by substantial evidence. *Berry v. Meadows,* 103 N.M. 761, 713 P.2d 1017 (Ct.App.1986). The trial court used wife's expert's figure of the present value in reaching a value. Both experts testified that their calculations did not take into account husband's earnings between the date of trial, May 31, 1984, and the maturity date of the pension, April 1986. The trial court's valuation falls within the range of figures offered through expert testimony. *See In re Marriage of Bergman,* 168 Cal.App.3d 742, 214 Cal.Rptr. 661 (1985). The substantial evidence requirement is met.

Husband contends that the trial court should have valued the pension as if husband quit working on June 1, 1984, an approach that would invoke early retirement penalties. We disagree. First, no evidence supports this assumption because husband testified that he would continue to work at Sandia. *See In re Marriage of Bayer,* 687 P.2d 537 (Colo.App.1984). Second, although husband received all of the pension, he wants to value it at the lower figure as if early retirement penalties had been imposed. This would severely penalize the nonemployee spouse. If wife had received one-half of the pension on a "pay as it comes in" basis, the pension would have been valued at the higher figure. Third, husband states several times in his brief-in-chief that even though the experts' calculations assume that husband will not earn any more money, the community is not entitled to use future employment years in valuing the pension. Husband cites no authority for this proposition. We assume no authority was found. *In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984). Finally, such an approach would come dangerously close to defeating the community interest of the nonemployee spouse. *See generally In re Marriage of Gillmore,* 29 Cal.3d 418, 174 Cal.Rptr. 493, 629 P.2d 1 (1981). Failing to use future employment years in valuing the pension would not effect an equal division of community property mandated by New Mexico case law. *Ellsworth v. Ellsworth,* 97 N.M. 133, 637 P.2d 564 (1981).

The fact that a spouse cannot receive any benefits until a certain age does not affect the character of the pension rights which are unmatured but vested. *In re Marriage of Bruegl,* 47 Cal.App.3d 201, 120 Cal.Rptr. 597 (1975), *overruled on other grounds, In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976). Husband has a vested right to his defined benefit pension plan. He is irrevocably entitled to collect benefits. *Copeland.* When the pension plan matures, husband is eligible to retire and is entitled to receive the benefits which he has earned through the years. *Id.* The maturity date is a certain time, a constant date when husband can collect benefits without penalty. The experts testified regarding the actuarial present value of the pension bene-

1. Trial court's finding No. 17 states that husband can retire in March 1985 with full retirement. This is incorrect and should have been April 1986. However, since neither of these dates was used as the valuation date, we find the error requires no reversal.

fit husband would be entitled to receive upon working twenty-five years in April 1986, taking into account monetary contributions and current pension entitlement accrued during coverture and based on husband's current salary. This was correct. *Bergman.*

It appears that husband confuses the two issues of valuation and contribution. Wife's expert only assumed that husband would continue working until April 1986, thereby having a fully matured pension; the expert did not include husband's monetary contributions or salary increases received after the divorce in valuing the pension. If husband were to seek pension benefits before his twenty-five years of service accrued, he would receive reduced pension benefits, resulting in a lower present value of the pension. In April 1986, husband's vested pension will have fully matured and he can collect benefits without penalty. Community effort contributed 92% to this pension. While rights to benefits under a retirement plan may never vest or mature due to contingencies and unforeseeable occurrences, the non-employee spouse, nevertheless, is entitled to have the community portion of the contingent interest computed and divided. *Berry.* We will not undervalue the pension based on an unsupported assumption. A nonemployee spouse's interest in future benefits, based on contributions made by the community during coverture, does not relate to when the right to the benefits vests or matures. *See Hughes; Copeland.*

If the trial court had divided the pension on a "pay as it comes in" basis, wife's share would have been one-half of twenty-three/twenty-five (total years of coverture divided by total years worked) at the date of maturity (when the pension "comes in"), i.e., the full value of the community portion at maturity. *Copeland.* The additional value of husband's monetary contributions to the pension from the end of coverture to the maturity date would be his separate property. *See Madrid.* We do not believe that valuing the pension at the time of divorce necessarily means valuing the pension as if it were cashed in precisely at that moment and subject to attendant penalties. Such an approach would rival the "potentially whimsical result" rejected in *In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976) (en banc) (where twenty-four years of community effort contributed to pension, it would be inequitable to consider pension separate property, even though it was unvested).

b) Retirement Age

At the same time that husband urges this court to value the pension plan as of June 1, 1984, husband also contends that the trial court should have used age sixty-five as his retirement age in valuing the pension. Based on the testimony of wife's expert, the trial court valued the pension considering only husband's monetary contributions to date, but took into account that the pension matured in April 1986. A pension plan matures when the employee is entitled to receive the benefits earned through the years and is eligible to retire. *Copeland.* Unlike a retirement date, the maturity date is not speculative and can be easily identified from the pension plan. *See* 3 W. Troyan, E. Poll, W. Cantwell & W. Weston, *Valuation & Distribution of Marital Property,* § 46.18[2] (1986). Wife's expert testified that the normal retirement date for the Sandia Plan is when the employee works twenty-five years and attains at least age fifty. Husband will have worked twenty-five years and be fifty-three years old in April 1986.[2] This date was used by wife's expert and implicitly taken into account by the trial judge. We find no error in doing so.

Indeed, a spouse should not unilaterally choose to postpone retirement when pension rights have fully vested and matured so as to impair a non-employee spouse's interest in those retirement benefits. *Gillmore.* We recognize that employee spouses can sharply reduce the

2. We note that this discussion of whether husband continued to work and whether the pension matured in April 1986 is moot since April 1986 has now passed. Nevertheless, wife's expert properly used April 1986 as the maturity date of the pension.

present value of pension benefits by projecting a retirement date as distant as possible. We do not condone this approach and instead adopt the approach in *Gillmore:* A spouse "cannot time * * * retirement to deprive [a nonemployee spouse] of an equal share of the community's interest in [the] pension. It is a 'settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.' " *Id.*, 29 Cal.3d at 423, 174 Cal.Rptr. at 496, 629 P.2d at 4 (citations omitted).

c) Discount Rate

"The calculation of a present value requires discounting for mortality, based upon group annuity mortality tables, discounting for interest, and discounting for the probability that the employee will remain with the company to retirement age." Hardie, *Pay now or later: Alternatives in the disposition of retirement benefits on divorce,* 53 Cal.St.B.J. 106, 108 (1978). *See also* Projector, *Valuation of Retirement Benefits in Marriage Dissolutions,* 50 L.A.Bar Bull. 229 (1975); Troyan, *Pension Evaluation & Equitable Distribution,* 10 Fam.L.Rep. (BNA) 3001 (Nov. 22, 1983); DiFranza & Parkyn, *Dividing pensions on marital dissolution,* 55 Cal.St.B.J. 464 (1980); *Johnson v. Johnson,* 131 Ariz. 38, 638 P.2d 705 (1981) (en banc). Discounting is an important and complex factor in valuing pension plans. The above-cited articles provide useful discussions of discounting factors.

Husband contends that the trial court erred in averaging the two discount rates presented by the experts. One expert used 9%; the other expert used 13.6%. The findings do not state the discount rate used by the trial court in valuing the pension. Again, husband relies on the trial court's letter opinion of September 13, 1984. As noted above, this letter opinion does not control. Nevertheless, even assuming that the trial court did average the two rates, the rate is supported by substantial evidence, the standard of review applicable to this case. *Lucas v. Lucas,* 95 N.M. 283, 621 P.2d 500 (1980); *Berry.* Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Lucas.* Here, the trial court's valuation of the pension was within the range of figures offered by both expert witnesses. This was sufficient. *See Bergman.*

d) Non-withdrawal Option

Husband asks this court to compute the value of the pension plan using the fact that husband does not intend to withdraw any contributions from the plan. As we understand the record, the trial court *did* compute the pension using the non-withdrawal alternative. Therefore, we do not address this argument.

e) Tax Consequences

Husband also argues that the trial court erred in failing to consider the tax consequences of the pension. We disagree. Courts in several other jurisdictions have decided that the tax consequences of deferred pension payments are too speculative. *Johnson; In re Marriage of Marx,* 97 Cal.App.3d 552, 159 Cal.Rptr. 215 (1979); *In re Marriage of Helland,* 354 N.W.2d 591 (Minn.App.1984); *In re Marriage of Gilbert,* 628 P.2d 1088 (Mont.1981); *Carpenter v. Carpenter,* 657 P.2d 646 (Okla. 1983); *In re Marriage of Clapperton,* 58 Or.App. 577, 649 P.2d 620 (1982). Because tax rates change and the employee's tax bracket will probably change after retirement, courts have held that future tax consequences are too speculative and should be disregarded in calculating the present value of pensions. We find this reasoning persuasive and decline to consider the speculative future effects of taxes on the pension value. The trial court did not err in not considering the tax consequences of the pension. We uphold the pension valuation of $101,239.[3]

3. New Mexico's Supreme Court recently held that the trial court must now divide community property retirement benefits on a "pay as it comes in" basis. *Schweitzer v. Burch,* 103 N.M. 612, 711 P.2d 889 (1985). This decision is prospective only and does not apply in the instant case, but we note that unless both parties agree otherwise, the "pay as it comes in" method is

EMPLOYEE STOCK OPTION PLAN (ESOP)

Under Sandia's Employee Stock Option Plan (ESOP), Sandia buys shares of stock for its employees. The trial court valued the ESOP at $3,150 and awarded that asset to husband. Husband contends that the trial court erred in this valuation because it failed to consider the tax consequences of the ESOP. Husband contends that 40% of the value of the ESOP would be taken by the Internal Revenue Service in taxes.

The general rule is that the trial court should consider tax consequences when deciding a property settlement upon dissolution of marriage. *Cunningham v. Cunningham,* 96 N.M. 529, 632 P.2d 1167 (1981). These tax consequences should be immediate and specific. *In re Marriage of Clark,* 80 Cal.App.3d 417, 145 Cal.Rptr. 602 (1978). Normally, the trial court should consider the different bases that property might have, and the resulting effects on capital gains taxes, when dividing property such as houses or stock. *See generally* Annot., 51 A.L.R.3d 461 (1973); Lepow, *Proposals to Reform the Tax Treatment of Property Division Incident to Divorce—A Splitting Headache,* 10 Com. Prop.J. 237 (1983). We note, however, that the actual, equal division of community property at divorce is not a taxable event for purposes of federal income taxes. *See Carrieres v. Commissioner of Internal Revenue,* 64 T.C. 959 (1975), *aff'd,* 552 F.2d 1350 (9th Cir.1977).[4]

In our case, too much is unknown: whether husband will sell the stock, the price of the shares upon sale, the tax laws in effect at the time of the sale,[5] husband's tax rate at the time of the sale. Requiring the trial court to consider tax consequences in light of numerous unknown factors would be unreasonable. The evidence indicates that husband has no immediate plans to sell the stock, nor is he able to do so under the provisions of ESOP. If husband had been able to sell the stock immediately, we might have reached a different result. Where tax consequences are too speculative, it is proper for the trial court to disregard them. *See In re Marriage of Sharp,* 143 Cal.App.3d 714, 192 Cal.Rptr. 97 (1983). The trial court did not err in valuing the ESOP. Even if the trial court had erred in valuing the ESOP, we note that the effect on the total distribution of community property would amount to less than one-half of 1%. As we have often stated, mathematical exactitude in the division of property is not required. *Bustos v. Bustos,* 100 N.M. 556, 673 P.2d 1289 (1983); *Michelson v. Michelson,* 89 N.M. 282, 551 P.2d 638 (1976) (*Michelson II*).

In so holding, we do not reach the issue of whether the trial court should have considered capital gains taxes on the three houses distributed in the property division. Although this would be a relevant consideration, neither party raised this issue, and we will not address it on appeal.

BELL SYSTEM SAVINGS PLAN (BSSP)

The trial court valued husband's BSSP at $36,550 and awarded the plan to wife. Husband contends that tax consequences, forfeitures, and penalties would render the BSSP through Sandia worth approximately $27,000, not $36,550. Husband's argument takes into account substantial penalties and forfeitures if he were to withdraw the proceeds in the BSSP. Husband contends that this lower figure should have been used in valuing the plan for distribution.

In awarding the BSSP to wife, the trial court did not indicate whether husband should liquidate the plan immediately and suffer consequent forfeitures or penalties; pay wife in installments as amounts be-

now mandatory. Thus, unlike our case where the employee spouse receives the entire pension, offset by an award of property to the non-employee spouse, the risks and uncertainties of future benefits are shared equally by the parties.

4. The Tax Reform Act of 1984, I.R.C. §§ 71, 1041 (1985), became effective after December 31, 1984, four days after the entry of final decree in this case. The holding of *Carrieres* is not affected by this Act.

5. We are well aware that tax rates and tax laws are subject to significant change in view of the recent Tax Reform Act of 1986, Pub.L. 99-514, 100 Stat. 2085 (1986).

come withdrawable; take out a loan for $36,550 and reserve the BSSP for himself; or effect some other alternative. We will not speculate as to any of the methods raised. We remand to the trial court to clarify how to distribute the BSSP or equivalent amount. In doing so, the trial court should consider what, if any, immediate and specific tax consequences husband will incur under the alternative the court chooses. *Cunningham; see generally In re Marriage of Hayne,* 334 N.W.2d 347 (Iowa App.1983); *In re Marriage of Kathrens,* 47 Or.App. 823, 615 P.2d 1079 (1980).

COIN COLLECTION

The parties state that they erroneously included the value of a coin collection twice in calculating the division of personal property. We agree. Pursuant to NMSA 1978, Civ.P.Rule 60(a) (Repl.Pamp.1980), we grant the parties' request to decrease husband's award of personal property by $1,450 and decrease wife's award of personal property by $20.

ALIMONY

The trial court awarded wife temporary alimony of $500 per month for one year. The trial court also awarded a portion of the community property as lump sum alimony. Husband appeals the award of alimony as excessive; wife cross-appeals the award of alimony as insufficient.

An award of alimony is based on need. *Weaver v. Weaver,* 100 N.M. 165, 667 P.2d 970 (1983); *Brister v. Brister,* 92 N.M. 711, 594 P.2d 1167 (1979). Factors to consider in determining whether to award alimony include the party's needs, age, health, means of support, the earning capacity and future earnings of the parties, the duration of the marriage and the amount of property owned by the parties. *Michelson v. Michelson,* 86 N.M. 107, 520 P.2d 263 (1974) (*Michelson I*). The decision to grant or deny alimony lies within the sound discretion of the trial court, and we will alter it only upon a showing of an abuse of discretion. *Ellsworth; Hurley.* In determining whether an award or denial of alimony is an abuse of discretion, we consider whether the denial was contrary to all reason. *Michelson I.*

In examining the factors listed above, the trial court found that wife was fifty-two years old, able-bodied and in good health. The trial court found wife able to teach school, earning approximately $13,000 per year. The trial court found that husband earned approximately $68,500 per year and planned to continue working. Although the trial court found economic disparity between the parties, it also found that wife's need for alimony was limited due to the substantial value of the community assets she was to receive. Wife contends that given the severe economic disparity between the parties, the trial court should have awarded more alimony for a longer time. While we might have awarded a different amount of alimony, we cannot say that the trial court's award was an abuse of discretion.

Husband argues that the award of lump sum alimony was an abuse of discretion. Husband contends that if wife were to liquidate the majority of the community property and invest the proceeds at an interest rate of 13% she would earn $22,000 per year, in addition to her teaching salary of $13,000. This argument has no basis in law. A spouse is not required to convert the majority of the community property into income-producing property. While income produced by property may normally be considered in setting alimony, proceeds from selling the property itself should not be considered except in such rare cases where fairness requires. *Ellsworth.* Further, interest rates fluctuate; wife will not always be guaranteed a 13% return on her investment. The award of lump sum alimony was not an abuse of discretion.

Both parties erred in computing the amount of lump sum alimony. In dividing the property, the judge awarded $203,820 of community assets to the wife and $187,459 of community assets to the husband. The trial court awarded "the difference in the value of the property as lump sum alimony." The parties characterize this difference as $16,631. They are incorrect. The total value of community assets was $391,279. Had this amount been equally divided, each party would have been enti-

tled to $195,639.50. Instead, wife received $203,820, an amount that exceeds her one-half share by $8,180.50, not $16,631.

ATTORNEY FEES

In determining whether attorney fees should have been awarded to either party, we apply the standard set out in *Berry.* Factors to consider in awarding or denying attorney fees include economic disparity between the parties. *Allen v. Allen,* 98 N.M. 652, 651 P.2d 1296 (1982). If there is economic disparity between the parties such that one party may be inhibited from preparing or presenting a claim, then the trial and appellate courts should be liberal in exercising discretion. *Id.* However, in *Fitzgerald v. Fitzgerald,* 70 N.M. 11, 369 P.2d 398 (1962), the trial court did not err in denying attorney fees in view of the value of property awarded to wife and alimony granted. Our standard of review for the award or denial of attorney fees is whether the trial court abused its discretion. *Berry.* Applying this standard to our case, we cannot say that the trial court abused its discretion in denying attorney fees to wife. *See Fitzsimmons v. Fitzsimmons,* 104 N.M. 420, 722 P.2d 671 (Ct.App. 1986).

Wife also seeks attorney fees of $4,015.43 for this appeal. Because of the economic disparity between the parties, the relative success of wife's appeal, and the limited liquid resources available to her, we award $2,500 to wife as attorney fees on appeal. *See Allen; Fitzsimmons; Blake v. Blake,* 102 N.M. 354, 695 P.2d 838 (Ct. App.1985). Husband is to pay his own attorney fees for this appeal. Each party shall pay his or her own costs.

IT IS SO ORDERED.

DONNELLY, C.J., and GARCIA, J., concur.

734 P.2d 267

Rebecca E. THOMPSON, A Minor, and William A. Thompson, Guardian and Best Friend, Plaintiffs-Appellees and Cross-Appellants,

v.

RUIDOSO-SUNLAND, INC., A New Mexico Corporation, Defendant-Appellant and Cross-Appellee.

No. 8354.

Court of Appeals of New Mexico.

Feb. 17, 1987.

Jon T. Kwako, Albuquerque, for plaintiffs-appellees and cross-appellants.

Kent Canada, Robert V. Cochrane, Sanders, Bruin, Coll & Worley, P.A., Roswell, for defendant-appellant and cross-appellee.

OPINION

ALARID, Judge.

This tort case has been pending on our docket and ready for submission since June 1985. In August 1986, upon the recommendation of and with the assistance of the State Bar of New Mexico, which assistance is greatly appreciated, this court adopted an experimental plan pursuant to which cases would be assigned to advisory committees of experienced attorneys. Upon assignment, the parties are given the opportunity to challenge members of the advisory committee to the same extent that challenge is allowed under NMSA 1978, Disc.Brd.P.Rule 10(c)(5) (Repl.1985); that is, challenge is allowed if a committee member cannot impartially decide the matter. Pursuant to our order adopting the plan, the advisory committee's opinion is served on the parties with an order to show cause, by response memoranda, why it should not be adopted as the opinion of the court.

This case was submitted to an advisory committee and the parties were so notified. Defendant filed a "challenge to panel members." The challenge was not on the ground that any panel member could not impartially decide the matter. Rather, the challenge was to our use of the panel itself. Specifically, defendant contended that this use was an unconstitutional delegation of our authority and a violation of due process and equal protection. A judge of this court denied the challenge and noted that defendant's argument could be raised in its response memorandum.

The advisory committee rendered an opinion which proposed to affirm on both defendant's appeal and plaintiff's cross-appeal. The parties were notified of the opinion and of their right to submit response memoranda. Both parties have filed responses in which they argue the advisory committee opinion should not be adopted by the court. This court has considered the record on appeal, the briefs in this case, the opinion of the advisory committee, and the parties' responses. We do not find the responses to be persuasive. Therefore, it is the decision of this court that the opinion of the advisory committee should be adopted, as modified by this court.

Before addressing the merits of this case, we dispose of defendant's preliminary challenge to our experimental plan. We deny the challenge on two grounds. First, since the challenge was made to the formation of the panel itself, the challenge was denied with instructions to argue the constitutional issue in the response memorandum. Defendant has not done so. Accordingly, it has abandoned its constitutional challenge. *See State v. Martinez,* 97 N.M. 585, 642 P.2d 188 (Ct.App.1982); *Novak v. Dow,* 82 N.M. 30, 474 P.2d 712 (Ct.App. 1970).

Second, even if the constitutional challenge were not deemed abandoned, it would be without merit. This court has not delegated any of its judicial power to anyone. This court is required to have three judges assigned to each appeal with two concurring in the decision. N.M. Const. art. VI, § 28. *See also* NMSA 1978,

§ 34–5–11 (Repl.Pamp.1981). That has been done in this case.

Nor is it a violation of due process or equal protection of law for this court to have the assistance of experienced attorneys for research and writing. This court is permitted to and does employ law clerks and staff attorneys to assist with these same functions. *See* NMSA 1978, § 34–5–5 (Repl.Pamp.1981). The only difference here is that the advisory committees serve on limited numbers of cases and on a volunteer basis. They serve because this court, during this time of statewide budget crises, does not have sufficient personnel to expeditiously handle its caseload. However, it is the judges who have decided this case and other cases under our experimental plan; it is the judges who have reviewed the record and briefs; and it is the judges who have approved the reasoning contained in the opinions and who have subscribed their names thereto.

Having disposed of this preliminary challenge, we now proceed to decide this case. Plaintiff sued defendant for damages for personal injury arising out of a horse racing accident. The trial court, sitting without a jury, found plaintiff and defendant each 50 percent negligent and entered judgment for plaintiff. Defendant appeals and plaintiff cross-appeals. We affirm the judgment of the trial court.

Plaintiff was an apprentice jockey at Sunland Park, New Mexico, a horse racing track owned and operated by defendant. The horse which plaintiff was riding was next to the inside rail when it was bumped twice by other horses in the race. On the second occasion, plaintiff was unseated and fell over the rail, colliding with a metal pole used to anchor the rail. She sustained severe personal injuries, including a compound fracture of her right femur.

The inside rail at Sunland Park on the day of plaintiff's accident was of a type known as a gooseneck rail which had been in place since the track was built. At the time the track was built, there were two basic designs of inside rail in use-the gooseneck rail and the slant rail. Both designs had different problems related to jockey safety, such that there was no clear choice between the two and both were commonly in use. If the jockey were thrown over the rail, he might collide with the exposed post and anchoring pipes, and suffer more severe injuries, such as plaintiff did here. By the mid–1970's when defendant purchased Sunland Park, this safety problem was so widely known that the vast majority of race tracks had either installed a newer-designed inside rail or had covered the supports of the gooseneck rail on the infield side with sheet metal or with sheets of wood to protect the jockey.

Indeed, there was evidence presented at trial that a representative of the Jockey Guild, of which plaintiff was a member, had complained to the manager of Sunland Park before plaintiff's accident; and portions of the gooseneck rail supports were then protected with sheet metal. However, there were no such protections in the area where plaintiff was injured. Prior to plaintiff's injury, defendant had installed a Fontana Safety Rail at Ruidoso Downs, another horse racing track owned by defendant, to replace a gooseneck rail there. Defendant also had verbally committed to having the same type of rail installed at Sunland when the racing schedule ended, which was shortly after plaintiff's accident. There was also evidence to support the trial court's finding that plaintiff was aware of the dangers involved with an exposed gooseneck rail, that she was aware of the complaint by the Jockey Guild and the measures taken to partially correct those dangers at Sunland Park, and that she continued to ride in horse races at Sunland despite that knowledge.

The foregoing is a summary of the trial court's findings of fact in this case, as material to this appeal. Both parties challenge portions of those findings. Their challenges are primarily legal arguments. Plaintiff, however, also challenges the trial court's findings on the apportionment of negligence. There is ample evidence in the record to support the trial court's apportionment of negligence. *See Marcus v. Cortese,* 98 N.M. 414, 649 P.2d 482 (Ct.App. 1982).

On appeal, defendant argues that a knowing and voluntary confrontation with full appreciation of the danger amounts to primary assumption of the risk, consent or express assumption of the risk—terms which defendant uses interchangeably—which bars any recovery by plaintiff. It is exactly that confusion of terms which led the New Mexico Supreme Court to abolish secondary assumption of the risk as a defense apart from contributory negligence. In *Williamson v. Smith,* 83 N.M. 336, 491 P.2d 1147 (1971), the court explained:

> [W]e have decided that there are two principal meanings of assumption of the risk. In one sense—hereafter called its "primary" sense—"it is an alternate expression for the proposition that the defendant was not negligent; i.e., either owed no duty or did not breach the duty owed." [Citations omitted.]
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> * * * * * *
>
> In another sense—hereafter called its secondary sense—it "is an affirmative defense to an established breach of duty." [Citations omitted.]
>
> * * * Assumption of risk in its secondary sense is in reality nothing more than contributory negligence.

Id. at 340, 491 P.2d 1151.

To say that primary assumption of the risk bars plaintiff's claim in this action is to say that defendant either owed her no duty or, alternatively, that defendant did not breach that duty. Both contentions are contrary to the law and evidence presented at trial. Under Regulation XXV of the New Mexico Racing Commission and a landowner's common law duty to a business invitee, *see* NMSA 1978, UJI Civ. 13-10 (Repl.Pamp.1980), defendant had a duty to exercise ordinary care to prevent injury to plaintiff. Defendant's knowledge of the danger posed by the unguarded gooseneck rail and its failure to take adequate, available precautions to protect plaintiff support the trial court's finding of a breach of that duty.

Defendant's reliance on *Moreno v. Marrs,* 102 N.M. 373, 695 P.2d 1322 (Ct. App.1984), and the Ski Safety Act, NMSA 1978, Sections 24–15–1 to –14 (Repl.1986), is misplaced. In *Moreno,* this court adopted a fireman's rule that owners and occupiers of land have a duty to firemen only to warn them of hidden perils on the premises, where the owner or occupant knows of the peril and has the opportunity to give warning of it. While the *Moreno* opinion is replete with references to "assumption of the risk," we were careful to point out that we used that term in its primary sense of no duty owed which accords with *Williamson v. Smith. Moreno v. Marrs,* 102 N.M. at 378, 695 P.2d 1322. We apply the same usage to this case. The Ski Safety Act has no application to the facts of this case. That the legislature may act to define the duty owed by landowners to others in certain circumstances is unquestioned. *E.g.,* NMSA 1978, § 66–3–1013 (Cum.Supp.1986) (off-road vehicles). At the time of plaintiff's accident, however, neither the legislature nor the courts had acted to relieve defendant of its duty to plaintiff.

Consent is generally a defense which precludes recovery for sports injuries. *Kabella v. Bouschelle,* 100 N.M. 461, 672 P.2d 290 (Ct.App.1983). There, this court defined the consent defense as it relates to contact sports as follows:

> Voluntary participation in a football game constitutes an implied consent to normal risks attendant to bodily contact permitted by the rules of the sport. Such risks are foreseeable or inherent to the playing of the sport. *See* Restatement (Second) § 50, Comment b (1965). Participation in a game involving bodily contact, however, does not constitute consent to contacts which are prohibited by the rules or usage of the sport if such rules are designed for the protection of the participants and not merely to control the mode of play of the game.

Id. at 463, 672 P.2d at 292. Here, if plaintiff had been thrown from her horse and injured in contacting the ground or had been kicked or stepped on by another horse, the consent defense might well preclude her recovery. The dangers posed by the unguarded gooseneck rail, however, were not found to be inherent to the sport of horse racing.

Nor are we unmindful of the opinion in *Ashcroft v. Calder Race Course, Inc.*, 464 So.2d 1250 (Fla.App.1985), relied on by defendant. We find the reasoning of the dissent in that case, to the extent that it classifies a dangerous condition in the railing of a racetrack as not being an ordinary and necessary danger inherent in racing, more in keeping with New Mexico law. Therefore, we decline to follow the majority opinion and its reliance on consent.

Express assumption of the risk relates to that circumstance in which a landowner obtains a release from another as a condition to allowing that person to engage in activities or use facilities on the owner's land. *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Blackburn v. Dorta*, 348 So.2d 287 (Fla.1977); *Williamson v. Smith.* There is nothing to suggest that defendant bargained for or that plaintiff gave a release in this action. Express assumption of the risk is therefore not applicable.

Defendant's argument that plaintiff's voluntary exposure to a known risk precludes her recovery was answered in *Williamson:* "We thus regard the Uniform Jury Instruction definition of negligence (U.J.I. 12.1) as being sufficiently broad to cover the ground formerly occupied by assumption of risk (U.J.I. 13.10), the gist of which is a voluntary exposure to a known danger." *Id.* 83 N.M. at 341, 491 P.2d at 1152. With the adoption of comparative negligence, however, plaintiff's contributory negligence no longer bars her recovery. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

Summarizing on defendant's appeal, we agree that *Williamson v. Smith* did not abolish the concepts of primary assumption of the risk (no duty or no breach), consent, or express assumption of the risk. However, none of these concepts is applicable to this case. The "knowing and voluntary confrontation with full appreciation of the danger" that is at issue here is secondary assumption of the risk, i.e., negligence on plaintiff's part, which the court below properly compared to defendant's negligence in allowing the dangerous gooseneck rail on the track.

In her cross-appeal, plaintiff argues that she should not have been held to be negligent to any extent and that punitive damages should have been awarded against defendant. As we have already pointed out, there was evidence from which the trial court could and did conclude that plaintiff voluntarily encountered a known danger. Plaintiff's rejoinder is that she was economically coerced into riding at defendant's track, because if she was to pursue her trade as a jockey, she must do so at a race track. The existence and weight to be given to extenuating circumstances are questions of fact.

> Furthermore, the voluntary exposure in this case, if any there was, is a defense that is applicable only where the injured plaintiff has a reasonable election as to whether she should expose herself to the peril. *Gray v. E.J. Longyear Company*, 78 N.M. 161, 429 P.2d 359 (1967). In determining whether there was a reasonable election of plaintiff's exposure to the peril, several factors must be considered. These factors include the importance of the interest, right or privilege which the plaintiff here was seeking to advance; the probability and gravity of the existing alternatives; and the inconvenience or difficulty of one course of conduct as compared to the other. Any or all of these factors could compel a decision on which reasonable men might well differ and necessarily involve a determination of facts.

Proctor v. Waxler, 84 N.M. 361, 365, 503 P.2d 644, 648 (1972). While it may have been convenient for plaintiff to race at Sunland Park, the evidence is that there were other horse racing tracks which did not involve the danger of an exposed gooseneck rail.

Plaintiff also contends that defendant, as owner of the track, was *solely* responsible for the condition of the gooseneck rail. However, none of the cases she cites stand for the proposition urged. Indeed, one of her cited cases supports an opposite result. In *Keller v. Holiday Inns, Inc.*, 105 Idaho

649, 671 P.2d 1112 (App.1983), the court specifically approved of treating a known or obvious danger as a limitation upon a defendant premises owner's liability by applying principles of comparative negligence.

Plaintiff finally contends that it is illogical to say, in answering defendant's appeal, that plaintiff did not assume the risk while, in answering plaintiff's appeal, that she did assume the risk. This is not illogical at all, for defendant's appeal involves primary assumption of the risk, consent, or express assumption of the risk, while plaintiff's appeal involves secondary assumption of the risk.

As to punitive damages, there is evidence of defendant's knowledge of the danger posed by the unguarded gooseneck rail before plaintiff's accident, but there is also evidence that defendant acted on that knowledge. Before plaintiff's accident, defendant installed covering over part of the supports in response to a complaint from the Jockey Guild. It had also ordered a "break away" rail to be installed, but changed to the Fontana Safety Rail at the insistence of representatives of the jockeys. Work on installation of the Fontana Safety Rail was scheduled to begin at the end of the racing season, one or two days after plaintiff's accident. Such evidence supports the trial court's conclusion that defendant was not willful or wanton and that defendant was not grossly negligent. NMSA 1978, UJI Civil 16.19 (Cum.Supp. 1985). The award of punitive damages is discretionary with the trial court, and a failure to award such damages will be upheld if supported by substantial evidence. *Padilla v. Lawrence,* 101 N.M. 556, 685 P.2d 964 (Ct.App.1984). Here, substantial evidence supported the trial court's decision.

Affirmed. Plaintiff's request for attorney fees is denied because there is no statutory or judicial authority on which to award plaintiff such fees. *Aboud v. Adams,* 84 N.M. 683, 507 P.2d 430 (1973).

This court acknowledges the aid of attorneys D. James Sorenson, Ronald C. Morgan, and David H. Pearlman in the preparation of this opinion. These attorneys constituted an advisory committee selected by the Chief Judge of this court, and this court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of the work submitted.

IT IS SO ORDERED.

FRUMAN and APODACA, JJ., concur.

734 P.2d 273

B.Y. NELSON, Plaintiff-Appellant,

v.

NELSON CHEMICAL CORPORATION, Employer, and U.S. Insurance Group, Insurer, Defendants-Appellees.

No. 9518.

Court of Appeals of New Mexico.

Feb. 17, 1987.

Steven J. Vogel, Albuquerque, for plaintiff-appellant.

Richard L. Puglisi, Stephen R. Kotz, Montgomery & Andrews, P.A., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Chief Judge.

Plaintiff appeals from the trial court's judgment in a worker's compensation case awarding benefits based upon a scheduled injury, but denying benefits for an alleged aggravation of his pre-existing back injury. Four issues are presented on appeal: (1) whether the court's finding that there was no causal connection between the work-related accident of October 5, 1982, and the aggravation of plaintiff's pre-existing back injury is supported by substantial evidence; (2) whether the court erred in finding that the compensation for the work-related injury to plaintiff's hip is limited to that provided in the scheduled injury section of the Workmen's Compensation Act; (3) whether the court erred in failing to award plaintiff compensation for pain in his back and hip; and (4) whether the court abused its discretion in its award of attorney fees to plaintiff. We affirm in part and reverse in part.

Plaintiff was the president and a director of defendant Nelson Chemical Corporation; defendant corporation supplied soil stabilization chemicals for use in road construction projects. On August 17, 1982, while

working at a job site, plaintiff slipped and fell from a truck, injuring his back and hip. Several months later, on October 5, 1982, plaintiff testified that he again fell from a truck, injuring his back and hip.

The following consists of a summary of pertinent findings of the trial court:

4. Plaintiff sustained a compensable on the job injury on August 17, 1982, when he fell from a truck onto the ground injuring his hip.

5. Plaintiff sustained a compensable on the job injury on October 5, 1982 when he fell from a truck onto the ground injuring his hip.

* * * * * *

13. & 14. Plaintiff has complained of back pain for the past thirty years.

* * * * * *

17. & 20. Following the on the job injury, plaintiff did not complain of back pain to any of his treating physicians until July of 1984. He denied any history of significant back pain in August of that year.

21. When plaintiff saw Dr. Michael McCutcheon on August 13, 1984, he denied any history of significant back pain.

22. The October 1982 on the job injury did not aggravate plaintiff's pre-existing back injury. His current back pain is not the result of any traumatic injury.

23. Plaintiff suffers a 50% impairment to the right leg at or near his hip.

Based on the findings, the trial court denied plaintiff compensation for aggravation of his pre-existing back injury, but did award him compensation for a scheduled injury to his right leg at or near the hip, and attorney fees of $3,000.

I. ISSUE OF CAUSATION

Plaintiff points to the testimony of several doctors that there was a causal connection between the work-related accident of October 5 and the aggravation of his pre-existing back injury. Plaintiff's reliance on this testimony and his accompanying argument, however, fails to acknowledge two well-established rules of appellate review. First, with regard to the deposition testimony of certain doctors allegedly admitted into evidence, plaintiff has failed to request that the depositions be filed as exhibits in this court or made a part of the record on appeal. Accordingly, we will not consider any of the deposition testimony admitted into evidence which is inconsistent with the trial court's findings. *Berlint v. Bonn,* 102 N.M. 394, 696 P.2d 482 (Ct.App. 1985) (appellant bears burden of insuring that appellate court has record adequate to review issues raised); NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 208(d) (Repl.Pamp.1983). Moreover, even if we were to consider the depositions as well as the trial testimony of the doctors who testified favorably for plaintiff on this question, we would not disturb the court's finding of the absence of any causal connection.

Plaintiff concedes that Dr. Michael E. McCutcheon, an orthopedic surgeon, testified that there was no causal connection between the October 5 accident and the aggravation of plaintiff's pre-existing back injury. It is for the trial court, not this court, to determine the weight of the evidence, the credibility of the witnesses, and where the truth lies. *Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985). We must view the evidence in the light most favorable to the trial court's findings, and disregard all evidence unfavorable to those findings. *Id.* We will not substitute our judgment for that of the trial court. *Id.* Under these standards of review, there is sufficient evidence to support the court's finding concerning the lack of any causal connection.

II. SCHEDULED INJURY

Plaintiff contends that the trial court erred in finding that the compensation awarded for the disability to his hip was limited to the scheduled injury section of the Workmen's Compensation Act. We reverse the trial court on this issue. Both parties point to different findings in support of their respective positions on this issue. Neither, however, challenges the sufficiency of the evidence to support these different findings. Accordingly, these unchallenged findings are the facts on appeal.

Latta v. Harvey, 67 N.M. 72, 352 P.2d 649 (1960). In support of his position, plaintiff relies on findings nos. 4 and 5; defendants rely on finding no. 23 in support of their position. Although these findings may appear to be inconsistent at first blush, we conclude that they are not. We hold that the court erred in limiting plaintiff to an award of scheduled injury benefits for the injury to his right hip.

Although defendants do not challenge the sufficiency of the evidence to support findings nos. 4 and 5, they point to finding no. 23 and argue that, as a matter of law, the court's award of compensation for a scheduled injury is correct. Defendants take the position that NMSA 1978, Section 52–1–43, the scheduled injury statute, provides that the situs of the resulting impairment, and not the situs of the original injury, is dispositive of whether an injury is a scheduled injury or not. Accordingly, defendants argue that because the trial court found that plaintiff suffers a 50% impairment to the right leg at or near his hip, and did not find any impairment or disability to any other part of the body, the trial court's award should be affirmed. We disagree because defendants' argument fails to consider the appropriate test established in this jurisdiction.

The test to be applied in determining whether an injury falls within the scheduled injury provision of the Act is that if a worker is totally disabled *due to an injury,* then he or she is entitled to total disability benefits even if the disability results from the loss or injury to a scheduled member. *Hise Construction v. Candelaria,* 98 N.M. 759, 652 P.2d 1210 (1982); NMSA 1978, § 52–1–41. "For partial disability the workmen's compensation benefits not specifically provided for in Section 52–1–43 * * * shall be that percentage of the benefit payable for total disability, as provided in Section 52–1–41 * * *." NMSA 1978, § 52–1–42. In *Hise Construction,* our supreme court construed the language of Section 52–1–42 to "[require] that *before* a percentage benefit is payable, the injured worker must ascertain that his or her *injury* is not covered under Section 52–1–43 * * *." *Id.* at 760, 652 P.2d at 1211 (emphasis added). *See also Gonzales v. Pecos Valley Packing Co.,* 48 N.M. 185, 193, 146 P.2d 1017, 1021 (1944) (quoting *Dailey v. Pooley Lumber Co.,* 233 Iowa 758, 760, 10 N.W.2d 569, 571 (1943)) ("We have first to determine whether appellee's *injuries* fall within the schedule.") (emphasis added); *Maschio v. Kaiser Steel Corp.,* 100 N.M. 455, 672 P.2d 284 (Ct. App.), *cert. denied,* 100 N.M. 439, 671 P.2d 1150 (1983). The proper test to apply in a case such as this is to first ascertain whether the work-related *injury* is covered by Section 52–1–43. Only if the answer to this threshold question is "yes," should the court go on to determine whether the resulting impairment or disability extends to other parts of the body or otherwise renders the claimant totally disabled. Accordingly, we now turn to the language of Section 52–1–43 in order to determine the answer to the threshold question.

Section 52–1–43(A) provides that for disability resulting from an accidental injury, the worker shall receive compensation for a specific number of weeks, following a healing period. Section 52–1–43(B) then lists forty-three specific body parts that are covered by the statute. Of relevance to this case is Subsection 29, which provides for 200 weeks of recovery for an "injury" to "one leg at or near hip joint, so as to preclude the use of an artificial limb[.]" While it is clear that the statute limits compensation for an injury to the leg at or near the hip, it is equally clear that it does not limit the compensation for an injury to the hip itself.

Section 52–1–43(A) states in unequivocal language that scheduled member benefits are paid for "disability resulting from an accidental *injury to specific members* * * *." (Emphasis added.) The hip is not a specific member. Therefore, an injury to the hip is an injury to the body as a whole, even if it results in pain, impairment, etc., to a member, i.e., the leg. This is the plain meaning of the statute.

The trial court erred in limiting plaintiff's compensation to that provided in Section 52–1–43. *See Hise Construction;*

Carter v. Mountain Bell, 105 N.M. 17, 727 P.2d 956 (Ct.App.1986); *Dailey v. Pooley Lumber Co.; Farmer's Co-op Ass'n v. Beagley,* 158 Okl. 53, 12 P.2d 544 (1932). We reverse the court on this issue and remand with instructions to determine the percentage of partial disability plaintiff suffers as a result of the hip injury. *See* § 52–1–42; *Hise Construction.* The court should take into consideration all relevant evidence in making its determination, including the disabling pain, if any, which plaintiff suffers in his hip. Because the court already determined that plaintiff is not totally disabled within the meaning of the Act, it need not reconsider that finding since plaintiff concedes that his disability does not render him wholly unable to perform all the tasks of his former job, or of any job for which he is fitted.

III. CLAIM OF DISABLING PAIN

Plaintiff asserts the trial court erred in failing to award compensation for pain suffered in his back and hip. Because we hold that there is sufficient evidence to support the court's finding of no causal connection between the October 5 accident and the aggravation of plaintiff's back injury, we affirm the court's denial of compensation for back pain. However, in view of our reversal on Issue II, above, we remand with instructions to consider to what percentage-extent plaintiff is disabled, taking into consideration the alleged disabling pain which he suffers, if any, as well as other statutory factors. *See* NMSA 1978, § 52–1–25; *Salazar v. Pioneer Paving, Inc.,* 99 N.M. 744, 663 P.2d 1201 (Ct.App. 1983).

As observed in *Perez v. International Minerals & Chemical Corp.,* 95 N.M. 628, 624 P.2d 1025 (Ct.App.1981), nondisabling pain does not constitute a compensable injury; severe pain, however, which does disable a workman and which is attributable to an injury which arose in the scope and course of the worker's employment, is compensable as a disability. *See also Herndon v. Albuquerque Public Schools,* 92 N.M. 635, 593 P.2d 470 (Ct.App.1978); *Gomez v. Hausman Corp.,* 83 N.M. 400, 492 P.2d 1263 (Ct.App.1971).

IV. AWARD OF ATTORNEY FEES

Lastly, plaintiff complains that the trial court abused its discretion in awarding him attorney fees of only $3,000. Because we reverse the trial court in limiting plaintiff to compensation under the scheduled injury statute, we vacate the award of attorney fees and remand with instructions to reconsider its award of attorney fees to plaintiff. The court should reconsider all *Fryar v. Johnsen,* 93 N.M. 485, 601 P.2d 718 (1979), factors, specifically the compensation awarded plaintiff for a partial disability. *See Woodson v. Phillips Petroleum Co.,* 102 N.M. 333, 695 P.2d 483 (1985); *Manzanares v. Lerner's, Inc.,* 102 N.M. 391, 696 P.2d 479 (1985); *Board of Education of Espanola Municipal Schools v. Quintana,* 102 N.M. 433, 697 P.2d 116 (1985).

We affirm the trial court's denial of benefits for the aggravation of plaintiff's preexisting back injury because there is sufficient evidence to support the finding of no causal connection. We reverse the award of scheduled injury benefits for the injury to plaintiff's hip, because such an injury is neither covered nor contemplated by Section 52–1–43. We also vacate the award of attorney fees. We decline to award plaintiff attorney fees for this appeal at this time because the amount of recovery to which he is entitled for a partial disability remains to be determined. In addition to its award of attorney fees for representation below, we direct the trial court to award plaintiff attorney fees for this appeal, in light of its final award of compensation to him. We remand this case with instructions to proceed in a manner not inconsistent with this opinion.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

734 P.2d 278

STATE of New Mexico,
Plaintiff-Appellant,

v.

Raymond BEGAY, Defendant-Appellee.

No. 9434.

Court of Appeals of New Mexico.

Feb. 17, 1987.

Hal Stratton, Atty. Gen., Patricia Frieder, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

BIVINS, Judge.

This appeal raises two issues: (1) whether the trial court erred in dismissing Count 3 of the criminal information; and (2) whether the trial court lacks subject-matter jurisdiction to hear this case.

Defendant, a Navajo Indian, was involved in a head-on automobile collision that killed a woman, who was seven months pregnant, and another woman. The unborn child also died. The victims were Indians. The criminal information charged defendant with two counts of vehicular homicide (Counts 1 and 2), pursuant to NMSA 1978, Section 66-8-101(A) (Cum. Supp.1986), and with injury to a pregnant woman (Count 3), pursuant to NMSA 1978, Section 66-8-101.1 (Cum.Supp.1986). The victim of the crimes charged in Counts 2 and 3 was the same person.

Defendant moved the trial court to dismiss Count 3 of the criminal information, arguing that Counts 2 and 3 merged into one offense. The trial court granted defendant's motion. The state, pursuant to NMSA 1978, Section 39-3-3(B)(1), appealed the trial court's dismissal of Count 3. We granted the state's request for an interlocutory appeal and issued a memorandum opinion reversing the trial court's dismissal of Count 3 of the indictment and remanding with instructions to proceed to trial on the merits without merging the offenses.

Defendant also moved the trial court to dismiss the case for lack of jurisdiction. The parties stipulated that the site of the accident was within land purchased by the United States Government and held in trust for the Navajo Tribe, and that defendant is an enrolled member of that tribe. Defendant contended that the land where the accident occurred was Indian country under 18 U.S.C. Section 1151 (1982), and not within the jurisdiction of New Mexico state courts. The trial court denied defendant's motion to dismiss for lack of jurisdiction. Defendant raised the issue of lack of jurisdiction in a separate application for leave to file an interlocutory appeal. We denied defendant leave to file an interlocutory appeal and advised defendant he could raise the issue upon the entry of a final judgment, should it become necessary. After we issued the memorandum opinion on the merger issue, defendant filed a motion for rehearing on the issue of jurisdiction. . Defendant argued in his motion for rehearing that we should resolve the jurisdictional matter now, prior to trial, in the interest of judicial economy so as to avoid an unnecessary trial should the trial court lack jurisdiction to hear the case. Upon that premise, we granted defendant's motion and now address the jurisdictional question posed.

We withdraw the memorandum opinion filed September 11, 1986, and substitute this opinion. We remand the issue of jurisdiction to the trial court for additional fact-finding. If defendant presents sufficient facts to satisfy the jurisdictional requirements outlined in this opinion, the trial court must dismiss the case for lack of jurisdiction. Should defendant fail to present sufficient facts to establish lack of jurisdiction, the trial court should proceed to trial on the merits. So as to avoid a further appeal should the latter occur, we set forth our decision on the merger question.

JURISDICTION

A party can attack subject-matter jurisdiction at any time in the proceedings, even raising jurisdiction for the first time on appeal. *Perea v. Baca,* 94 N.M. 624, 614 P.2d 541 (1980); *Chavez v. County of Valencia,* 86 N.M. 205, 521 P.2d 1154 (1974). Demonstrating a lack of jurisdiction is defendant's burden. *State v. Cutnose,* 87 N.M. 307, 532 P.2d 896 (Ct.App. 1974).

The federal government has exclusive jurisdiction over certain crimes listed in 18 U.S.C. Section 1153 (Supp. II 1985) when these crimes are committed by an Indian in Indian country. *State v. Ortiz,* 105 N.M. 308, 731 P.2d 1352 (Ct.App.1986). Section 1151 defines Indian country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Lands held by the United States in trust for an Indian tribe and outside the boundaries of an Indian reservation, as is the situation here, are not specifically listed in this definition. We must determine if such lands are included in the definition of Indian country.

Neither party argues that the land in question qualifies as a reservation, dependent Indian community or allotment. The state contends that because lands held in trust are not included in the above definition, such lands are not Indian country. Defendant contends that the trial court lacks jurisdiction to try him in this matter because he is a Navajo Indian and the crime occurred in Indian country. Defendant's brief, however, sidesteps the issue of why land held in trust and outside the boundaries of an Indian reservation should be considered Indian country. Defendant instead relies on *State v. Begay,* 63 N.M. 409, 320 P.2d 1017 (1958), *rev'd on other grounds, State v. Warner,* 71 N.M. 418, 379 P.2d 66 (1963), and argues that the holding in *Begay* is dispositive. In *Begay,* the New Mexico Supreme Court ruled that the district courts of this state lacked jurisdiction to try the defendant, a Navajo Indian, where the offense took place on a state highway right-of-way running through the Navajo Reservation.

We agree with defendant that the facts in *Begay* resemble the facts in our case. We disagree, however, that *Begay* is dispositive. *Begay* dealt with jurisdiction where charges arose within the boundaries of the reservation proper, not on trust land outside of reservation boundaries. We must look further to determine the status of the land in question here.

Ortiz, while helpful generally, does not address the precise issue before us. Rather, *Ortiz* decides that for purposes of Section 1153, land within the exterior boundaries of an Indian pueblo is Indian country, the same as land within the exterior boundaries of an Indian reservation. Thus, we distinguish *Ortiz* on that basis.

The status of trust lands located outside reservation boundaries is uncertain. F. Cohen, *Handbook of Federal Indian Law,* ch. 1, § D5 at 45 (1982 ed.) Several cases have discussed the status of land held in trust for Indian tribes.

> The * * * lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that particular time.

United States v. John, 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978) (land in question had been proclaimed a reservation at time of suit, so discussion of status of land held in trust is dicta).

In *Langley v. Ryder,* 602 F.Supp. 335 (W.D.La.1985), the court ruled that land held by the United States in trust for the Coushatta Tribe was Indian country under Section 1151 and subject only to the jurisdiction of federal courts. However, the district court subsequently discovered that the land in question was actually reservation land, expressly subject to exclusive federal jurisdiction by Subsection 1151(a). *Id.* at 341, n. 6. In affirming the district court, the appeals court noted the district court's error and stated that "whether the lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country and the district court's conclusion was correct." *Langley*

v. Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985).

Finally, in *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980), the court stated: "We are convinced that, barring possible specific exceptions to which our attention is not directed, lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)." Thus, state hunting and fishing laws did not apply to members of the tribe on land held in trust by the United States for the tribe. *Id.* at 668. At first glance, it would appear that *Cheyenne-Arapaho* requires we hold the trust lands in question Indian country. We hesitate to do so without more facts. In *Cheyenne-Arapaho*, the lands were located within the reservation and apparently used by the tribe. In the case before us, we assume the land lies outside the reservation, and we have no information regarding its use.

While the cases discussed above are not necessarily dispositive of the issue in question, they do demonstrate the reluctance of courts to extend state jurisdiction over Indian lands. "Under the relevant rule of construction, 'doubtful expressions' should be resolved in favor of limiting state jurisdiction." *Ortiz*, 105 N.M. at 311, 731 P.2d at 1355. Favoring such limitation, we remand to the trial court for additional fact-finding.

As mentioned before, the parties stipulated that the land involved is federally owned and held in trust for the Navajo Tribe, and that defendant is a member of that tribe. Although the parties may have thought that these facts are sufficient to determine jurisdiction, we cannot so determine. On remand, defendant still has the burden of demonstrating lack of jurisdiction. *Cutnose. Contra Hartley v. Baca*, 97 N.M. 441, 640 P.2d 941 (Ct.App.1981) (where challenging party submits uncontested affidavit regarding jurisdiction, burden shifts to opposing party).

The principle test for determining whether a tract of land is "Indian country" within the meaning of Subsection 1151(a) is whether the land in question has been validly set apart for the use of Indians, under the superintendence of the United States Government. *Ortiz.*

> [T]he test has several parts: (1) the federal government must have recognized an area as subject to Congressional authority for the use of Indians; (2) the authority must be a valid exercise of Congressional power; and (3) the area must be subject to Congressional authority at the present time. In applying the test, the [United States] Supreme Court has examined legislative history, and the past and present relationship of the United States government to the Indian tribe, in order to reach an appropriate conclusion about the land in question.

Id., 105 N.M. at 310, 731 P.2d at 1354; *see also United States v. Martine*, 442 F.2d 1022 (10th Cir.1971).

Cases that discuss "use" criteria include *United States v. Martine* and *Blatchford v. Gonzales*, 100 N.M. 333, 670 P.2d 944 (1983). The trial court should make appropriate findings of fact regarding the status of the land in question and the jurisdiction issue.

While we may logically infer that land held in trust for a tribe is necessarily set apart for the use of the tribe, we are reluctant to do so. If defendant submits evidence showing that the land in question is Indian country, the state court will have no jurisdiction. The federal government will have exclusive jurisdiction. § 1153. Should defendant fail in his burden, then this case shall proceed on the merits.

We note that 25 U.S.C. Section 1324 (1982) allows states to affirmatively assume jurisdiction over Indian country by passing a statute similar to NMSA 1978, Section 31-10-3 (Repl.Pamp.1984). Because our legislature has not so assumed jurisdiction subsequent to the passage of Section 1324, federal courts retain exclusive jurisdiction over Indian country at this time. *See Blatchford.*

MERGER

As discussed above, the state appealed the trial court's decision to grant defendant's pretrial motion for merger of Counts 2 and 3 of the criminal information. We reverse the decision of the trial court.

Count 2 alleges a third degree felony of homicide by vehicle in violation of Section 66–8–101(A). "Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle." § 66–8–101(A). This statute applies when the vehicular killing occurs while driving under the influence of intoxicating liquor or drugs, or while driving recklessly. *State v. Montoya,* 93 N.M. 346, 600 P.2d 292 (Ct. App.1979).

Count 3 alleges a third degree felony of injury to a pregnant woman in violation of Section 66–8–101.1. This crime involves "injury to a pregnant woman by a person other than the woman in the unlawful operation of a motor vehicle causing her to suffer a miscarriage or stillbirth as a result of that injury." § 66–8–101.1(A).

Defendant contends that Count 3 should merge into Count 2. Defendant claims that vehicular homicide of the pregnant woman necessarily includes injury to a pregnant woman. The state maintains that vehicular homicide does not necessarily include injury to a pregnant woman because it is possible to cause the death of a nonpregnant woman through the unlawful use of a motor vehicle. We agree.

Merger is an aspect of double jeopardy. The concept is applied to prevent a person from being punished twice for the same offense. *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977). Double jeopardy principles require that two offenses merge when one offense necessarily involves another, either under a statutory analysis of the elements of each offense in light of the facts of the case, or where it is impossible to commit one offense without necessarily committing the other offense. *State v. Jacobs,* 102 N.M. 801, 701 P.2d 400 (Ct.App.1985).

In the case before us, a comparison of the statutory elements of the two offenses for which defendant is charged shows that either offense can be committed without committing the other offense. Section 66–8–101(A) requires the killing of a human being, whereas Section 66–8–101.1 does not. *See State v. Johnson,* 102 N.M. 110, 692 P.2d 35 (Ct.App.1984). The same operative facts are not necessary to prove each offense. As already mentioned, the offense of vehicular homicide is proved by evidence showing that the victim died of injuries caused by defendant's unlawful operation of a motor vehicle. *See* NMSA 1978, UJI Crim. 2.60 (Repl.Pamp.1982). The offense of injury to a pregnant woman is proved by showing that defendant, while unlawfully operating a motor vehicle, caused injury to the victim resulting in a miscarriage or still birth. *See* § 66–8–101.-1(A).

Defendant argues that merely because the legislature has created two separate statutory offenses does not mean that the two offenses can never merge. We agree. However, because the two statutory offenses involved here require proof of different facts, we believe that the legislative intent in enacting the two statutes is to punish a person who violates the two statutes under the provisions of both. *See, e.g., State v. Trujillo,* 85 N.M. 208, 510 P.2d 1079 (Ct.App.1973). We note that when an unlawfully operated automobile strikes a pregnant woman, four different results might occur: (1) the mother dies, but the fetus does not—Section 66–8–101(A) would apply; (2) the fetus dies, but the mother does not—Section 66–8–101.1 would apply; (3) both mother and fetus die—Sections 66–8–101(A) and –101.1(A) would apply; or (4) neither mother nor fetus dies—neither statute would apply. Here, because it is possible to commit one offense without necessarily committing the other offense, merger does not occur. *See Jacobs.*

Accordingly, we reverse the trial court's dismissal of Count 3 of the information. If the trial court determines that it has jurisdiction, we remand with instructions to reinstate Count 3 and proceed to trial on the merits. If the trial court finds that it lacks jurisdiction, this case must be dismissed.

IT IS SO ORDERED.

DONNELLY, C.J., and FRUMAN, J., concur.

734 P.2d 743

Alberta DUPPER, Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY and J.C. Penney Company, Inc., Respondents.

No. 16330.

Supreme Court of New Mexico.

Feb. 3, 1987.

Rehearing Denied March 12, 1987.

Robinson & Wainwright, Paul S. Wainwright, Sherrie L. Tepper, Albuquerque, for petitioner.

Rodey, Dickason, Sloan, Akin & Robb, Tracy E. McGee, Albuquerque, for respondents.

OPINION

WALTERS, Justice.

This appeal concerns a claim for worker's compensation by plaintiff Dupper against defendants J.C. Penney Company, Inc., Dupper's employer, and its insurer, Liberty Mutual Insurance Co. Dupper had completed her shift, signed out for the day, and was on her way to the employee parking lot when she tripped over a "pop-up" sprinkler head that had failed to retract after use. Liberty denied compensation for her injury on the ground that the accident occurred after she had left her duties of employment, thereby precluding her from recovery under New Mexico's "going-and-coming" rule which provides:

> [an injury by accident] shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer's negligence.

NMSA 1978, § 52-1-19. The trial court ruled that Dupper had failed to establish that her injury was caused by J.C. Penney's negligence, but awarded compensation by purporting to adopt the "premises" rule which allows compensation for "injuries occurring on the premises while [employees having fixed hours and place of work] are going to and from work before or after working hours or at lunchtime." 1 A. Larson, *The Law of Workmen's Compensation* § 15.00 (1985).

Jurisdictions which recognize the premises rule characterize injuries occurring on an employer's premises as "injur[ies] by accident arising out of and in the course of employment." Injuries occurring off the employer's premises, however, are not compensable unless they are covered by one of several exceptions to the "going-and-coming" rule. 1 Larson § 15.00. Deferring to New Mexico case law, the Court of Appeals reversed the trial court. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973); *see also Gonzales v. New Mexico State Highway Department,* 97 N.M. 98, 637 P.2d 48 (Ct.App.), *cert. quashed,* 97 N.M. 621, 642 P.2d 607 (1981); *Hayes v. Ampex Corporation,* 85 N.M. 444, 512 P.2d 1280 (Ct.App. 1973). We granted certiorari in this case because we believe that it is time for New Mexico to join every other state in the country in its view of compensability for injuries suffered on an employer's premises.

Of necessity, we must reassess Section 52-1-19, as that statute has been construed in earlier New Mexico decisions, *see, e.g., Trembath v. Riggs,* 100 N.M. 615, 673 P.2d 1348 (Ct.App.1983), *cert. denied,* 101 N.M. 11, 677 P.2d 624 (1984); *Gonzales v. New Mexico State Highway Department; Romero v. S.S. Kresge Co.,* 95 N.M. 484, 623 P.2d 998 (Ct.App.), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981); *Hayes v. Ampex Corp.; McDonald v. Artesia General Hospital,* 73 N.M. 188, 386 P.2d 708 (1963); *Caviness v. Driscoll Const. Co.,* 39 N.M. 441, 49 P.2d 251 (1935); *Cuellar v. American Employer's Ins. Co.,* 36 N.M. 141, 9 P.2d 685 (1932), which cases denied compensation for on-premises injuries occurring while the employee is "on his way to assume the duties of his employment or after leaving such duties," not proximately caused by the employer's negligence. NMSA 1978, § 52-1-19.

When worker's compensation was first enacted, New Mexico joined Kansas in statutorily limiting liability under its "going-and-coming" rule to cases based upon employer negligence. 1917 N.M.Laws, ch. 83, § 12(L); 1913 Kan.Laws, ch. 216, § 4. *Cuellar v. American Employer's Ins. Co.* gave this Court its first opportunity to interpret the original statute's identical language in a later codification. NMSA 1929, § 156-112(L). The Court, considering a case where a worker had been injured on his employer's premises, held that unless an employer's negligence was the proximate cause of a worker's injury, a worker "injured while going to or from work is within the rule that he is not in the course of his employment." *Id.* at 145, 9 P.2d at 687. Subsequent decisions have read this case as rejecting the premises rule. *See, e.g., Mountain States Telephone & Telegraph Co. v. Montoya,* 91 N.M. 788, 581 P.2d 1283 (1978); *McDonald v. Artesia General Hospital; but see Gonzales v.*

New Mexico State Highway Department (Wood, J., specially concurring).

In *Cuellar*, Judge Watson recognized the problem inherent in interpretation and concurred only in the result, explaining:

> Under the theory of my brethren, the beneficiaries of the act and the courts are left to struggle with the question, so long and often troublesome, whether, under given circumstances, a workman, on his way to assume the duties of his employment, or after leaving such duties, is in the course of employment, and whether the injury then occurring arose out of it. It merely adds a new complication and imposes a new burden upon the workman.

Cuellar v. American Employer's Ins. Co., 36 N.M. at 148, 9 P.2d at 689 (Watson, J., concurring in result); *see also* 1 Larson § 15.44 at 4–116.2. To reach its conclusion, the majority had rejected an alternative reading interpreting the subsection to mean that "if the employer's negligence is the proximate cause of the injury, it shall be deemed to have arisen out of and in the course of the employment, though the workman had left his duties," *id.* at 142, 9 P.2d at 686, even though the Court acknowledged that the clause "seem[ed] to mean that very thing." *Id.* The strained construction was particularly surprising because the Court began its analysis by explicitly noting that "[t]he idea of negligence as an essential to recovery is generally foreign to the theory of workmen's compensation." *Id.* at 143, 9 P.2d at 686, citing *Merrill v. Penasco Lumber Co.*, 27 N.M. 632, 204 P.2d 72 (1922). As Judge Wood noted in his *Gonzales* special concurrence, the *Cuellar* opinion can be read as a decision "approaching a premises rule in New Mexico." *Gonzales*, 97 N.M. at 99, 637 P.2d at 49. We are committed to the view that, as remedial legislation, the Workmen's Compensation Act must be liberally construed, with all doubts resolved in favor of the worker. *See, e.g., Avila v. Pleasuretime Soda, Inc.*, 90 N.M. 707, 568 P.2d 233 (Ct.App.1977); *McKinney v. Dorlac*, 48 N.M. 149, 146 P.2d 867 (1944); *Cuellar v. American Employer's Ins. Co.*

In *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950), this Court recognized that subdivision (L) of NMSA 1941, Section 57–912 (now, NMSA 1978, Section 52–1–19) was "never intended to deprive a workman of compensation, who at the time of his injury was acting within his contract of employment, if his injury, 'arose out of and was suffered in the course of his employment.'" *Id.* at 108, 227 P.2d 382. More than forty years ago we held that an accident arises in the course of the employment when it occurs within the period of the employment *at a place where the employee reasonably may be in the performance of his duties* and while he is fulfilling those duties *or engaged in doing something incidental thereto. McKinney v. Dorlac*, 48 N.M. at 153, 146 P.2d at 870.

To give effect to this early holding, a number of specific exceptions to the "going-and-coming" rule have been carved out. For instance, a worker injured as he was crossing the highway while on a coffee break was entitled to recover under the "personal comfort" exception. *Whitehurst v. Rainbo Baking Co.*, 70 N.M. 468, 374 P.2d 849 (1962); *see also Sullivan v. Rainbo Baking Co.*, 71 N.M. 9, 375 P.2d 326 (1962), where an employee crossed the street for a meal during his shift, and fell at the door of the cafe. His injury was held to be compensable "as arising out of and in the course of his employment." *Id.* at 10, 375 P.2d at 326. Similarly, a worker may be compensated for injuries suffered while on a "special mission" for her employer outside her normal working hours, *i.e.*, returning home from an agency meeting in another city, *Edens v. New Mexico Health and Social Services Department*, 89 N.M. 60, 547 P.2d 65 (1976); *see also, Clemmer v. Carpenter*, 98 N.M. 302, 648 P.2d 341 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (injured while traveling on personal as well as work-related business); *Avila v. Pleasuretime Soda, Inc.* (employee making bank deposit on way home after work was on "special errand"). Similarly, an employee required to drive a city vehicle to and from work and to remain on call at all times was within his

"course of employment" while driving home, even though he had spent two and one-half hours after work socializing and drinking in a bar before beginning his homeward trip. *Salazar v. City of Santa Fe,* 102 N.M. 172, 692 P.2d 1321 (Ct.App.), *cert. quashed,* 102 N.M. 225, 693 P.2d 591 (1985). Thus, except for those cases alleging accidental injuries on an employer's premises, there has been a consistent pattern of rejecting a narrow reading of NMSA 1978, Section 52–1–19 (and its forerunners), in order to allow workers to recover.

As was said in *Gonzales* at 97 N.M. at 99, 637 P.2d at 49, "[o]ne who has arrived upon or is leaving his employer's premises certainly is where his employment requires him to be, and he necessarily is [as] engaged in doing something incidental thereto" as any of the above-excepted cases. The obvious incongruity led the Court of Appeals there to urge the adoption of the premises exception. *See also Hayes v. Ampex Corporation,* (Sutin, J., specially concurring). Despite such urgings, New Mexico has remained the only jurisdiction that heretofore has refused to recognize that an injury occurring on the premises is one occurring within the employee's course of employment. 1 Larson § 15.11.

Today the issue is once more squarely before this Court, and we take this opportunity to redeem New Mexico from its orphan status and extend the "course of employment" meaning, first adopted in *McKinney v. Dorlac,* to the instant case. We hold that a workman, while on the employer's premises coming to or going from the actual workplace is in a place where the employee is reasonably expected to be, and that he is engaged in a necessary incident of employment. *Federal Insurance Co. v. Coram,* 95 Ga.App. 622, 98 S.E.2d 214 (1957). Further, as guidance and in hopes of avoiding future litigation, we define "premises" to include parking lots intended for employees or customers, whether "within the main company premises or separated from it." 1 Larson § 15.42(a) at 4–98 (citations omitted). In aligning ourselves with every other jurisdiction by adoption of the premises rule, we simply recognize that the "course of employment" includes not only the time for which the employee is actually paid but also a reasonable time during which the employee is necessarily on the employer's premises while passing to or from the place where the work is actually done. *See, e.g., Brown v. Reed,* 209 Va. 562, 165 S.E.2d 394 (1969); *U.S. Casualty Co. v. Russell,* 98 Ga.App. 181, 105 S.E.2d 378 (1958).

We join respectable company in forsaking a "going-and-coming" rule that does not recognize a premises exception. In 1973, the Arizona Supreme Court overruled its own very narrow premises exception in favor of the broader and more generally accepted view. Under its old rulings, an injury occurring before or after work on the employer's premises was not compensable unless the employee had been exposed to "some special risk or danger upon the premises." *McCampbell v. Benevolent & Protective Order of Elks,* 71 Ariz. 244, 254, 226 P.2d 147, 153 (1950). Twenty-three years later the Arizona court held:

> [W]hen an employee is going to or coming from his place of work and is on the employer's premises he is within the protective ambit of the Workmen's Compensation Act, at least when using the customary means of ingress and egress or route of employee's travel or is otherwise injured in a place he may reasonably be expected to be.

Pauley v. Industrial Commission, 109 Ariz. 298, 302, 508 P.2d 1160, 1164 (1973). We adopt the *Pauley* holding as the rule in New Mexico hereafter.

The rationale in *Pauley* was that compensation for industrial accidents is not dependent upon the presence of some special risk or danger. *Id.* at 301, 508 P.2d at 1163. Under similar reasoning, compensation for an accident occurring in a work-related setting should not depend on proof of employer negligence. *See Taylor v. Delgarno Transportation Inc.,* 100 N.M. 138, 139, 667 P.2d 445, 446 (1983).

The need to prove negligence arises under Section 52–1–19 if, and only if, the employee's injury is sustained while going

to or coming from work, *and* the injury does not fall within the premises rule or any of the generally recognized exceptions to the "going-and-coming" rule. Thus construed, Section 52–1–19 preserves coverage for injuries that are clearly work-related, but otherwise protects the employer from liability for employee injuries not caused by employer negligence while the employee is otherwise on the way to or from work away from the employer's premises. *See Galles Chevrolet Co. v. Chaney,* 92 N.M. 618, 593 P.2d 59 (1979).

Since we adopt a premises rule which allows compensation under the Workmen's Compensation Act in proper circumstances, it is unnecessary to respond to Dupper's claim of error in the trial court's refusal to find the employer negligent.

We agree with defendants and the Court of Appeals that this case cannot be distinguished from prior case law; accordingly, to the extent we adopt the premises rule, cases to the contrary are overruled.

Judgment of the lower court is AFFIRMED.

SCARBOROUGH, C.J., SOSA, Senior Justice, and RANSOM, J., concurs.

STOWERS, J., dissents.

STOWERS, Justice, dissenting.

I dissent. Section 52–1–19 of the New Mexico Workmen's Compensation Act is clear and unambiguous. In pertinent part it states:

> As used in the Workmen's Compensation Act * * * "injury by accident arising out of and in the course of employment" * * * *shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties,* the proximate cause of which is not the employer's negligence.

NMSA 1978, § 52–1–19 (Cum.Supp.1986) (emphasis added).

The district court specifically found that plaintiff-employee, Dupper, (Dupper) had not established that her injury was due to any negligence on the part of defendant-employer, J.C. Penney Company, Inc. (Penney). This finding is supported by substantial evidence.

The record indicates that Dupper left the sidewalk provided for by Penney for ingress and egress to the premise, that Penney routinely inspected the "pop-up" sprinkler system, and that Penney employed a groundkeeper who was on site five days a week. Additionally, there was no evidence that the sprinkler was defective prior to the incident with Dupper or that the malfunction resulted from a prior condition which Penney failed to properly repair. Obviously this evidence falls far short of establishing negligence as a matter of law.

Pursuant to the clear language of Section 52–1–19, New Mexico has consistently disallowed recovery in cases where employees have been coming or going from their employment. *See, e.g., McDonald v. Artesia Gen. Hosp.,* 73 N.M. 188, 386 P.2d 708 (1963); *Romero v. S.S. Kresge Co.,* 95 N.M. 484, 623 P.2d 998 (Ct.App.), *cert. denied,* 95 N.M. 593, 624 P.2d 535 (1981); *Hayes v. Ampex Corp.,* 85 N.M. 444, 512 P.2d 1280 (Ct.App.1973). Since Dupper failed to prove that her injuries were proximately caused by Penney's negligence, and since it is uncontradicted that Dupper's injuries occurred after she left the duties of her employment with Penney, she is not protected by the New Mexico Workmen's Compensation Act. The language of the statute is clear. There is no room for interpretation.

> The first rule of statutory construction is that the courts must ascertain and give effect to the Legislature's intentions. Legislative intent is to be determined primarily from the language used in the statute as a whole. When the words used are free from ambiguity and doubt, no other means of interpretation should be resorted to.

State v. Sinyard, 100 N.M. 694, 696, 675 P.2d 426, 428 (Ct.App.1983), *cert. denied,* 100 N.M. 689, 675 P.2d 421 (1984).

> A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and

> complications which might arise in the course of its administration * * * * Courts must take the act as they find it and construe it according to the plain meaning of the language employed. If the act is to be given a different effect, in this respect, it must be by an act of the Legislature.

Burch v. Foy, 62 N.M. 219, 223, 308 P.2d 199, 203 (1957).

These principles of statutory construction were reaffirmed in the case of *Perea v. Baca,* 94 N.M. 624, 614 P.2d 541 (1980), wherein the Court stated: "[i]f a change in the statute is necessary or proper, that is a task for the Legislature." *Id.* at 627, 614 P.2d at 544. In the case of *Taylor v. Delgarno Transp., Inc.,* 100 N.M. 138, 667 P.2d 445 (1983), this Court explained: "New Mexico's Workmen's Compensation statutes are to be construed liberally in favor of the workman. However, provisions of the Act may not be disregarded in the name of a liberal construction." *Id.* at 141, 667 P.2d at 448 (citations omitted). *See also Varos v. Union Oil Co.,* 101 N.M. 713, 688 P.2d 31 (Ct.App.1984).

No degree of statutory interpretation, no matter how liberal, can alter the language of Section 52–1–19 which prohibits workmen's compensation recovery for employees coming or going from their employment, unless the injuries were proximately caused by the employer's negligence. Interpreting Section 52–1–19 to include a "parking lot" exception is neither warranted nor justified. Until such time as this Court holds Section 52–1–19 of the Workmen's Compensation Act unconstitutional, it is the law of the state of New Mexico and should apply to the facts of this case.

For the above reasons, I dissent.

734 P.2d 748

NEW MEXICO HOSPITAL ASSOCIATION, Plaintiff-Appellee,

v.

A.T. & S.F. MEMORIAL HOSPITALS, INC., Defendant-Appellant.

No. 16497.

Supreme Court of New Mexico.

March 3, 1987.

OPINION

WALTERS, Justice.

Plaintiff New Mexico Hospital Association (NMHA), as the representative of an unemployment compensation group fund, sued defendant A.T. & S.F. Memorial Hospitals (Memorial), a member of the fund, to recover compensatory and punitive damages for breach of a May 1982 contract entitled "Agreement to Participate in New Mexico Hospital Association Private Joint Unemployment Compensation Plan." The dispute concerns how much Memorial owed to the group fund for unemployment compensation benefits reimbursed by the fund to the State Employment Security Department for Memorial's former employees who had been laid off when Memorial closed its Albuquerque hospital.

Memorial relies on NMSA 1978, Section 51–1–13(E) (Repl.Pamp.1983) as providing a statutory limitation to its liability to the fund, arguing as well that the contract itself limits its liability. The trial court determined that the formula in Section 51–1–13(E) was inapplicable, and that Memorial was obliged under the terms of the contract to reimburse NMHA the full amount of benefits that had been paid, plus administrative expenses incurred. The final judgment, including costs and post-judgment interest, was $261,986.97. Memorial appeals the amount awarded; NMHA cross-appeals the denial of punitive damages. We affirm.

We have not previously decided whether the formula contained in Section 51–1–13(E) of the Unemployment Compensation Act, NMSA 1978, Sections 51–1–1 to –53 (Repl. Pamp.1983 and Cum.Supp.1986), for computation of a group member's liability in some circumstances, is applicable to a benefit reimbursement situation as is here presented. Section 51–1–13(E) provides:

> Two or more employers that have become liable for payments in lieu of contributions * * * may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each application shall identify and autho-

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Sutin, Thayer & Browne, P.C., John A. Bannerman, Martha J. Kaser, Frank C. Salazar, Albuquerque, for plaintiff-appellee.

Modrall, Sperling, Roehl, Harris & Sisk, P.A., R.E. Thompson, Jeffrey Twersky, Dale B. Eppler, Albuquerque, for defendant-appellant.

rize a group representative to act as the group's agent for the purpose of this subsection * * *. Upon establishment of the account, each member of the group shall be liable for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in the quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment for such member during the quarter bear to the total wages paid during the quarter for service performed in the employ of all members of the group. The secretary shall prescribe regulations as he deems necessary with respect to applications for establishment, maintenance and termination of group accounts that are authorized by this subsection, for addition of new members to, and withdrawal of active members from, the accounts and for the determination of the amounts that are payable under this subsection by members of the group and the time and manner of payments.

I.

In construing an act, all parts of the act must be read together. *Tudesque v. New Mexico State Bd. of Barber Examiners*, 65 N.M. 42, 331 P.2d 1104 (1958). The Unemployment Compensation Act was enacted "for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." NMSA 1978, § 51–1–3 (Repl.Pamp.1983). An underlying, but equally important, purpose of the Act is to insure that the Employment Security Department will have sufficient funds to meet the needs of unemployed workers. The Department is primarily funded by contributions from employers. Each quarter, "contributing" employers pay a fixed rate determined by adjusting a specified percentage of wages paid according to the employer's benefit experience. NMSA 1978, §§ 51–1–9, –11(H) (Repl.Pamp.1983 and Cum.Supp.1986). All contributions are pooled and are nonrefundable, even though no actual benefits are paid out on behalf of an individual employer. NMSA 1978, § 51–1–11(D) (Cum.Supp.1986).

To lessen the economic burden for some organizations, the legislature has provided for exceptions to this method of funding. *See* NMSA 1978, §§ 51–1–13(A), –14(B), –16 (Repl.Pamp.1983). Specifically, NMSA 1978, Section 51–1–13(A) (Repl.Pamp.1983), permits a nonprofit employer, such as Memorial, to become a "reimbursing" rather than a "contributing" employer, and to elect to make payments "equal to the amount of regular benefits and of one-half the extended benefits paid" to employees by the Department. *Id.* These "payments in lieu of contributions" will ordinarily be less than the amount an employer would be required to pay as a contributing employer.

Memorial unsuccessfully argued below, and renews that argument here, that Subsection 51–1–13(E) controls the amount it is required to reimburse NMHA for payment of benefits to its former employees. That subsection, quoted above, provides that reimbursing non-profit employers may form a group "for the purpose of sharing the cost of benefits paid." Memorial says that the portion of Section 51–1–13(E) providing for each member's "payments [to the group's account] * * * in the amount * * * [bearing] the same ratio to the total benefits paid * * * [for employees] of all members of the group as the total wages paid * [to all employees of] such member * * * bear[s] to the total wages paid * * * [by] all members of the group," means that all members of the group share to some extent in paying the benefits liability of every other member. For instance, if member A's payroll constituted 1/10 of the total wages paid by all of the group members, A would only have to reimburse 1/10 of the benefits paid out, even though A's former employees may have been the only former employees receiving unemployment benefits during the period for which reimbursement was billed.

It is certainly not unreasonable to so read Subsection (E). But it cannot be read in a vacuum. If we were to accept Memorial's argument, we would have to ignore

and render meaningless Subsection (B) of the same statute:

> B. Payments in lieu of contributions shall be made in accordance with the provisions of this subsection.
>
> (1) At the end of each calendar quarter, or at the end of any other period as determined by the secretary, the department shall bill each nonprofit organization (*or group of such organizations*) which has elected to make payments in lieu of contributions *for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits* paid during such quarter or other prescribed period that is attributable to service in the employ of such organization. (Emphasis added.)

The above subsection very clearly requires quarterly reimbursement of full regular benefits plus one-half of extended benefits paid as are "attributable to service in the employ of *such organization,*" both from the individual non-profit organization and from such organizations as may have formed the kind of group allowed in Subsection (E), without any mention of a ratio-based payment by members of a group. Consequently, Subsection (E)'s provisions for proportionate payment according to the total payroll ratio must refer to something other than ongoing reimbursement for benefits paid out on behalf of former employees of the group's members. We cannot interpret Subsection (E) in such a way as would make another portion of the statute —here, Subsection (B)—totally superfluous or absurd. *State ex rel. Newsome v. Alarid,* 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977). We construe each provision in relation to every other provision, in accord with common sense and reason, and in a manner that will not defeat the intention of the legislature. *Id.*

We read Subsection 51–1–13(E)'s "[u]pon establishment of the account" to mean exactly that: that at the time the account is approved and established, each member of the group shall deposit an amount that is its payable percentage according to a ratio reflected by the total quarterly wages paid by it, contrasted against the amount paid by all members of the group; and that the secretary shall prescribe by regulation the amounts, time and manner of any payments due under the subsection for the "establishment, maintenance and termination of group accounts," and for adding or dropping active members to or from the account. Unless Section 51–1–13(E) is so read, both it and Section 51–1–13(B) would refer to two different methods of funding the same function, *i.e.,* the payment of benefits, and would be irreconcilably in conflict. By regulation the Department has determined that Section 51–1–13(E) shall apply, except in unusual circumstances, only when a group account is established or terminated.

That regulation, 421H,—the only one so far promulgated by the secretary with respect to Subsection 51–1–13(E)—lends further support to our interpretation of the statute. It provides, in relevant part:

> * * * *[u]pon establishment and after termination of the group account,* each group member, group account and group account representative shall be fully liable for:
>
> (1) any payment in lieu of contributions, penalties or interest required under Section 51–1–13E, N.M.S.A. 1978, for the period during which any benefits or portion thereof are payable on the basis of wage credits earned during the period of the claimant's base period employer was a group member; and
>
> (2) the performance of the group representative.

Under the regulation, the situation before us is one where Section 51–1–13(E) simply does not apply. The membership of a group member was terminated, but the group itself has not sought termination of its account with the Department.

This construction of Section 51–1–13(E) comports with testimony offered by Department officials. Although not binding, the interpretation of a statute by the agency which administers it is persuasive. *City of Raton v. Vermejo Conservancy Dist.,* 101 N.M. 95, 678 P.2d 1170 (1984). At trial, a Department official explained that the

only time the formula contained in Subsection 51–1–13(E) had been applied to NMHA was to determine the amount initially necessary to fund the Department's account. The official said further that the formula might be used otherwise to determine the ultimate liability of group members to the Department in the event a group account dissolved and all other efforts to collect from the group's agent failed. The Department's interpretation and its regulation certainly solves the possibility of an employer's dilemma in determining whether Subsection (B) or (E) applies in calculating a member's liability for benefits paid.

We hold, therefore, that the formula contained in NMSA 1978, Section 51–1–13(E), does not determine the amount of a group member's liability to the group account after that member has been terminated; rather, Section 51–1–13(E) applies to establish an initial account, and thereafter in situations where the Department is unable, for one reason or another, to collect adequate funds from a group representative to cover the liability of the group *to the Department,* and must look instead to all of the individual group members to cover payments made by the Department to former employees. In the instant circumstances, the requirements of Section 51–1–13(B) establish Memorial's liability.

II.

In the alternative, Memorial urges that the contract between Memorial and NMHA contains two provisions that limit a group member's liability to the group. Sections 7 and 8 of the contract address the annual adjustments that NMHA may make to a member's account to insure that it will have adequate funds to cover its projected liability to the Department. Section 7 allows the group representative to uniformly raise the rates participating hospitals are required to pay to the group fund, provided that this amount is not "greater than the tax which could be charged the Hospital by the Department, using the maximum percentage rate being charged by the Department to any employer in New Mexico in that year." Section 8 details how NMHA arrives at the amount an individual group member must pay into the fund. Members who have a high number of claims against them may be required to pay the fund at a higher percentage rate than members with fewer claims, also limited to an amount not "greater than the tax which could be charged the Hospital by the Department using the maximum percentage rate being charged by the Department to any employer in New Mexico in that year" unless all participating hospitals are required to pay at a higher rate. At all times relevant to this lawsuit, the maximum amount charged by the Department was 4.2%, and no attempt was made by NMHA to require all members to pay additional amounts. Thus, Memorial argues, its maximum liability to the group fund is 4.2% of its base wages for the time period in question.

Those provisions, however, no longer apply to Memorial. They provide the means for NMHA to adjust the payment schedules of *active* group members so that the group will have sufficient funds to cover its anticipated liability to the department. The percentage ceiling imposed by those provisions simply ensures the participating hospitals that the rates charged by NMHA will not exceed the amount they could be charged directly by the Department. NMHA sent Memorial a written notice of exclusion by a letter dated May 6, 1983. Exclusion from the group fund became effective 30 days thereafter. Section 10 governing exclusion, then, is the correct contractual provision to apply to Memorial:

> *Exclusion:* The Board shall have the authority, subject to the Unemployment Compensation Law, to exclude the Hospital from further participation in the Plan after 30 days written notice if the Hospital refuses to make payments, make timely reports requested by NMHA, the Board or the Administrator in connection with the Plan, or otherwise interferes with or impedes the efficient administration of the Plan. *Any Hospital so excluded shall remain liable to pay the Fund the amount of any deficit in its Account and shall have the right to any balance in its Account, in the same*

manner as if the Hospital withdrew. (Emphasis added.)

This section necessarily refers us to the provision governing procedures upon withdrawal, exclusion, or termination. Section 9 of the contract provides, in part:

> C. If the Hospital's Account, computed after provision for payments to the Department and its share of Plan operating expenses, is determined to contain any unallocated funds, these funds shall be paid to the Hospital within 30 months [sic] after the termination date. *If the Hospital's account, similarly calculated, shows a deficit, then the Hospital shall pay the Fund, within 30 days after demand, the amount of the estimated deficit and any actual remaining deficit within 15 days after notice of the deficit amount.* (Emphasis added.)

With respect to computation of any hospital's "account," a portion of Section 6 of the contract reads:

> B. The Administrator shall keep a separate account for the Hospital (hereinafter called an "Account") which shall show:
>
> (1) The amounts paid by the Hospital into the Fund.
>
> (2) The Hospital's share of any income or loss from investment of the Fund.
>
> (3) *The amounts paid from the Fund to the Department for benefits paid by the Department attributable to the Hospital.*
>
> (4) The Hospital's share of Plan operating expenses paid from the Fund. (Emphasis added.)

By the express terms of its agreement with NMHA, Memorial's account surplus or deficit at the time of exclusion would show the amount of benefits paid to the Department on its behalf by NMHA, as well as its share of administrative expenses, offset by whatever Memorial had already paid into the fund and its share of investment income (or loss). The judgment entered by the district court accurately reflects this calculation; accordingly, the terms of the contract will not operate to alter the judgment.

III.

NMHA's cross-appeal alleges error in the district court's refusal to assess punitive damages against Memorial. It relies on a finding of intentional conduct on the part of Memorial to deceive NMHA and so to avoid the full extent of its liability to the fund, as sufficient to support an award of punitive damages. Memorial points to deletion by the court of such language as "reckless," "willfully," "willful," "intent to mislead and deceive," and "intent not to fully disclose" from some of NMHA's requested findings to argue insufficient evidence. They cite the rule that refusal to accept a requested finding constitutes a finding to the contrary. Although that may be a correct statement, *Thornton v. Hesselden Construction Co.,* 80 N.M. 121, 452 P.2d 190 (1969), it overlooks the findings in this case which do use that or language of like import in characterizing Memorial's conduct.

Punitive damages, however, are not awarded as a matter of right, but lie within the discretion of the court. *Padilla v. Lawrence,* 101 N.M. 556, 685 P.2d 964 (Ct. App.), *cert. denied,* 101 N.M. 419, 683 P.2d 1341 (1984). We are concerned only with abuse of discretion, which requires a showing that the court's ruling was contrary to logic and reason. *Three Rivers Land Co., Inc. v. Maddoux,* 98 N.M. 690, 652 P.2d 240 (1982).

Even though we have held that punitive damages may be recovered in contract actions, *Hood v. Fulkerson,* 102 N.M. 677, 699 P.2d 608 (1985), normally they are awarded only when the breach is maliciously intentional, fraudulent or oppressive, or committed recklessly or with a wanton disregard of rights of the party injured. *Ranchers Exploration and Development Corp. v. Miles,* 102 N.M. 387, 696 P.2d 475 (1985). Despite the district court's conclusion that Memorial intentionally misled NMHA and breached its contract, it refused to impose punitive damages. A trial court is not required to award such damages. *Merritt v. De Los Santos,* 721 F.2d 598 (7th Cir.1983). We will not substitute our judgment for that of the trial court,

nor consider whether we would have reached the same conclusion. *Edington v. Alba,* 74 N.M. 263, 392 P.2d 675 (1964); *Coastal Plains Oil Co. v. Douglas,* 69 N.M. 68, 364 P.2d 131 (1961).

We affirm the judgment in all respects. IT IS SO ORDERED.

SOSA, Senior J., and RANSOM, J., concur.

734 P.2d 754

FOUNDATION RESERVE INSURANCE COMPANY, INC., Plaintiff-Appellee,

v.

Oneva W. GARCIA and Joseph Garcia, Defendants-Appellants.

No. 16342.

Supreme Court of New Mexico.

March 20, 1987.

Carol J. Vigil, Santa Fe, for defendants-appellants.

Felker & Ish, Carol J. Ritchie, Mark L. Ish, Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Senior Justice.

Plaintiff Foundation Reserve Insurance Company, Inc. (Foundation Reserve) brought a declaratory judgment action in the District Court of San Miguel County seeking a determination of its duties and responsibilities under an insurance policy issued to defendant Oneva Garcia. The district court concluded that it had jurisdiction over the parties and subject matter of this cause. We affirm.

Defendants Joseph and Oneva Garcia (Garcias), husband and wife, are both Indians who reside on the reservation of the Pueblo of San Juan. Defendant Oneva Garcia is an enrolled member of the Cherokee Tribe and defendant Joseph Garcia is an enrolled member of the Pueblo of San Juan.

On or about July 13, 1984, defendant Oneva Garcia obtained a Foundation Reserve automobile insurance policy from Finch/Talbot Insurance Agency, Inc., which is located in Espanola, New Mexico. The policy contained an exclusionary en-

dorsement which stated that Foundation Reserve would not be liable for losses or damages sustained while the automobile was driven or operated by defendant Joseph Garcia. On March 30, 1985, the Garcias had an automobile accident within the exterior boundaries of the Pueblo of San Juan.

On June 19, 1985, Foundation Reserve initiated a declaratory judgment action in the Fourth Judicial District of New Mexico, San Miguel County. The Garcias entered a special appearance and moved to dismiss for lack of subject matter jurisdiction and personal jurisdiction, asserting that the San Juan Tribal Court possessed exclusive jurisdiction. A hearing was held on the motion. The court found: (1) that the Garcias are Indians residing on the reservation of the Pueblo of San Juan; (2) that on March 30, 1985, the Garcias had an automobile accident within the exterior boundaries of the Pueblo of San Juan; and (3) that defendant Oneva Garcia applied for the insurance policy at issue through Finch/Talbot Insurance Agency, Inc., whose offices are located in Espanola, New Mexico, outside the exterior boundaries of the Pueblo of San Juan. The district court's findings on these matters are not challenged. Based on these findings, the court concluded that it had subject matter jurisdiction over the cause of action and personal jurisdiction over the Garcias. The matter then proceeded to a bench trial on January 3, 1986. The court found that defendant Joseph Garcia was driving the insured automobile when the accident occurred, and so the exclusionary provision applied, thus resulting in no liability for Foundation Reserve.

The sole issue on appeal is whether the state court has jurisdiction in a declaratory judgment action, filed by a non-Indian plaintiff, arising out of an insurance agreement that was entered into outside the exterior boundaries of an Indian reservation.

The test for determining whether a state court has jurisdiction over causes of action involving Indian matters is set forth in *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). In *Williams* the United States Supreme Court framed the question as being "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 271. This language has become known as the infringement test. In applying this test, we have considered the following criteria: (1) whether the parties are Indians or non-Indians; (2) whether the cause of action arose within the Indian reservation; and (3) what is the nature of the interest to be protected. *Chino v. Chino,* 90 N.M. 203, 206, 561 P.2d 476, 479 (1977).

In applying these factors to this case, it is undisputed that the defendants are Indians and that the plaintiff is a non-Indian. The next factor concerns where the cause of action arose. The Garcias maintain that the cause of action arose on the reservation when the accident occurred. They, in essence, define the cause of action as being one in tort. We disagree.

This case is unlike the New Mexico Court of Appeals' decision in *Hartley v. Baca,* 97 N.M. 441, 640 P.2d 941 (Ct.App.1981), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982), where a non-Indian plaintiff sought damages in state court for personal injury and property damage resulting from an automobile accident that occurred on an Indian reservation. The Court of Appeals, applying the infringement test, properly affirmed the district court's dismissal of the action for lack of subject matter jurisdiction. *Id.* at 443, 640 P.2d at 943. The facts in the instant case differ from those found in *Hartley v. Baca.* Here the transaction giving rise to this declaratory judgment arose off the reservation. This dispute involves the determination of obligations arising from the insurance agreement that was entered into in Espanola, New Mexico, outside the boundaries of the Pueblo of San Juan. Thus, the declaratory judgment proceeding, based on the insurance policy, cannot be appropriately characterized as litigation arising on the Indian reservation.

When the cause of action arises off the reservation, a state court can obtain jurisdiction over Indians who reside on an Indian reservation. *See State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973). Furthermore, based on our application of the infringement test, the nature of the interest to be protected (i.e., the right

of an Indian defendant to be heard in Tribal Court and be ruled by his own laws) has not been infringed upon by state action. Therefore, under these circumstances, the state court has concurrent jurisdiction with the San Juan Tribal Court.

This is not to say that exclusive tribal jurisdiction could not exist under the appropriate circumstances. Exclusive tribal jurisdiction exists where an action involves a proprietary interest in Indian land, *see Chino v. Chino,* 90 N.M. at 206, 561 P.2d at 479; or when an Indian sues another Indian on a claim for relief recognized only by tribal custom and law, *see Native Am. Church of N. Am. v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir.1959); or when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country, *see Williams v. Lee,* 358 U.S. at 223, 79 S.Ct. at 272.

Finally, we find no corresponding decline in the authority of the San Juan Tribal Court. The Pueblo of San Juan Tribal Code § 03.03(5) states:

> The jurisdiction invoked by this Code over any person, cause of action or subject matter shall be concurrent with any valid jurisdiction over the same by the courts of the United States, any states, or any political subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity in which jurisdiction does not otherwise exist in law.

This code recognizes that state courts can have concurrent jurisdiction with the Tribal Court so long as the state court is properly exercising subject matter jurisdiction and personal jurisdiction.

Finding subject matter and personal jurisdiction in the district court, we affirm its judgment.

IT IS SO ORDERED.

STOWERS and RANSOM, JJ., concur.

734 P.2d 756

LUBBOCK STEEL & SUPPLY, INC., a DIVISION OF LUBBOCK AMERICAN IRON & METAL, INC., a Texas corporation, Plaintiff-Appellee,

v.

Mary Helen GOMEZ and Phyllis Mackey, Defendants-Appellants.

No. 16638.

Supreme Court of New Mexico.

March 24, 1987.

Ortega & Snead, Charles P. Reynolds, Albuquerque, for defendants-appellants.

Bozart, Craig & Vickers, Marion J. Craig, III, Roswell, Jones, Gallegos, Snead & Wertheim, Steven L. Tucker, Santa Fe, for plaintiff-appellee.

OPINION

SCARBOROUGH, Chief Justice.

Lubbock Steel & Supply, Inc., appellee, filed suit on a note against appellants. Appellants' motion to dismiss was denied. We affirm.

This case is before the Court on interlocutory appeal from the District Court of Chaves County, New Mexico. The facts are undisputed and were framed by the district court as stipulated findings as follows:

1. Gomac, Inc., a New Mexico corporation, purchased steel on an open account from Plaintiff Lubbock Steel between March of 1984 and August 21, 1984.

2. On August 21, 1984, upon the request of employees of Lubbock Steel, Paul Mackey and Ruben Gomez (officers, directors and employees of Gomac, Inc.) signed a promissory note in an amount equal to the then outstanding indebtedness of Gomac, Inc., owed to Lubbock Steel on the open account.

3. The promissory note was intended to act as a collateral contract or assurance by which Paul Mackey and Ruben Gomez engaged to secure Lubbock Steel against the possibility that Gomac, Inc. would fail to pay its indebtedness to Lubbock Steel on the open account.

4. Gomac, Inc. subsequently went out of business and failed to pay its indebtedness on the open account to Lubbock Steel.

5. At all times pertinent hereto, Paul Mackey was married to Defendant Phyllis Mackey and Ruben Gomez was married to Defendant Helen Gomez.

6. Neither wife signed the promissory note; neither wife had any knowledge of the promissory note until Lubbock Steel brought suit on the note against their husbands in June of 1985.

7. Both Paul Mackey and Ruben Gomez filed for bankruptcy and each has discharged in bankruptcy any personal liability which might have been created under the promissory note.

8. The Plaintiff Lubbock Steel seeks, in the present action, to recover from the wives on the above-mentioned promissory note signed by their husbands.

The only issue before this Court is the application of NMSA 1978, Section 40–3–4 (Repl.Pamp.1986) to the above facts.

Appellants-defendants argue that recovery against them on the note signed by their husbands is barred by Section 40–3–4. This section was originally enacted as Chapter 74 of the Laws of the State of New Mexico, 1965. The title to the act contains the following language: "An act relating to contracts of indemnity of surety companies; and declaring that no community property shall be liable under a contract of indemnity with a surety company, unless signed by both husband and wife." *See* NMSA 1953, § 57–4–10 (Supp.1975). Section 40–3–4 provides:

> It is against the public policy of this state to allow one spouse to obligate community property by entering into a contract of indemnity whereby he will indemnify a surety company in case of default of the principal upon a bond or undertaking issued in consideration of the contract of indemnity. No community property shall be liable for any indebtedness incurred as a result of any contract of indemnity made after the effective date of this section, unless both husband and wife sign the contract of indemnity.

Appellee argues that the note signed by the spouses of appellants was not a proscribed contract of indemnity, and that recovery on the note is not barred by Section 40–3–4. They argue that Section 40–3–4 is inapplicable to this case as it is "a simple suit on a note against the remaining members of the marital community." We agree. What we have here is a community debt as defined in NMSA 1978, Section 40–3–9(B) (Repl.Pamp.1986). It is quite clear that this is not a contract of indemnification with a surety company in which both spouses must join to obligate their community estate.

Appellants further argue that the general language of the second sentence of Section 40–3–4 should control over the more specific language of the first sentence of

the statute. As a general rule of statutory construction, however, general language in a statute is limited by specific language. *Postal Finance Co. v. Sisneros,* 84 N.M. 724, 507 P.2d 785 (1973). Moreover, we are bound to give effect to the intention of the Legislature, *Board of Education v. Jennings,* 102 N.M. 762, 701 P.2d 361 (1985), and we are of the opinion that a reading of the title of the act together with the entire statute clearly indicates the intent of the Legislature was to prevent one spouse from obligating community property by entering into contracts of indemnity with surety companies unless the contract is signed by both spouses.

We affirm the order of the district court denying appellants' motion to dismiss.

IT IS SO ORDERED.

WALTERS and RANSOM, JJ., concur.

734 P.2d 758

Manuel A. FERRAN, Receiver for Guaranteed Equities, Inc., Appellant,

v.

Beneranda L. SANCHEZ, a/k/a Bennie Sanchez, Appellee.

No. 16302.

Supreme Court of New Mexico.

March 31, 1987.

Timothy J. Dreher, Singer, Smith & Williams, P.A., Albuquerque, for appellant.

Edward J. Apodaca, Christopher L. Trammell, Albuquerque, for appellee.

OPINION

WALTERS, Justice.

In May, 1982, appellee Sanchez, third-party defendant below, borrowed $37,500 through Guaranteed Equities, Inc. and pledged a rental property as security for the loan. Equities was in the business of

putting investors together with borrowers in the secondary money market. Because of pending bankruptcy proceedings, Equities is not a party to this suit. Sanchez executed four promissory notes bearing an interest rate of 22%, and four deeds of trust to secure the notes. Concurrently, she signed a 36–month interest-only "wraparound" mortgage with a balloon payment of the principal due at the end of the loan period. The federal disclosure form signed by Sanchez indicated that the amount financed was $42,907.72 at an annual percentage rate of 23.92%.

The court appointed Ferran, appellant and third-party claimant, as receiver for Equities in May, 1984. At that time, Sanchez was in default, and Ferran was sued as a defendant in a foreclosure action brought by the holder of Sanchez's first mortgage. Ferran then cross-claimed against Sanchez. The trial judge ruled that Equities had failed to comply with the disclosure requirements of NMSA 1978, Section 56–8–11.2 (Repl.Pamp.1986), and therefore the receivership was subjected to the penalty provisions of NMSA 1978, Section 56–8–11.3 (Repl.Pamp.1986). Ferran, as receiver, appeals and we reverse.

The issue on appeal is whether the trial court erred in concluding that Equities should have added the $5,248.60 prepaid loan servicing fee and the $1,637 impound fee to the simple annual interest amount in order to calculate the interest rate required to be disclosed under NMSA 1978, Section 56–8–11.2(A)(5) (Repl.Pamp.1986). Subsection (A)(5) requires a lender to disclose "the interest rate to be charged within one-quarter of one percent, including all charges or costs stated as a percent per month and percent per year basis." Using his own figures, the trial judge calculated an interest rate in excess of 26% per annum. Consequently, he considered the information Equities provided to Sanchez to be "substantially incorrect," and ruled that Ferran would have to "forfeit all interest, charges or other advantage for the loan." NMSA 1978, § 56–8–11.3 (Repl.Pamp.1986).

Ferran relies on NMSA 1978, Section 56–8–11.2(D), which provides that "any form which is in compliance with the federal law regarding disclosure of information by creditors to borrowers, such as the federal Truth in Lending Act, shall be deemed to be in compliance with Subsection A of this section." Statutes will be given effect as written. If they are free from ambiguity, there is no room for construction. *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977). We focus, then, on whether the disclosure form signed by Sanchez meets the federal requirements.

In determining whether Equities failed to disclose an accurate interest rate to Sanchez, federal law differs from the disclosure requirements of NMSA 1978, Section 56–8–11.2(A). The federal Truth in Lending Act requires the disclosure, upon request, of a finance charge rather than an interest rate. 15 U.S.C. § 1638(a)(2)(B), (3) (1982). 12 C.F.R. Section 226.4(a) (1986), enacted pursuant to the Act, defines "finance charge" as "the cost of consumer credit as a dollar amount." The finance charge may include interest, points, and loan fees. 12 C.F.R. § 226.4(b) (1986). In other words, under the federal regulations a "finance charge is much more than 'interest' in the traditional sense." Annotation, *What Constitutes "Finance Charge" Under § 106(a) of the Truth in Lending Act (15 USCS § 1605(a)) or Applicable Regulations,* 46 A.L.R.Fed. 657, 663 (1978) (citing Clark & Fonseca, *Handling Consumer Credit Cases* § 39). We agree with Ferran that the trial court improperly characterized points as interest, even though the distinction is immaterial for our purposes.

Here, the finance charge of $29,998.60 was reached by adding the $5,248.60 prepaid finance charge to the total amount of interest Sanchez would pay on the $37,500 principal, *i.e.,* $24,950. Equities was not obliged to add the $1,637 impound payment to the finance charge total because Section 226.4(c)(7)(iv) of the regulations specifically excludes from the finance charge "[a]mounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge." The impound charge, included in the amount financed, represents $262 with-

held as the May and June payments to the first mortgage company, and two payments (totalling $1375) held in reserve by Equities to be credited to Sanchez's account in the event she failed to make a monthly payment. At no time would the total interest paid (excluding late charges) exceed $24,950.

The annual percentage rate is merely the finance charge expressed as a percentage. 12 C.F.R. § 226.14 (1986). Equities accurately disclosed the total finance charge to Sanchez; accordingly we assume, and there is no evidence to the contrary, that the 23.92% a.p.r. is an accurate expression of the cost of Sanchez's credit at a yearly rate. 12 C.F.R. §§ 226.14(a), 226.18(e) (1986), and the appendix attached thereto, Part 226, App. J (Annual Percentage Rate Computations for Closed-end Credit Transactions).

We are satisfied that the disclosure provided by Equities to Sanchez comported with the federal disclosure requirements. *See* 15 U.S.C. 1638(a) (1982) and 12 C.F.R. § 226.18 (1986). The disclosures thus being in compliance with the federal Truth in Lending Act, they are deemed to be in compliance with the New Mexico requirements. NMSA 1978, § 56–8–11.2(D) (Repl. Pamp.1986). Consequently, the penalty provision of Section 56–8–11.3 is inapplicable.

We reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

SCARBOROUGH, C.J., and RANSOM, J., concur.

[redacted]

734 P.2d 762

Bernie and Elena CANO,
Plaintiffs-Appellees-Cross-Appellants,

v.

Placido LOVATO, Defendant-Third-Party Plaintiff-Appellant-Cross-Appellee,

v.

ESTATE OF Niven S. ROBINSON, et al., Third-Party Defendants-Fourth-Party Plaintiffs-Appellants,

v.

NEW MEXICO TITLE COMPANY, Fourth-Party Defendant-Appellant.

Nos. 7915, 7926.

Court of Appeals of New Mexico.

April 29, 1986.

Certiorari Denied June 24, 1986, (N.M. Title and Estate of Robinson).

Certiorari Quashed March 12, 1986 (Cano).

Linda R. Bonnefoy, Daniel J. Herbison, Albuquerque, for plaintiffs-appellees cross-appellants Bernie and Elena Cano.

Earl R. Norris, Oldaker & Oldaker, Albuquerque, for defendant-third-party plaintiff-appellant-cross-appellee Placido Lovato and fourth-party defendant-appellant New Mexico Title Co.

Katherine C. Pearson, Johnson & Lanphere, P.C., Albuquerque, for third-party defendants fourth-party plaintiffs-appellants Estate of Niven S. Robinson, et al.

OPINION

ALARID, Judge.

This case is a quiet title action brought by Bernie and Elena Cano (the Canos) against Placido Lovato (Lovato). Lovato joined the Estate of Niven R. Robinson (the Estate) in the action, and the Estate joined New Mexico Title Company (N.M. Title). The trial court quieted title in the Canos, and granted other forms of relief to Lovato and the Estate. Lovato, the Estate, and N.M. Title appeal from that portion of the

judgment quieting title in the Canos, and the Canos cross-appeal from that portion of the judgment granting Lovato a lien against the subject property. The Estate and N.M. Title also appeal various other rulings of the trial court. The specific positions on appeal are as follow:

(1) Lovato and the Estate challenge the validity of the tax sale at which the Canos bought the property;

(2) Lovato and the Estate challenge the trial court's refusal to find superior title in Lovato as a good faith purchaser;

(3) Lovato and the Estate challenge the constitutional adequacy of notice of the tax sale;

(4) N.M. Title challenges the trial court's conclusion that it was negligent as an agent for the Estate;

(5) the Estate challenges its measure of damages granted by the trial court;

(6) the Canos challenge the trial court's imposition of an equitable lien on the property in favor of Lovato; and

(7) the Canos challenge the amount of the lien.

We remand for a fact-finding under issue (2), involving the good faith purchaser. We conditionally affirm the other issues on appeal, however, because, depending on the outcome under issue (2), they could reappear as issues for decision. We first outline the facts and various procedural matters. We then address the issues as presented in the above sequence.

FACTS

The residential property in question is located in Albuquerque, in Bernalillo County. On July 8, 1980, Lovato signed a purchase agreement with the Estate to purchase the property, along with a single trailer on the property, from the Estate. Niven Robinson died in 1979, and his wife died in 1978. The Estate was administering the property. On August 1, 1980, Lovato took possession of the land, and made various improvements on the land. Pursuant to the purchase agreement, on September 30, 1980, the Estate and Lovato entered into a real estate contract. The Estate had signed the contract earlier in September, but Lovato signed the contract and tendered a down payment on September 30. The contract price was $28,000.00; Lovato made a down payment of $12,000.00, leaving a principal balance of $16,000.00 at 8% interest.

The real property taxes on the property remained unpaid for the years 1976, 1977, 1978 and 1979. Lovato's purchase of the property was conditioned upon proration of the 1980 taxes, together with payment by the Estate of any delinquent taxes, penalties and interest. However, there was no requirement that any such taxes be paid prior to closing.

The Estate retained N.M. Title to secure a title insurance policy for the property, and to act as closing agent for the transaction between the Estate and Lovato. On July 23, 1980, an employee of N.M. Title performed a tax search of the property at the Bernalillo County Treasurer's office and discovered the delinquency in the property taxes. This information was forwarded to N.M. Title. N.M. Title did not inform the Estate or Lovato of the delinquent taxes, nor did N.M. Title make any inquiry of the New Mexico Property Tax Division (Division) in Santa Fe as to the possibility of a tax sale to collect payment of back taxes.

The tax "account" on the property was transferred to the Division for collection sometime prior to September 30, 1980. Pursuant to statute, notice of the pending tax sale was published on August 22, 1980, and notice of the sale was sent by certified mail to "Robinson, Niven, Etux [sic], 4217 4th St., NW, Albuquerque, NM 87107." No notice was mailed or otherwise given to Lovato, who, at the time, had no recorded interest in the property. The notice was returned to the Division with a notation that the taxpayer, Robinson, did not reside at the address shown. The address was derived from the current property tax schedule.

On September 30, 1980, the same day the real estate contract was executed by Lovato, the Division conducted a sale of the property. The Canos were the successful bidders for the property, paying $1,900.00,

which included delinquent taxes, penalties and interest. The Canos were given a receipt for the property on September 30, and the Division executed a tax deed on that date. The deed was not physically delivered to the Canos until approximately one month after the sale.

On September 29, 1980, a second tax search was updated by N.M. Title, at which time the notation, "transferred to P.T.D. for collection", appeared on the tax receipt (tax bill) and tax rolls in the County Treasurer's office. The tax searcher took no action in response to this information. Subsequently, on October 3, 1980, the real estate transaction was closed when the Estate approved, and signed, the "Seller's Closing Statement" provided by N.M. Title. This closing statement reflected the outstanding delinquent taxes. Pursuant to the agreement between the parties and N.M. Title, sufficient money was withheld from the closing for the payment of any delinquent taxes. On or about October 9, 1980, N.M. Title attempted to pay such taxes, and discovered that a sale of the property was conducted to satisfy the delinquent *ad valorem* taxes. N.M. Title then returned this money to an escrow account set up for the transaction. N.M. Title, pursuant to its duties as closing agent, also recorded the real estate contract with the Bernalillo county clerk on October 9, 1980.

The Canos received a tax deed executed on September 30, on or about November 1, 1980 and recorded this deed on November 7, 1980, with the County Clerk.

Lovato remained in possession of the property and had no notice of any adverse claims to the property until early October, 1981, shortly after the Canos filed a complaint in forcible entry and detainer in Bernalillo County Metropolitan Court. By agreement of the parties, the action was dismissed and refiled as a quiet title action in the district court on February 12, 1982. Subsequently, the Estate and N.M. Title were joined in the litigation.

After trial on the merits, the court entered findings of fact and conclusions of law on March 23, 1984, and a judgment on March 23, 1984. The judgment, in pertinent part, directed that: (1) the Canos held superior title to Lovato and the Estate; (2) Lovato was to vacate the property on or before April 1, 1984; (3) Lovato was awarded a lien against the property, based on the improvements placed thereon, in the amount of $37,500.00, subject to offset for the rental value of the property during Lovato's possession; (4) Lovato was given the right, at his option, to remove certain improvements from the property at his expense; (5) the real estate contract between Lovato and the Estate was rescinded; (6) the Estate and N.M. Title would reimburse Lovato for the money he paid under the contract, including the down payment, and installment payments, with interest; and (7) the Estate was to be indemnified and held harmless by N.M. Title for any sums due Lovato. From this judgment, Lovato, N.M. Title, and the Estate appeal, and the Canos cross-appeal.

PROCEDURAL MATTERS

We note, initially, that subsequent to the original findings, conclusions and judgment, "supplemental" findings and conclusions, and a "supplemental" order (judgment) were filed on May 29, 1984. These reflect various additions to the originals, and the parties often refer to this supplemental set in their arguments. Motions to amend the judgment, and the findings and conclusions were timely filed by Lovato and the Canos on April 2, 1984. However, these motions were deemed denied when not ruled upon by May 2, 1984, NMSA 1978, Section 39-1-1, and the court was, therefore, without authority to enter the supplemental findings and order on May 29. We do not consider them for purposes of the appeal.

Secondly, Niven Robinson was a named defendant in a prior quiet title action filed by the Canos. A default judgment was entered in Bernalillo County District Court, on September 16, 1981, against Niven Robinson or his unknown heirs. The parties on appeal do not contend that the Estate was foreclosed from arguing the issue of the validity of the Canos' title, nor did the trial court foreclose the Estate. We assume,

but do not decide, that the Estate could properly contest the validity of the Canos' title in this action.

Thirdly, the Estate argues at the beginning of its brief-in-chief that a remand is proper, with directions to the trial court to "take evidence on the sufficiency of notice and procedure for the tax sale to the Canos." The remand is proper, argues the Estate, because the trial court granted the Canos' motion for summary judgment on the superiority of the Canos' title before the Estate was made a party to the litigation. Consequently, the argument continues, the Estate was foreclosed from presenting evidence on the sufficiency of notice of the tax sale, which relates to the issue of the validity of the tax deed.

We disagree. The record discloses that the Canos filed a similar motion for summary judgment against the Estate after the Estate was joined. On October 5, 1982, the court ordered that the motion was premature and would be taken under advisement *pending the completion of discovery.* The issue was nominally then foreclosed on October 17, 1983, when it was not reserved as an issue at trial in the pretrial order. The Estate, however, *was* free to conduct additional discovery on the issue it now claims was foreclosed to it. More significantly, the trial court, in fact, did not foreclose the issue of superior title at the trial on the merits, conducted on December 5, 1983. When the issue of superior title was raised again by Lovato's counsel at trial, the court stated that "the Court's chance of reconsidering are mighty slim" but that the court would hear evidence on the issue. Counsel for the Estate made no motion for a continuance at that point in order for time to prepare additional evidence. Nevertheless, evidence was introduced regarding notice to Lovato, which, the Estate agrees, was relevant to the superiority of title. The findings and conclusions subsequently entered reflect the evidence adduced at trial. No remand will, therefore, be ordered for the taking of additional evidence on notice.

ISSUES ON THE APPEAL

I. SUPERIORITY OF TITLE

A. Validity of Tax Sale and Issuance of Tax Deed

Lovato and the Estate argue, first, that the tax sale to the Canos was defective, thereby invalidating the Canos' title. They base this argument on the fact that the deed to the Canos was delivered to the Canos approximately one month after the tax sale. They challenge the conclusions of the trial court as to this matter. The trial court concluded: 1) that the Canos, by virtue of the tax deed, held superior title to Lovato and the Estate; and 2) that the tax sale and delivery of the deed were "valid and properly conducted in substantial compliance with applicable New Mexico law." We address this issue notwithstanding the resolution of the following issue relating to good faith purchaser.

The applicable statutory section involved is NMSA 1978, Section 7-38-70 (Repl. Pamp.1983), which provides:

> A. Upon receiving payment for real property sold for delinquent taxes, the division shall execute and deliver a deed to the purchaser.
>
> B. If the real property was sold substantially in accordance with the Property Tax Code [Articles 35 to 38 of Chapter 7 NMSA 1978], the deed conveys all of the former property owner's interest in the real property as of the date the state's lien for real property taxes arose in accordance with the Property Tax Code, subject only to perfected interests in the real property existing before the date the property tax lien arose.
>
> C. After two years from the date of sale, neither the former real property owner shown on the property tax schedule as the delinquent taxpayer nor anyone claiming through him may bring an action challenging the conveyance.
>
> D. Subject to the limitation of Subsection C of this section, in all controversies and suits involving title to real property held under a deed from the state issued under this section, any person claiming title adverse to that acquired by the deed

from the state must prove, in order to defeat the title, that:

(1) the real property was not subject to taxation for the tax years for which the delinquent taxes for which it was sold were imposed;

(2) the division failed to mail the notice required under Section 7–38–66 NMSA 1978 or to receive any required return receipt;

(3) he, or the person through whom he claims, had title to the real property at the time of the sale and had paid all delinquent taxes, penalties, interest and costs prior to the sale as provided in Subsection E of Section 7–38–66 NMSA 1978; or

(4) he, or the person through whom he claims, had entered into an installment agreement to pay all delinquent taxes, penalties, interest and costs prior to the sale as provided in Section 7–38–68 NMSA 1978 and that all payments due were made timely.

This section is a portion of the new Property Tax Code (Code), NMSA 1978, Sections 7–35–1 to 7–38–93 (Repl.Pamp.1983 and Cum.Supp.1985). The Code was enacted originally in 1973, 1973 N.M.Laws, ch. 258, and repealed the former act, which was codified, in part, at NMSA 1953, Repl.Vol. 10 (1961), Sections 72–8–1 to –52. *See* ch. 258, § 156. Both the new and old statutes deal with the sale of property for delinquent taxes. Central to the old act was a right of redemption vested in the property owner, which permitted the owner to reacquire property sold for delinquent taxes to the state by the county treasurer. §§ 72–8–1 and –9. Under this act, the first sale that occurred was a sale to the state from the county treasurer. *Id.* The period of redemption ran two years from the date of sale, Section 72–8–9, and the state and its grantees were not entitled to possession of the property until that period had expired. § 72–8–5. Upon expiration of the redemption period, the county treasurer was required to execute tax deeds to the state for all unredeemed property, and any unredeemed properties were to be administered by the state tax commission for the benefit of the state. § 72–8–15. Included in the tax commission's power was the ability to offer the property for sale, Section 72–8–28, subject to the owner's right of repurchase. § 72–8–31. All of these provisions were conceived in accord with the intention underlying the act: to provide a method "whereby persons who have lost title to property through sale of the same to the state for delinquent taxes may repurchase such property and recover the title thereto without undue hardship and whereby the state and its subdivisions may receive their proper revenue * * *." § 72–8–44.

The new code, conversely, eliminated the right of redemption, the right of repurchase, and the initial transfer of the property from the county treasurer to the state. Once a sale is conducted of the taxpayer's property by the Division, Sections 7–38–65 to –70, payment by the tax sale purchaser is to be made "in full by the close of the public auction before an offer may be deemed accepted by the division." § 7–38–67(F). The deed conveyed to the purchaser upon receipt of payment, Section 7–38–70(A), is not subject, under the terms of Section 7–38–70(B)–(D), to a right of redemption or repurchase. The statutory language, reflecting the legislative intent, makes the sale final, subject only to the challenges enumerated in Section 7–38–70(D). These challenges are, generally, the only permissible methods for attacking the validity of the sale and deed. They represent the "curative feature" of the new code, which is a continuation of the "curative feature" of the old. *See Wine v. Neal,* 100 N.M. 431, 671 P.2d 1142 (1983). "This curative feature ... stands out conclusively against any technical objection to a tax title." *Maxwell v. Page,* 23 N.M. 356, 365, 168 P. 492 (1917). The curative policy is, and always has been, an attempt "to clothe tax titles with a measure of certainty and security." *Bailey v. Barranca,* 83 N.M. 90, 92, 488 P.2d 725 (1971). Lovato and the Estate agree that these challenges are not available in this case. Lovato and the Estate argue that the failure to immediately execute and deliver a deed at the tax sale on September 30, 1980, amounts to a jurisdictional defect, which was an exception

not "cured" by the curative provisions under the old code. *Pace v. Wight,* 25 N.M. 276, 181 P. 430 (1918).

We note, however, that the deed bears an execution date of September 30, and so it is only true that the deed was not delivered on that date. A jurisdictional defect "partakes of the nature of an essential of taxation", *Williams v. Van Pelt,* 35 N.M. 286, 289, 295 P. 418 (1930), and has been found where there was a failure to conduct a sale, *Pace;* a failure to sufficiently describe and identify the property in a tax assessment, *Manby v. Voorhees,* 27 N.M. 511, 203 P. 543 (1921); and where a county treasurer assigned a tax sale certificate and issued a deed to a purchaser after his authority to act under the statute had expired, *Werner v. Garcia,* 57 N.M. 249, 257 P.2d 929 (1953). Lovato and the Estate assert that the validity of the sale is dependent upon the immediate execution and delivery of the deed to the Canos. Without execution and delivery on September 30, 1980, they argue, there could be no valid conveyance of the property on that date, *see Den-Gar Enterprises v. Romero,* 94 N.M. 425, 611 P.2d 1119 (Ct.App.1980), which, they claim, amounts to a jurisdictional defect. Neither party contends that the requirements leading up to the sale, nor the requirement that payment shall be made in full, were not met under Sections 7–38–66 and –67.

We agree that a jurisdictional defect constitutes a proper challenge under the new code. *Pace* established the following requirements "essential to constitute a valid exercise of the taxing power, without which no tax sale could be validly made": (1) the necessity that a tax has been levied; (2) the property sold is subject to taxation; (3) the property has been assessed; (4) the taxes have not been paid; (5) the existence of a statutory directive for the sale; and (6) a sale made under such directive. 25 N.M. at 280, 181 P. 430. *Manby* added the requirement that any tax assessment must sufficiently describe the property so as to identify the property subject to taxation. 27 N.M. at 526, 203 P. 543. Based on the record, we find no jurisdictional defect existing at the time the purchase price was transmitted to the Division by the Canos. In order to set aside the tax deed, therefore, Lovato and the Estate must demonstrate that the Division proceeded to issue the tax deed without authority of law, under *Werner.*

In *Werner,* under the 1941 code, a county treasurer assigned a tax sale certificate to a party and subsequently issued a deed to the party more than two years after the period of redemption had expired. *See* NMSA 1941, §§ 76–611 and –724. That code required the assignment to be made *before* the expiration of the two-year redemption period, Section 76–711, and, where not assigned, required the treasurer to execute a tax deed to the state "immediately upon" the expiration of the period. § 76–724. The supreme court held that the tax deed to the party was void "for the reason that the county treasurer was without authority to assign the tax sale certificate issued [originally] to the State, and upon which the deed issued, after the period of redemption had expired." *Werner,* 57 N.M. at 253, 257 P.2d 929.

The only directive, however, in the new code is contained in Section 7–38–70(A): "*Upon* receiving payment for real property * * * the division shall execute and deliver a deed to the purchaser." (Emphasis added.) No definite time period is set out for the issuing of the deed. Absent any clear indication to the contrary, the words of the statute are to have their ordinary and usual meaning. *Perea v. Baca,* 94 N.M. 624, 614 P.2d 541 (1980). "Upon" means "with little or no interval after." *Webster's New International Dictionary* 2800 (2d ed. 1953). We presume that had the legislature intended to use the word "immediately," as it had done in Section 76–724 of the 1941 code, or to otherwise prescribe a specific time limitation, it would have done so. *See Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971). Because the statute does not mandate immediate delivery at the time of sale, we conclude, on these facts, that the deed was issued pursuant to statutory authority, and that the sale and deed may not be invalidat-

ed on the basis of a claimed jurisdictional defect.

Lovato and the Estate further argue, under this section, that the delivery of the tax deed in November 1980 operated as a constructive fraud on Lovato. Constructive fraud is a breach of legal or equitable duty, which the law declares to be fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Worman v. Echo Ridge Home Cooperative, Inc.*, 98 N.M. 237, 647 P.2d 870 (1982). They contend that an immediate delivery of the deed to the Canos would have led the Canos to record the deed before October 9, 1980, the date the real estate contract was recorded. This record notice to N.M. Title would have then prevented their recording of the contract. Lovato claims that any interest he had in the property was sold without record notice to him as a result of this "fraud". We reject this argument. The subsequent delivery of the deed is a separate concept from any record notice due Lovato prior to the tax sale, which is discussed in Point C. Moreover, we cannot find a breach of statutory duty which Lovato claims gives rise to the fraud. The deed, as we have concluded, was issued under statutory authority. No constructive fraud was practiced upon Lovato.

B. Applicability of the Recording Act

Lovato requested a conclusion that he held superior title as a good faith purchaser, entitled to the protection of the New Mexico Recording Act, NMSA 1978, Section 14–9–3 (Act). The court refused this conclusion in its original findings and conclusions. Lovato and the Estate, on appeal, argue that Lovato has superior title because he was a purchaser who recorded the real estate contract without knowledge of the tax sale and tax deed. Lovato and the Estate rely upon the Act, which provides:

> No deed, mortgage or other instrument in writing, not recorded in accordance with Section 14–9–1 NMSA 1978, shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

The Act is designed to protect the title of a subsequent innocent purchaser for value without notice of an unrecorded deed. *Jeffers v. Martinez*, 93 N.M. 508, 601 P.2d 1204 (1979). "An innocent purchaser without notice of an unrecorded deed can do nothing to protect his position except to place his reliance upon the law as stated in Section 14–9–3." 93 N.M. at 510, 601 P.2d 1204.

The Act undoubtedly applies to tax deeds. The plain language of the Act makes no exception for tax deeds. A tax deed, under Section 7–38–70(B), conveys the former property owner's interest; in this regard, the tax deed is similar to other types of deeds which come under the Act. *See Doyle v. Lazarro*, 33 A.D.2d 142, 306 N.Y.S.2d 268 (1970). Moreover, to exclude a tax deed from operation of the Act would leave the subsequent innocent purchaser with "nothing to protect his position," *Jeffers*, which would be inequitable.

The Act embraces a "deed, mortgage or other instrument in writing." Here, an instrument in writing does exist, giving rise to Lovato's claim under the Act, because the Division executed a tax deed on September 30 naming the Canos as grantees. The executed deed reflected the Canos completed purchase of the property on September 30. Given the existence of this "instrument," we turn to the question of whether Lovato was a purchaser for value without knowledge of its existence.

The Act is designed to "prevent injustice by protecting innocent purchasers for value * * * who have invested money in property." *Jeffers v. Doel*, 99 N.M. 351, 353, 658 P.2d 426, 428 (1982); *Arias v. Springer*, 42 N.M. 350, 78 P.2d 153 (1938). Lovato executed the contract and obligated himself to pay the purchase price. Under the contract, he acquired equitable interest in the property, and he is treated as the owner of the property. *See Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979). Lovato was a purchaser for value.

Our Act is a "notice" provision. A subsequent purchaser prevails over an owner if, at the time the purchaser acquires an interest in the property, the owner's deed is unrecorded and the purchaser has no knowledge of the unrecorded instrument. *Angle v. Slayton,* 102 N.M. 521, 697 P.2d 940 (1985). Lovato acquired his interest in the property at the time he and the Estate entered into the contract. *J.C. Penney Co., Inc. v. Koff,* 345 So.2d 732 (Fla. App.1977); *Skendzel v. Marshall,* 261 Ind. 226, 301 N.E.2d 641 (1973). The representatives of the Estate had signed the contract earlier in September. Lovato executed the contract on September 30, at which time he tendered a check for the down payment to N.M. Title. N.M. Title did not release these funds to the Estate until October 3. The funds were not released until the Estate signed the "Seller's Closing Statement" prepared by N.M. Title. The statement, in part, authorized N.M. Title to pay delinquent taxes, recording fees, and various escrow fees to the holder of the contract deeds, First National Bank in Albuquerque, and to itself. It is not determinative, however, that the Estate did not have possession and use of the money until after September 30. The consideration essential to the validity of the real estate contract is not dependent on the payment of the purchase price, or any portion thereof, at the time the contract is executed. *Craigmile v. Sorenson,* 239 Minn. 383, 58 N.W.2d 865 (1953); *Cowman v. Allen Monuments, Inc.,* 500 S.W.2d 223 (Tex.Civ.App.1973). "The mutual promises [contained in the executed contract]—one by the seller to sell and one by the buyer to buy and pay for the land—are sufficient consideration to make the contract binding." *Id.* at 227. We conclude that Lovato was a purchaser for value on September 30, 1980, at which time the mutual promises of the parties had been given.

The Canos argue, with regard to the question of knowledge, that N.M. Title, as closing agent for Lovato, should have known of the pending tax sale and subsequent tax purchase, and that this "constructive knowledge" of N.M. Title is attributable to Lovato because of the agency relationship. We disagree. It is, first, not disputed that Lovato had no actual knowledge of the tax sale and deed until late in 1981. Secondly, the Canos overlook the specific circumstances of this case, where N.M. Title was in possession of facts which made the Lovato-Estate real estate transaction adversarial. As more fully discussed in Section II, N.M. Title knew that the property had been transferred for collection to the Division, and that this transfer could result in a tax sale. Such sale would naturally call into question the Estate's warranties under the real estate contract. Lovato, in fact, later claimed a breach of the contract by the Estate. Where, as here, the agent, N.M. Title, had knowledge of facts which made the transaction adversarial, but failed to disclose those facts so that the principal, Lovato, could make a fully-informed decision regarding his continuing participation in the transaction, N.M. Title's undisclosed knowledge is not to be imputed to Lovato. *C.B. & T. Co. v. Hefner,* 98 N.M. 594, 651 P.2d 1029 (Ct. App.1982). Lovato was thus without notice of delinquent taxes, the tax sale, and the resulting deed.

We are unable to determine, from the record, which party purchased the property first on September 30. This is important, of course, because Lovato is protected from a written instrument that is unrecorded *at the time of his acquisition. Angle.* If he purchased after the Canos purchased at the tax sale, he is protected against the unrecorded tax deed that was executed upon the receipt of the Canos' purchase money. If, however, he purchased before the tax sale to the Canos, we must determine whether he is protected against any other prior interest in the property.

There is no dispute that the property was encumbered by a statutory tax lien. The lien attached to the property on January 1, 1976, the year of the first unpaid tax. Section 7–38–48 provides for the creation and attachment of the lien:

> Taxes on real property are a lien against the real property from January 1 of the tax year for which the taxes are imposed. The lien runs in favor of the

> state and secures the payment of taxes on the real property and any penalty and interest that becomes due. The lien continues until the taxes * * * are paid. The lien created by this section is a first lien and paramount to any other interest in the property, perfected or unperfected.

Under the language of this section, the lien is created, and attaches, independent of any written instrument. It arises by operation of law. Unlike other kinds of tax liens, *see* NMSA 1978, Sections 7–1–37 and –38 (Repl.Pamp.1983), a lien under Section 7–38–48 is not dependent upon a filing of notice of lien for its creation and effect against purchasers. *See* NMSA 1978, §§ 7–1–2 and –3 (Repl.Pamp.1983 and Cum. Supp.1985); *Lovelace Center for Health Sciences v. Beach,* 93 N.M. 793, 796, 606 P.2d 203 (Ct.App.1980). Because such a lien is not a written instrument, we fail to see how it is embraced by the Act, which applies, by its terms, to instruments in writing.

Support for our conclusion and a discussion of its ramifications are found in *Roby v. Baker,* 78 A.D.2d 918, 432 N.Y.S.2d 917 (1980). The plaintiff in *Roby* commenced a quiet title action against defendant. Plaintiff purportedly purchased the property from the prior owner in 1973. Plaintiff then recorded a deed in 1973. At the time plaintiff purchased, property taxes assessed for that year were unpaid and remained unpaid. A property tax lien attached to the property as of January 1, 1973, pursuant to a statutory provision similar to Section 7–38–48. The lien was not extinguished until the county paid the taxes at a tax sale in 1974. Defendant subsequently bought the property from the county at a public auction in 1977. The trial court found that plaintiff held superior title, and defendant appealed. The appellate court, however, reversed the trial court on the basis that New York's Recording Act did not apply. Therefore, despite the fact that plaintiff's purchase and subsequent recording of his deed were undertaken without notice of a tax lien (recording as well as the absence of notice were required under New York's provision), defendant prevailed. 432 N.Y.S.2d at 918. The court reasoned:

> [T]he tax lien, as a creature of statute and not a conveyance evidenced by a written instrument ... was not embraced by the recording act which relates solely to conveyances * * *. Consequently, even though the lien was never recorded, it could not be cut off by the subsequent attempted purchase of the property by plaintiff and his prompt recording of his deed * * *. Under these circumstances, the interest prior in time, i.e., the tax lien, must be first in right and prevail over the later attempted conveyance of the land to plaintiff * * *.

Id. at 918.

Similarly, in this case, we conclude that the tax lien is not within the class of written instruments governed by the Act. The lien could not be extinguished on that basis by an attempted purchase prior to, and outside of, the tax sale. Where the Act has no application, the interest prior in time prevails, and the party claiming under that interest acquires superior title. *Id.* The tax lien, arising in 1976, was prior in time to Lovato's 1980 interest. Therefore, if Lovato purchased before the tax sale, the Canos prevail as the party claiming title under the state's tax lien.

No evidence was introduced, however, regarding the time of the purchases on September 30, perhaps because the relevance of the sequence, admittedly, was not readily apparent. Resolution of the title question requires a remand for the taking of additional evidence to determine whether Lovato executed the real estate contract before or after the sale of this specific property to the Canos. If it is determined that Lovato executed after the Canos purchased, Lovato prevails on his claim of superior title, and the right of possession. In that event, the other issues litigated between all parties, which arise from the finding that the Canos hold superior title, become moot.

We recognize that the result which we reach today may seem inequitable if the tax sale occurred prior to the execution of

the Lovato/Estate contract. In that event, we have held that Lovato would have a superior claim to the property because he entered a real estate contract without notice of the Canos' unrecorded deed. Clearly, the Canos could not have recorded the deed because the deed had not been delivered to them, and we have held that the Division is not required to deliver a deed immediately to a tax sale purchaser. While our result may seem unjust, we simply are not empowered to read into Section 7–38–70 a requirement which is not there. *See Smith v. Village of Corrales,* 103 N.M. 734, 713 P.2d 4 (Ct.App.1985).

Notwithstanding the results of the fact-finding, we will proceed to address the other issues presently on appeal. Should the Canos prevail because Lovato purchased before the tax sale, these issues would necessarily arise in any subsequent proceeding before this court. The interest of time and economy mandates their consideration.

C. Constitutional Notice

Lovato and the Estate seek, alternatively, to invalidate the tax sale on the basis that they were entitled to, but did not receive, constitutionally adequate notice of the sale. They claim that the failure to give such notice constituted a violation of due process, relying upon *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

In *Mennonite,* Elkhart County, Indiana, instituted proceedings to sell a mortgagor's property for nonpayment of taxes by the mortgagor. In conducting a tax sale, pre–1980 Indiana law required notice by certified mail to the "owner" (mortgagor) of the property, as it did in regular foreclosure sales, but did not provide for such notice by mail or personal service to a mortgagee of the property. Accordingly, only the mortgagor in *Mennonite* was notified by certified mail. The county posted and published an announcement of the proposed tax sale. The mortgagee (Mennonite Board of Missions) was totally unaware of the pending sale, and neither it nor the mortgagor appeared at the sale. The property was sold, and the two-year statutory redemption period ran before the mortgagee finally learned that the property in which it had an interest had been sold. The purchaser at the sale brought suit to quiet title. The mortgagee defended with the contention that it had not received constitutionally adequate notice and had not received due process. *Id.* at 792–95, 103 S.Ct. at 2708–10. The mortgagee's name was listed in the mortgage, which was filed in the Indiana County Clerk's office. *Id.*

The Supreme Court cited *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and reemphasized that prior to an action which affects an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, a state must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mennonite,* 462 U.S. at 795, 103 S.Ct. at 2709–10. The court held, in deciding for the mortgagee, that notice "by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party [emphasis in original], whether unlettered or well versed in commercial practice, *if* its name and address are reasonably ascertainable." *Id.* at 800, 103 S.Ct. at 2712. (Emphasis added.)

Lovato, using *Mennonite,* argues that Section 7–38–70(B) is unconstitutional as applied to him on the facts of this case. Lovato received no notice by mail, nor had any actual knowledge of the pending sale. However, as distinguished from the mortgagee in *Mennonite,* Lovato did not possess an of-record interest at the time of the tax sale. The basis for the reasonable ascertainability of the mortgagee's interest in *Mennonite* was the recordation of its interest. The court did point out that, by its holding, it was not suggesting "that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee

whose identity is not in the public record." *Id.* at 798, n. 4, 103 S.Ct. at 2711 n. 4. We would view any efforts by the Division to go beyond the county clerk's record in order to ascertain Lovato's interest as extraordinary, absent actual knowledge on the part of the Division of his interest not appearing of record. No evidence was presented that the Division had actual knowledge of Lovato's interest. On this basis, the holding of *Mennonite* does not apply to Lovato.

Lovato further argues that another "proceeding" which "adversely affected" his property interest was the belated delivery of the tax deed. He contends that because his contract was of record as of October 9, 1980, the Division, before issuing the deed, should have informed him of its delivery to the Canos. This "belated delivery," however, did not deprive him of a property interest. As we have discussed, the tax sale was the "proceeding" which adversely affected his interest. It is, therefore, the tax sale which was the proceeding of importance for notice purposes.

The Estate argues that, because Niven S. Robinson was deceased, reasonable further inquiry was required to ascertain the identity of one or more living interested persons to whom notice might be given. *See Klinger v. Kepano,* 64 Haw. 4, 635 P.2d 938 (1981). Notice was mailed to "Robinson, Niven, Etux [sic]" to an incorrect address in Albuquerque. "Et ux" is the equivalent of "and wife." *Black's Law Dictionary* 497 (5th ed. 1979). The address was taken from the Bernalillo County tax schedule. The return of the notice to the Division indicating an incorrect address did not invalidate the sale under Section 7-38-66(C). The Estate argues, however, that for due process purposes, the Division should have next consulted the county probate records to determine the representatives of the Estate. The Estate ignores the fact that no evidence was offered which put the Division on notice that Robinson was deceased. By contrast, in *Klinger,* the Supreme Court of Hawaii held a tax deed invalid against certain defendants where the county treasurer had actual notice of the death of the property owner, and notice of the address of a living person designated to receive any correspondence for tax purposes, and failed to mail notice to such person. 635 P.2d at 940-41. Moreover, the Estate does not point to any evidence of death ascertainable through the county clerk's records. The clerk's record contains a prior real estate contract on which Robinson was the vendee. The contract lists his address as the same address on the tax schedule. Under these circumstances, we view any effort at determining an interest through the probate records as an "extraordinary effort" outside the scope of *Mennonite.*

The Estate, alternatively, urges this court to remand and order an evidentiary hearing to develop "the full facts as to the basis upon which the state *could* have ascertained their [the parties'] identity for tax sale notice purposes" (emphasis added). Even if we were to assume that such evidence would be relevant, the Estate was not foreclosed from presenting such evidence at the trial on December 5, 1983, almost six months after the *Mennonite* decision. We will not now remand for an additional hearing when the opportunity was presented in the trial court for the introduction of pertinent evidence regarding notice.

Finally, Lovato argues that the code provisions outlining notice are unconstitutional on their face, under *Mennonite.* This argument was not raised below and will not be considered on appeal. *Mwijage v. Kipkemei,* 85 N.M. 360, 512 P.2d 688 (Ct.App. 1973). We express no opinion as to the facial validity of the notice requirement of the code for due process purposes. The tax sale and resulting deed may not be invalidated on the basis of allegedly inadequate notice on these facts.

II. NEGLIGENCE OF N.M. TITLE

N.M. Title argues that the trial court erred in finding it negligent in closing the transaction between the Estate and Lovato and in not finding the Estate wholly negligent for nonpayment of property taxes. N.M. Title challenges, additionally, the

court's determination that its negligence was the proximate cause of the failure to pay the delinquent taxes and the resulting tax sale. The trial court found: (1) N.M. Title acted as a closing agent for Lovato and the Estate and as a securer of title insurance for the property; (2) in the performance of a tax search, and as a closing agent, N.M. Title should have exercised reasonable diligence and should have been aware of the pending tax auction; (3) N.M. Title should have informed both parties of the pending auction prior to the auction and the closing; and (4) the proximate cause of the tax sale was the lack of diligence on the part of N.M. Title. The trial court concluded that N.M. Title was negligent as closing agent in failing to ascertain the existence of the auction, and failing to insure that delinquent taxes "were or would be paid and such negligence was the proximate cause of the damages suffered by Lovato * * *." The court further concluded that N.M. Title should indemnify the Estate for all sums which the Estate was required to refund to Lovato as a result of the rescission of the real estate contract. On appeal, no party challenges the propriety of the court's rescission of the real estate contract as a result of the tax sale, nor the court's conclusion that Lovato is due back the money he paid under the contract. N.M. Title, however, challenges the conclusion that it should indemnify the Estate for any money paid to Lovato.

We review the findings to determine if they are supported by substantial evidence, *Getz v. Equitable Life Assurance Society of United States,* 90 N.M. 195, 561 P.2d 468 (1977), and all reasonable inferences in support of the findings will be indulged. *Mountain States Construction Co. v. Aragon,* 98 N.M. 194, 647 P.2d 396 (1982). There is no dispute on appeal that N.M. Title was the closing agent for the Estate and Lovato, and was, additionally, to prepare a title insurance policy. No written agreement was apparently utilized between Lovato, the Estate and N.M. Title to create and delineate the scope of the agency. However, the agency relationship need not be evidenced in writing to be given effect. *Vandeventer v. Dale Construction Co.,* 277 Or. 817, 562 P.2d 196 (1977). The dispute on appeal revolves around the scope of the duty of N.M. Title. As closing agent, N.M. Title performed, with the consent of both parties, the following acts: (1) receiving and disbursing purchase money at the closing; (2) preparing buyer's and seller's closing sheets prior to the closing; (3) withholding money after the closing to pay for items such as outstanding property taxes and recording fees; (4) examining title before closing and between the date of closing and the date of recording of the real estate contract; and (5) recording the real estate contract. In the performance of these duties, N.M. Title was an agent for both the Estate and Lovato. *Collins v. Heitman,* 225 Ark. 666, 284 S.W.2d 628 (1955). As such, a fiduciary relationship between N.M. Title, Lovato and the Estate existed. *See Barber's Super Markets, Inc. v. Stryker,* 84 N.M. 181, 500 P.2d 1304 (Ct.App.1972); *Colegrove v. Behrle,* 63 N.J.Super. 356, 164 A.2d 620 (1960). This relationship obligated N.M. Title to exercise ordinary care, or reasonable diligence, to communicate to both Lovato and the Estate knowledge acquired in the course of its agency with respect to matters pertaining thereto. *Spaziani v. Millar,* 215 Cal.App.2d 667, 30 Cal.Rptr. 658 (1963); *State Automobile & Casualty Underwriters v. Salisbury,* 27 Utah 2d 229, 494 P.2d 529 (1972); *see Pittard v. Four Seasons Motor Inn, Inc.,* 101 N.M. 723, 688 P.2d 333 (Ct.App.1984).

N.M. Title argues that it was given no instructions concerning payment of taxes prior to closing, and that payment of delinquent taxes was not a condition precedent to closing. N.M. Title also argues that it had no policy of requiring its personnel to advise parties of any tax delinquency, and that it was unaware of any such policy amongst title companies. Adherence to an "industry standard" is not conclusive, however, on the issue of negligence; N.M. Title was obligated to use reasonable care under the circumstances. *Walker v. L.G. Everist, Inc.,* 102 N.M. 783, 701 P.2d 382 (Ct. App.1985). It is undisputed that N.M. Title performed a search of county tax records

on two occasions: July 23, 1980, and September 29, 1980. Both of these searches revealed delinquent taxes dating back to 1976, and the second search revealed that the property had been transferred to the Division for collection. N.M. Title did not notify the parties of either development. The employees of N.M. Title involved in the transaction testified that they were aware, furthermore, that the state conducted sales of property for the collection of delinquent taxes. The tax searcher who noticed the "transfer for collection" notation did not convey this information to the main office and admitted she did not "pay any attention to it at all." Additionally, N.M. Title admitted that, prior to the auction, it received a list of properties due for sale, which list contained the property in question. No notification was given to Lovato and the Estate, apparently because the list was not checked.

In the course of preparing for the closing, and in specifically preparing the "Seller's Closing Statement" which earmarked funds for the payment of the delinquent taxes, N.M. Title had acquired information which it knew could affect the status of the property being closed. N.M. Title took no action to further investigate, or to inform the parties of delinquent taxes, the transfer for collection, and the possibility of the tax sale. It was under a duty to communicate this information. *Spaziani.*

There was, therefore, substantial evidence to support a finding of a breach of duty to use ordinary care. We recognize that the trial court, in its conclusion, imposed a duty on N.M. Title to pay the taxes itself prior to closing. We disagree with that characterization of the duty. The duty was one of communication regarding relevant information. The trial court's conclusion is not binding upon us. *Trigg v. Allemand,* 95 N.M. 128, 619 P.2d 573 (Ct. App.1980). The conclusion is not, however, reversible error because the trial court arrived at the correct conclusion, i.e., a breach of duty, for the wrong reason. *Holmes v. Faycus,* 85 N.M. 740, 516 P.2d 1123 (Ct.App.1973).

As to the issue of proximate cause, we again accept all reasonable inferences to support the findings and conclusions. The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. *New Mexico State Highway Department v. Van Dyke,* 90 N.M. 357, 563 P.2d 1150 (1977). There is substantial evidence, in the present context, to support the trial court's findings and conclusions that the sale of the property for taxes constituted the injury to Lovato and the Estate, from which all subsequent damages flowed. N.M. Title's breach of its duty to communicate (1) the existence of delinquent taxes, (2) the transfer of the account for collection, and (3) the pending tax auction deprived the parties of an opportunity to cure the delinquency prior to the sale, and thereby prevent the sale. *See* § 7–38–66(D). It was reasonable for the court to infer that the parties, absent this breach of duty, would have taken steps to prevent the sale. *See Sanders v. Atchison, Topeka & Santa Fe Railway Co.,* 65 N.M. 286, 336 P.2d 324 (1959). There was substantial evidence to support the trial court's findings and conclusions on this issue.

Based on substantial evidence to support the trial court, we do not consider N.M. Title's argument that the proximate cause of the tax sale was the failure of Niven Robinson, and the Estate after his death, to pay the property taxes when they came due. *Getz; Mountain States.*

III. MEASURE OF ESTATE'S DAMAGES

The Estate argues that the trial court failed to award its full measure of damages. The Estate describes its full measure of damages as its loss of contract rights, occasioned by the rescission of the real estate contract. The trial court awarded the Estate $12,000.00 against N.M. Title as reimbursement for the money the Estate was required to refund to Lovato. The Estate maintains, however, that because it may not regain the property under the tax sale, it is properly due an additional $16,000.00, which represents the difference be-

tween the total purchase price under the real estate contract and the reimbursement figure. The Estate points out that it did request a conclusion of law for damages based on the total purchase price after trial on the merits.

From the beginning of its participation in the lawsuit, the Estate prayed only for indemnification against N.M. Title and never asserted, until after trial, an independent measure of damages based on the loss of the purchase price. At trial, the Estate never argued to the court a new measure of damages. Therefore, it was not error for the trial court to refuse the Estate's conclusion of law because it related to a measure of damages that had not been litigated before the trial court. *In re Will of Skarda,* 88 N.M. 130, 537 P.2d 1392 (1975). This issue will not be considered on appeal. *Id.*

We recognize that after this appeal was filed, the Estate requested a remand to the trial court for what the Estate termed a "correction" of the judgment to reflect its "full" measure of damages. In denying the remand, this court ordered that the Estate could brief the issue of the trial court's asserted failure to grant full relief. We did not, however, by the express terms of that order, foreclose our resolution of the Estate's argument on the basis that it was not properly raised below.

CROSS-APPEAL

The Canos, on cross-appeal, challenge the court's imposition of an equitable lien on the property, in favor of Lovato, for the fair market value of improvements Lovato placed upon the property prior to the time he was served with a summons in the original ejectment action in Metropolitan Court. This issue was preserved below. The Canos argue, first, that the tax deed, under the provisions of Section 7-38-70(B), conveys the former owner's interest "subject only to perfected interests in the real property existing before the date the property tax lien arose." The Canos contend that the deed extinguishes any existing liens on the property which were not perfected before 1976, the year in which the property tax lien arose. We do not dispute this. The Canos misapprehend, however, when the lien in favor of Lovato arose.

The trial court's imposition of the lien was pursuant to the "betterment" statutes, NMSA 1978, Sections 42-4-14 to -19. Section 42-4-17 is the applicable statute in the present context, and it provides:

> When any person or his assignors may have heretofore made, or may hereafter make any valuable improvements on any lands, and he or his assignors have been or may hereafter be deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of his said improvements assessed in his favor, as of the date he was so deprived of the possession thereof, and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof situate in the same county, until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in an action of ejectment on him in favor of the person against whom he seeks to have said value assessed for said improvements.

Color of title is required in order for the dispossessed to come under the operation of this statute. *Speartex Grain Co. v. West,* 98 N.M. 91, 645 P.2d 447 (Ct.App. 1982). The real estate contract between the parties provides color of title. The statute mandates that a lien for the value of improvements arises at the time when the value is assessed in favor of the nonowner in an action brought by the nonowner or by the owner. The lien runs from that time, and does not arise at the time the improvements are placed upon the land.

To subject the tax deed to operation of this subsequent lien is not in conflict with Section 7-38-70(B). The statute does not, by its express terms, extinguish liens arising against the property *after* the issuance of the tax deed. Moreover, we would be interpreting the section in an unreasonable manner, which we cannot do, *State v. Santillanes,* 99 N.M. 89, 654 P.2d 542 (1982), were we to suggest that liens could not, in

the future, arise against property held under a tax deed. We would foreclose an avenue of security for those performing services upon the property. In the present case, we would be allowing the Canos to be unjustly enriched for the improvements placed upon the land by Lovato. The trial court did not err in imposing the lien.

We must further decide the proper amount of the lien, which is the Canos' second issue on cross-appeal. The trial court, in its order, granted a lien in the amount of $37,500.00. This amount represents the fair market value of the following improvements undertaken by Lovato: $20,000.00 for a double-wide trailer; $10,000.00 for a double-wide roof and shelter; and $7,500.00 for detached buildings. The parties agree that these figures represent the amount the improvements have enhanced the value of the land.

The actual cost to Lovato for placing these improvements on the land is different. The Canos argue that this is the proper method of valuing the lien. The supplemental findings and conclusions list this cost but, as we pointed out earlier, these findings and conclusions are a nullity. We need not remand for a new finding, however. The cost to Lovato, excluding any improvements placed on the land after he received a summons in the ejectment action, Section 42–4–17, appears undisputed from the record. Under these circumstances, we may "supply" the findings. *Boddy v. Boddy,* 77 N.M. 149, 420 P.2d 301 (1966). The cost is: two mobile trailers, $18,000.00; concrete footings, roof structure, and other construction costs, $4,961.21; and other miscellaneous improvements, $361.35. Lovato paid $10,000.00 for the trailer he brought on to the property, and paid $8,000.00 out of the real estate contract price for the trailer on the property. The parties consistently refer to this latter figure, and we presume they derive it from the real estate contract, where Lovato agreed to insure for the trailer for the amount of $8,000.00.

The *Restatement of the Law of Restitution* § 42 comment on subsection (1)(c) (1937), states that, where the improver is permitted to recover for the improvements, "he is entitled to the reasonable value of his labor and materials or to the amount which his improvements have added to the market value of the land, whichever is smaller." The reasoning behind this approval was presented in *Madrid v. Spears,* 250 F.2d 51, 54 (10th Cir.1957), where the court stated that the "test of recovery is not how much the owner is enriched by the improvements, but how much he is unjustly enriched. And, the owner is not unjustly enriched more than the improver's cost." *See also Moore v. Sterling Warner Industrial Investment Corp.,* 114 N.H. 520, 323 A.2d 581 (1974); *Taylor v. Balch Land Development Corp.,* 6 Wash.App. 626, 495 P.2d 1047 (1972). We agree with the reasoning of *Madrid,* and adopt it.

The trial court erred in imposing a lien totalling $37,500.00. Should the trial court, after fact-finding, determine that the Canos have superior title, the original judgment must be corrected to impose a lien totalling $23,322.56. Lovato requested no findings as to the value of his labor, and we will not consider this element on appeal. *See McNabb v. Warren,* 83 N.M. 247, 490 P.2d 964 (1971).

We note that several changes appear in the "supplemental" findings, conclusions and judgment that, apparently, were typographical in nature, or inadvertently omitted from the original findings, conclusions and judgment. On remand, we direct the trial court to correct the original findings, conclusions and judgment to incorporate these changes. *See* NMSA 1978, Civ.P.R. 60(a) (Repl.Pamp.1980).

The case is remanded for the limited fact-finding specified in Section I(B). With the exception of the amount of the lien, the judgment is conditionally affirmed as to the issues raised in Section I(A), I(C), II, III and the cross-appeal. The parties will bear their respective costs on appeal.

IT IS SO ORDERED.

DONNELLY and BIVINS, JJ., concur.

734 P.2d 778

STATE of New Mexico,
Plaintiff-Appellee,

v.

Alberto LOPEZ and Thomas K. Colson,
Defendants-Appellants.

Nos. 9083, 9084.

Court of Appeals of New Mexico.

Sept. 9, 1986.

Certiorari Quashed March 17, 1987.

Paul G. Bardacke, Atty. Gen., Carol J. Vigil, Sp. Ass't Atty. Gen., Santa Fe, for plaintiff-appellee.

David A. Baca, Timothy M. Padilla, Albuquerque, for defendants-appellants.

OPINION

DONNELLY, Judge.

The appeals of co-defendants Alberto Lopez and Thomas K. Colson arise out of efforts of Lopez, a Texas bail bondsman, and Colson, his employee, to arrest and forcefully return to Texas authorities a person to whom Lopez had issued a surety bond. As a result of this incident, Lopez was convicted of aggravated assault on a peace officer, attempted aggravated burglary, and aggravated assault; Colson was convicted of attempted aggravated burglary and aggravated assault. The jury found that defendants committed each of the charges with a firearm. The two appeals have been consolidated.

We discuss: (1) the authority of a bail bondsman to arrest a bonded defendant; (2) denial of defendants' motions for mistrial; (3) comment on defendants' failure to testify; (4) claim of prosecutorial misconduct; (5) refusal to disqualify prosecutor and exclusion of evidence; and (6) defendants' claim of cumulative error. We affirm as to defendant Lopez and reverse as to defendant Colson.

The charges against defendants stem from a complicated scenario. In November 1984, Rudy Ojinaga was arrested in El Paso, Texas, and charged with possession of marijuana (a felony) and driving while intoxicated. A bail bond company operated by Lopez, secured the release of Ojinaga by posting a $9,500 surety bond. Following his release, Ojinaga left Texas and resided at the home of his parents in Grant County, New Mexico. In March 1985, Lopez was informed that Ojinaga had failed to comply with the conditions of his release on bond and that he had been terminated from a pretrial diversion program. In response, Lopez filed a motion in El Paso County Court, requesting that he be permitted to surrender Ojinaga to the custody of the court and be relieved of the bond. Thereafter, the Texas Court issued a bench warrant, directed to "any peace officer of the State of Texas," for the arrest of Ojinaga.

In May 1985, Lopez directed George Sandoval, an employee, to go to Central, New Mexico, and return Ojinaga to Texas authorities. In Central, Sandoval contacted Ojinaga's parents, seeking their assistance in returning their son to El Paso. The parents refused to relinquish their son or permit him to be returned to Texas and phoned Daniel Garcia, a Grant County undersheriff. Upon the deputy's arrival, Sandoval showed him the Texas bench warrant and informed him that he had been directed by the defendant Lopez to return Ojinaga to El Paso authorities.

Garcia testified that he was suspicious of Sandoval's authority because Sandoval was not a Texas peace officer and the bench warrant had several apparent erasures. Sandoval explained to Garcia that he was a

"bounty hunter" with Texas Fugitive Apprehension. Texas Fugitive Apprehension was a private company owned by Lopez. Garcia told Sandoval to return after the Memorial Day holiday with a valid bench warrant and that he would assist in Ojinaga's arrest. Sandoval then returned to El Paso.

Early the next morning, Lopez, Colson and Sandoval and two other men, without notifying New Mexico authorities, went to the home of Ojinaga's parents, where Ojinaga was staying. Lopez issued firearms to three of the men and armed himself. Lopez positioned the men around the residence and then knocked on the front door. Ojinaga's father answered the door. Lopez identified himself and informed him that he had come to take his son into custody for return to Texas. The father told Lopez he would not surrender his son. Lopez advised the father that they would forcibly enter the house if the son did not surrender voluntarily. The father locked the door, and Ojinaga's mother phoned the sheriff.

Lopez then instructed Colson to break the door down so they could enter the house. Pursuant to Lopez's direction, Colson kicked the door in. Both Lopez and Colson were armed. The father barred the entry to the house and brandished a knife. Hernandez, who had accompanied Lopez, pointed a rifle at the father and told him to drop the knife or he would shoot. Lopez then observed several other persons inside the house and instructed his men not to enter the house.

At this point, Garcia, dressed in civilian clothes, arrived at the house, where he was met by Lopez, Colson and two other armed men. Lopez disarmed Garcia. Lopez testified that he did not know that Garcia was a deputy sheriff because Garcia was neither wearing a badge nor driving a marked vehicle. Garcia testified that he had a badge pinned to his sport coat. Garcia persuaded Lopez to permit him to enter the house and bring out Ojinaga. Upon entering the house, Garcia phoned the sheriff's department and requested further assistance. Both the sheriff's department and the State Police responded.

Deputy Carl Henderson testified that when he arrived at the Ojinaga residence, Lopez was carrying a shotgun. Lopez put the gun down and approached Henderson, who was in a marked sheriff's vehicle and wearing a jumpsuit without insignia. Henderson testified that he identified himself as a deputy sheriff. Lopez then returned to where his shotgun was and picked it up. Henderson drew his revolver and told Lopez to leave the gun alone. Lopez disregarded Henderson's order and told him to leave the area "or we will shoot." Henderson then drove away from the residence. Lopez denied threatening to shoot Henderson or knowing that Henderson was a deputy sheriff.

Thereafter, other officers arrived at the scene and arrested Lopez, Colson, Sandoval and two other accomplices.

I. BONDSMAN'S AUTHORITY TO ARREST

Defendants argue that the trial court erred in refusing to grant their motion to dismiss and their motions for a directed verdict. Defendants claim that they had both a legal and contractual right to arrest their bonded principal and forcibly return him to judicial authorities in Texas; hence, their actions were not criminal. Defendants also contend that they were lawfully armed and authorized to use reasonable force, and that the sheriff's deputies who intervened to prevent the arrest were not acting lawfully. In advancing this argument, defendants assert that the trial court erred in denying their requested instructions relating to their authority to arrest and in excluding certain exhibits referring to their good faith in reliance on their authority to act as bondsmen. We find no error in the rulings of which defendants complain.

Defendants rely upon *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371, 21 L.Ed. 287 (1872), which provides in applicable part:

> When bail is given, the [bonded] principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment * * * they may seize him and deliver him

up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose.

At common law, a defendant released on bond was still under court control and in the custody of his bondsman. To be discharged from the obligation of its bail bond, the surety could surrender the principal to the control from which he had been released on bail. The bondsman was invested with authority to arrest the principal without warrant and redeliver him to the custody of the court to exonerate the bond. *See generally Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952); *Taylor v. Taintor; Reese v. United States,* 76 U.S. (9 Wall. 13) 13, 19 L.Ed. 541 (1869). *See also* Annot., 3 A.L.R. 180 (1919); 73 A.L.R. 1369 (1931). Under common law, and in the absence of a statute providing otherwise, no new process is necessary for the arrest of a principal by his surety. *See Taylor v. Taintor; Crain v. State,* 66 Okla.Crim. 228, 90 P.2d 954 (1939).

In New Mexico, the powers of a bondsman are regulated by statute under the Bail Bondsmen Licensing Law, NMSA 1978, Sections 59A–51–1 to –19 (Orig.Pamp. 1984). By separate statute, a bondsman is empowered to arrest his principal. NMSA 1978, Section 31–3–4(B) (Repl.Pamp.1984), provides: "When a paid surety desires to be discharged from the obligation of its bond, it may arrest the accused and deliver him to the sheriff of the county in which the action against the accused is pending." *Compare State v. United Bonding Insurance Co.,* 81 N.M. 154, 464 P.2d 884 (1970). Alternatively, a bondsman may petition a judge or magistrate [in this state] for the issuance of an arrest warrant for the apprehension of an individual alleged to have violated the terms of his bail. *See* NMSA 1978, § 31–4–13 (Repl.Pamp.1984). Under this statute, the accused may be arrested to await requisition for extradition. The arresting officer is directed to bring the accused before the court to answer the complaint and show cause why he should not be subject to extradition to another state. *Id.*

Assuming but not deciding that the common law has been codified in Section 31–3–4(B), that does not support defendants' arguments on appeal. We are persuaded that the common law authority of the bondsman to transport a principal out-of-state, without the principal's consent, has been modified by enactment of the Uniform Criminal Extradition Act. NMSA 1978, §§ 31–4–1 to –30 (Repl.Pamp.1984). Under Section 31–4–15, a bondsman may not, without consent of the principal, remove him from this state without compliance with the provisions of the Uniform Criminal Extradition Act. The purpose of this statute is to provide an orderly means of extradition, and to accord procedural due process to persons sought to be removed without consent from this state. *Compare State v. Epps,* 36 Or.App. 519, 585 P.2d 425 (1978) (en banc).

In *State v. Epps,* the court considered a case factually analogous to the present cause and found that the common law authority of a bondsman had been modified by enactment of the Uniform Criminal Extradition Act. In *Epps,* agents of a California bonding company entered Oregon to return their principal to the custody of California officials. After forcibly seizing and removing a bonded individual from the state, the agents were charged and convicted of kidnapping in Oregon. Defendants argued that they had a common law right as bondsmen to forcibly arrest their surety and deliver him to California authorities. The court held that the common law right advocated by the defendants had been modified by statute, and that a bondsman seeking to remove a bonded principal from the state must follow the Oregon extradition statute. The court reasoned:

> [T]he legislative action [enactment of the Uniform Extradition Act] was intended to eliminate the bail system and its attendant evils in favor of a more civilized system of apprehension and return of

accused and convicted criminals. The common law rule is abandoned in favor of [the extradition statute] which provides judicial notice and identification safeguards which are more consistent with contemporary standards of due process.

This same result is applicable under New Mexico law. A bondsman, while empowered by statute with the authority to arrest his principal under Section 31–4–14, is not immunized from liability for violations of this state's criminal laws perpetrated against third parties or the property of others while carrying out such arrest.

In conjunction with defendants' contention that the trial court erred in refusing to recognize their common law authority as bondsmen to arrest a bonded principal and to use reasonable force in effecting such arrest, defendants submitted four instructions which were refused by the trial court. It was not error for the trial court to refuse defendants' instructions Nos. 1, 2, 3A and 5. Defendants' requested instructions relying on the common law authority of a bondsman, or his agents, to take Rudy Ojinaga into custody were not correct statements of the law. Section 31–4–14 provides in part:

> The arrest of a person may be lawfully made * * * by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, *but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath* * * *. [Emphasis added.]

The authority of a private bondsman or his agents to arrest a bonded principal without a warrant, is qualified by the statutory requirement that the individual arrested must be promptly taken before a judge or magistrate in this state, to be held pursuant to the Uniform Criminal Extradition Act. Sections 31–4–1 to –31. Defendants' requested instruction No. 1 referred, in part, to the authority of defendants to enter New Mexico and *"to return Rudi Ojinaga to the custody of the El Paso Police Department,"* (emphasis added) but omitted the statutory requirement that the arrested individual must be taken promptly before a court of appropriate jurisdiction in this state. Moreover, in view of this state's constitutional provision against unreasonable searches and seizures, neither the common law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a defendant of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party. *See* N.M. Const. art. II, § 10.

An instruction is properly refused if it is an incorrect statement of the law. *See generally State v. Lujan,* 94 N.M. 232, 608 P.2d 1114 (1980), *overruled on other grounds, Sells v. State,* 98 N.M. 786, 653 P.2d 162 (1982); *State v. Turner,* 97 N.M. 575, 642 P.2d 178 (Ct.App.1981). To preserve error defendants must submit a correct instruction on the law. *See State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982). Defendants also tendered a proposed instruction on the use of reasonable force. This instruction was also rejected. The definition of "reasonable force" was only applicable if defendants' requested instruction No. 1 was given. It was not error to refuse these instructions.

Defendants also contend that the trial court erred in excluding three documentary exhibits consisting of publications referring to the common law right of a bail bondsman to arrest his principal. The trial court sustained the objection of the state to the admission of these exhibits. However, the court permitted Lopez to identify the exhibits and to testify that he had relied upon the documents, believing that he had a right to arrest Rudy Ojinaga.

The trial court did not err in excluding these exhibits. The exhibits constituted an incorrect statement of New Mexico law, insofar as they referred to the right of a bondsman to arrest a principal and forcibly remove him from this state without prior opportunity for a court hearing. *See* §§ 31–4–13 to –15. It is not error to ex-

clude evidence where its probative value is outweighed by the danger of confusion of the issues or misleading of the jury. *See* NMSA 1978, Evid.R. 403 (Repl.Pamp.1983).

Defendants further assert that the evidence at trial was insufficient to sustain their convictions of aggravated assault on a peace officer because they acted in self-defense and were unaware that Garcia and Henderson were sheriff's deputies. Additionally, they argue the state failed to prove that they made an unlawful entry into the Ojinaga residence with intent to commit a felony therein. The record rebuts these contentions. The statutory right of a bondsman or his agents to arrest a principal does not empower defendants, without lawful process, to effect an armed entry into the home of a third party (Ojinaga's parents), and to assault one or more of the occupants therein. The rationale discussed in *State v. Epps* is persuasive here.

The trial court's denial of defendants' motions to dismiss the indictment for a directed verdict of acquittal and rejection of defendants' requested exhibits and jury instructions was not error.

II. DENIAL OF MISTRIAL

(A) Prior to trial, defendants filed a motion in limine seeking to prohibit the rifles and shotguns allegedly used by defendants from being introduced into evidence.

After the beginning of trial, but prior to the hearing of defendants' motion, the prosecutor carried the weapons into the courtroom. Defendants immediately moved for a mistrial, contending that the probative value of these items was substantially outweighed by the risk of prejudice to the defendants. The trial court denied the motion for mistrial.

We find no error in the denial of a mistrial resulting from the introduction of the weapons. Testimony regarding the presence of the weapons was introduced by both sides. Defendant Lopez admitted during his testimony that he had issued the weapons to his employees. The introduction of the weapons was relevant to the charges against defendants. *See* NMSA 1978, Evid.R. 401 (Repl.Pamp.1983). A weapon found in the possession of an accused or his associate is admissible as part of the history of the offenses charged. *See State v. Samora,* 83 N.M. 222, 490 P.2d 480 (Ct.App.1971); *see also State v. Smith,* 92 N.M. 533, 591 P.2d 664 (1979).

The admission or exclusion of evidence is within the trial court's discretion, and its determination will not be disturbed absent a clear abuse of discretion. *State v. McGhee,* 103 N.M. 100, 703 P.2d 877 (1985). The fact that relevant or otherwise competent evidence may tend to prejudice a defendant is not grounds for its exclusion. *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct.App.), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977).

Defendants also argue that the prosecutor acted improperly by pointing the weapons erratically around the courtroom and cocking the shotgun during his questioning of a witness. The prosecutor prefaced this act by informing a witness that he was doing so to show the weapon was not loaded. No objection was voiced at trial to the manner in which the exhibits were handled at trial. To preserve a claim of error for appellate review involving the admissibility of evidence, a party must make a timely objection. *State v. Aguilar,* 98 N.M. 510, 650 P.2d 32 (Ct.App.), *cert. denied,* 98 N.M. 478, 649 P.2d 1391 (1982). The claim of error was not preserved.

III. COMMENT ON FAILURE TO TESTIFY

at the close of defendants' case, the trial court inquired of the state whether it desired to present rebuttal testimony. In the presence and hearing of the jury, the prosecutor responded:

> Yes sir, we intend to have two rebuttal witnesses. Um. *Having been told that Mr. Colson was going to take the stand* ... its going to take me about * * *. [Emphasis added.]

Defendant Colson objected to the statement, and each of the defendants moved for a mistrial. They contended that the remark constituted an improper, direct

comment on Colson's failure to testify and prejudiced the defendants. This motion was denied by the trial court.

The state, although acknowledging that the remark was improper, argues that the statement was inadvertent and was prompted by a conversation with defense counsel, during a recess, that defense counsel planned to have Colson testify. Defendants admit having previously informed the prosecutor that they planned to have Colson testify but note that they reconsidered this decision.

We agree that the comment was prejudicial. Comment by a prosecutor on the accused's silence is violative of a defendant's constitutional rights under the fifth and fourteenth amendments. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *see Gonzales v. State,* 94 N.M. 495, 612 P.2d 1306 (1980). In *Gonzales v. State,* the court noted, citing *State v. Frank,* 92 N.M. 456, 589 P.2d 1047 (1979), that "whatever the prosecutor's intentions might have been and even if spoken with the purest of motives, if in fact the comments related to the failure of the defendant to testify, they were prejudicial and required that the conviction be set aside." *Id.* at 496, 612 P.2d at 1307. *See also State v. Frank,* 92 N.M. 456, 589 P.2d 1047 (1979). The prosecutor's remark specifically brought to the jury's attention Colson's failure to testify and, thereby, constitutes reversible error. *See Gonzalez v. State.* The mistake or inadvertence of the prosecutor in making the comment does not lessen its prejudicial impact. *See id.; State v. Frank.*

The test employed in determining whether an accused's fifth amendment privilege against self-incrimination has been violated by a comment of the prosecutor, is whether the language used directly called the jury's attention to defendant's failure to testify, or whether the statement was of such character that a jury would naturally and necessarily assume the remarks to be a comment on the accused's failure to become a witness. *See State v. Hunter,* 29 Wash.App. 218, 627 P.2d 1339 (1981). Where the comment specifically refers to defendant's failure to testify, the state bears the burden of establishing that the comment complained of did not contribute to defendant's conviction. *State v. Jones,* 80 N.M. 753, 461 P.2d 235 (Ct.App. 1969). The state has not persuaded us that the error was harmless.

Defendant Colson's reconsideration of his decision not to testify did not open the door to the prosecutor's remark concerning his failure to testify in the presence of the jury. While the remark amounted to error as to defendant Colson, the remark, however, did not constitute error as to defendant Lopez, who elected to testify on his own behalf. *Cf. Holdge v. State,* 586 P.2d 744 (Okla.Crim.App.1978). On appeal, Lopez fails to cite any authority or to explain how this remark resulted in prejudice to him. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984). The remark was directed solely to defendant Colson's failure to testify and did not implicate defendant Lopez, who testified at length in his own defense. Although we hold there was reversible error as to defendant Colson, we address the remaining issues in light of the necessity for a new trial for defendant Colson.

IV. PROSECUTORIAL MISCONDUCT

Defendants complain of four instances of misconduct by the prosecutor.

(A) ***Reference to Badge.*** During the defense portion of the case, while defendant was testifying, two defense exhibits were introduced: (1) a badge worn by Lopez at the time of the incidents in question; and (2) an accompanying identification card. During cross-examination, the prosecutor referred to a "phony badge." Defendant Lopez admitted that the badge worn by him was not issued by an official law enforcement agency.

Defendant made a general objection without stating a specific ground, and the objection was overruled. A similar motion for mistrial was also overruled. On appeal, defendant contends the remark of the prosecutor was an improper reference

to Lopez's character and intimated to the jury that Lopez was impersonating an officer. An objection not sufficiently specific to call the trial court's attention to the particular reason for the inadmissibility of the matter will be treated on appeal as if no objection had been made. *Tobeck v. United Nuclear-Homestake Partners,* 85 N.M. 431, 512 P.2d 1267 (Ct.App.1973). Even though a matter may properly be excluded on a particular ground, it is not error to admit testimony where no proper objection is asserted in the trial court. *State v. Casteneda,* 97 N.M. 670, 642 P.2d 1129 (Ct.App.1982).

Defendants further argue that the court should have sustained their objection to the prosecutor's remark, that the reference should have been stricken from the record, and that the jury should have been admonished to disregard it. The record does not reflect that defendants sought this relief below. If further relief is sought, objecting counsel must move to strike the testimony or to seek an admonition to the jury. *See State v. Casteneda; State v. Sandoval,* 88 N.M. 267, 539 P.2d 1029 (Ct.App. 1975).

(B) ***Reference to Incident in Mexico.*** Defendant Lopez went to Mexico in 1983 to pursue an alleged bail jumper and return him to Texas. The prosecutor initially indicated that he planned to call witnesses from Mexico to testify in the present case concerning Lopez's prior acts of forcibly seizing and returning another individual to Texas. At a pretrial hearing, defendants sought a continuance on the basis that they did not have sufficient opportunity to interview the Mexican witnesses on this issue. The prosecutor then withdrew his efforts to call the witnesses, and stated that he would not introduce testimony against Lopez touching upon "prior bad acts of this nature."

During defendants' case-in-chief, Lopez called as a witness Luther Jones, the El Paso County prosecutor. Jones testified that defendants were in good standing as bondsmen in El Paso and that Lopez had a "clean" file. On cross-examination, the prosecutor inquired: "so that you wouldn't have any records, for example, of any difficulties that Mr. Lopez might have had in * * * Mexico * * *?" The witness stated, "No." On appeal, defendants contend the prosecutor failed to abide by a pretrial promise and such action amounted to prosecutorial misconduct. No objection was stated to this inquiry. Defendants cannot complain on appeal of claimed errors which were not objected to below. *See State v. Gutierrez,* 91 N.M. 54, 570 P.2d 592 (1977).

(C) ***Coaching Testimony.*** During direct examination, deputy Henderson testified that he became "scared" and felt "threatened" when Lopez picked up his shotgun and threatened to shoot. He also stated that he felt scared and threatened by Lopez's "menacing conduct" with the shotgun. On cross-examination, Henderson was asked why he used the phrase "menacing conduct" to describe the incident. He stated that he felt menaced and admitted that he had heard the term used by the prosecutor and had referred to the same language contained in the statutes defining assault and battery.

Defendant Sandoval moved for a mistrial contending that the prosecutor had improperly coached the witness. While it is patently improper for a prosecutor to advise a witness to testify falsely or to phrase a witness' testimony, there is no showing in the record that the witness testified falsely or that Henderson was not, in fact, threatened or menaced by defendants' actions. The record does not support the claim of improper coaching. We find no error in the court's ruling denying the motion for mistrial.

(D) ***Prejudicial Charge.*** Deputy Garcia testified that Lopez had searched him for weapons before allowing him to enter the Ojinaga residence. Defendants made an offer of proof to the court that Garcia had allegedly told Henry Quintero, an attorney, that he had a back-up weapon when he entered the house. In conjunction with their offer of proof, defendants told the court that Quintero, if called, would testify regarding Garcia's possession of a back-up weapon. At this point the prosecutor agreed to dismiss, with prejudice, the

charge of battery against defendants. This charge was premised in part upon the allegation that defendants had searched deputy Garcia and disarmed him when he arrived at the residence.

Defendants moved for a mistrial, contending that dismissal of the charge of battery on the motion of the state was prejudicial because the testimony regarding the charge had been admitted prior to the dismissal. Defendants also contend that the prosecutor charged this count for improper reasons. There was a basis in the evidence for the charge. Defendants' contention is without merit. We find no prosecutorial misconduct on this issue. Moreover, the jury's subsequent acquittal of Colson on two counts, and the acquittal of Lopez on one count of alleged assault on Garcia, indicates the jury was not improperly influenced.

Defendants also argue that the trial court erred in refusing to permit them to call Quintero as a defense witness. Defendants claimed Quintero's testimony would show that the Ojinagas had allegedly made prior inconsistent statements.

Defendants contend that Garcia's statement that he had obtained a gun when he went into the residence was false and that he had the weapon hidden on him when he entered the home. Based on this premise, defendants argue that if the gun was hidden on Garcia, this evidence would directly contradict Garcia's testimony that he was the victim of a battery when Lopez undertook to "frisk" him. We find no error in the trial court's ruling excluding Quintero's testimony on this matter. At an in-camera hearing, Quintero testified that his knowledge of occurrences on the date of the incident was privileged communication which he could not disclose under the attorney-client privilege. He stated that he had been hired by the Ojinagas to explore the filing of a civil suit growing out of this incident. Defendants' offer of proof as to the subject matter of Quintero's testimony did not disclose that deputy Garcia or the Ojinagas testified falsely or that the matter sought to be established would be corroborated by Quintero.

Viewing each of the alleged instances of prosecutorial misconduct, in isolation and as a whole, we do not consider the conduct improper or prejudicial so as to deprive defendant Lopez of a fair trial.

V. EXCLUSION OF EVIDENCE

In light of our ruling under the point above, we consider the claim of defendant Lopez that the trial court erred in excluding material testimony and evidence at trial.

Defendants sought to disqualify the District Attorney, David Lane, from prosecuting the case against them, contending that he was allegedly aware of specific instances of violence on the part of undersheriff, Daniel Garcia, and that they planned to call the district attorney and Tim Kling, an investigator, to testify about Garcia's propensity for violence.

Following an in-camera hearing, the trial court denied the motion to disqualify the district attorney and ruled that the testimony of Lane and Kling was inadmissible. We find no error in the trial court's refusal to disqualify the district attorney or in its exclusion of evidence regarding Garcia's alleged propensity for violence.

When the trial court refuses to permit a prosecutor to be called as a witness for the defense, the issue on appeal is whether the court abused its discretion. *State v. Hogervorst.* Specific acts of violence by the victim may be introduced by defendant if there was evidence that defendant had been informed or knew of the acts at the time of the incident. *State v. McCarter,* 93 N.M. 708, 604 P.2d 1242 (1980). Here, there was no evidence that defendants knew Garcia or had been informed of Garcia's alleged propensity for violence at the time of the incidents for which defendants were tried. In addition, defendants were not prejudiced by the exclusion of this evidence, nor did the exclusion of this evidence improperly shift the burden of self-defense to defendants. The jury acquitted both defendants of the charge of aggravated assault upon deputy Garcia. It was not error to exclude this

evidence. The evidence of Garcia's alleged propensity for violence was irrelevant to the other charges against defendants.

VI. CUMULATIVE ERROR

Defendants argue that the instances of prosecutorial misconduct itemized under Point IV, above, served to deny them of a fair trial and constitute cumulative error. The doctrine of cumulative error has no application if no cumulative errors are committed and defendant has received a fair trial. *See State v. McGuinty,* 97 N.M. 360, 639 P.2d 1214 (Ct.App.1982). Additionally, defendants contend that the trial court committed five other errors which, *in toto,* deprived them of a fair trial. The other errors are: (1) exclusion of exhibits and defendant Lopez's testimony regarding his good faith reliance on the common law and the statutory privilege of a bondsman to arrest a principal; (2) denial of defendants' requested jury instructions regarding the arrest rights of a bondsman and the failure to properly respond to jury questions; (3) failure to disqualify district attorney; (4) error in the exclusion of testimony regarding deputy Garcia's propensity for violence and prior bad acts; and (5) denial of defendants' motion for mistrial.

We have examined the records and there is no basis for the claim of cumulative error. *See State v. McGuinty; cf. State v. Martin,* 101 N.M. 595, 686 P.2d 937 (1984).

CONCLUSION

The convictions and sentences of defendant Colson are reversed and the cause is remanded for a new trial. We affirm the convictions of defendant Lopez.

IT IS SO ORDERED.

MINZNER, J., concurs.

GARCIA, J., concurring in part & dissenting in part.

GARCIA, Judge (concurring in part and dissenting in part).

I concur in the opinion with the exception of that portion concerning reversal of Colson's conviction based on the prosecutor's comments. I do not view the prosecutor's statement as a direct comment on Colson's failure to testify.

Gonzales v. State, 94 N.M. 495, 612 P.2d 1306 (1980) is cited as New Mexico's authority on this proposition. The comment in *Gonzales,* however, was far different. The prosecutor said:

> And did you hear one word from the defense, one word of denial that he beat him with this 2 × 4. Not one word of denial * * *. What was his justification for doing to Byron what he did? He didn't tell you, the defense didn't tell you what the reason was. He didn't give you any justification. He didn't deny that he hit him with a 2 × 4 and he didn't tell you why.

Gonzales at 495, 612 P.2d 1306.

The prosecutor's comments concerned defendant's failure to justify, explain or deny the alleged misconduct; those direct comments are forbidden by the Fifth Amendment to the Constitution.

In the present case, it is undisputed that defense counsel advised the prosecuting attorney that Colson would testify, and in fact, extracted a concession not to cross-examine him. Anticipating defendant's testimony, the prosecutor arranged for rebuttal witnesses. The record indicates that the judge inquired of prosecutor whether he would present rebuttal testimony and the prosecutor responded:

> Yes, sir, we intend to have two rebuttal witnesses. Um. Having been told that Mr. Colson was going to take the stand, uh, its going to take me about * * *.

Certainly the prosecutor's comments were improper, and the state concedes as much. Improper as they may have been, I believe they are more in line with the "indirect comments" on defendant's failure to testify as discussed in *State v. Dominguez,* 91 N.M. 296, 573 P.2d 230 (Ct.App.1977). Our cases have drawn distinctions between direct and indirect comments. The former are constitutionally forbidden and will result in reversible error. The latter may not result in reversible error under the particular circumstances of the case. I would determine that under the circumstances in this case, the indirect comment did not re-

quire a reversal. *State v. Carmona,* 84 N.M. 119, 500 P.2d 204 (Ct.App.1972).

I respectfully disagree with that portion of the opinion.

734 P.2d 789

STATE of New Mexico, Plaintiff-Appellee,

v.

Roger GREYEYES, Defendant-Appellant.

No. 9600.

Court of Appeals of New Mexico.

Feb. 10, 1987.

Certiorari Denied March 23, 1987.

Hal Stratton, Atty. Gen., Anthony Tupler, Ass't. Atty. Gen., Santa Fe, for plaintiff-appellee.

George A. Harrison, Philip S. Lott, George A. Harrison, P.A., Farmington, for defendant-appellant.

OPINION

DONNELLY, Chief Judge.

Defendant appeals his conviction of driving while intoxicated, in violation of NMSA 1978, Section 66-8-102 (Cum.Supp.1986). On appeal, defendant raises six issues. We group the questions presented and discuss: (1) claims of error as to the admission of evidence; (2) denial of preliminary hearing; (3) sufficiency of the evidence; and (4) legality of sentence. We affirm defendant's conviction, but reverse as to the sentence imposed and remand for resentencing.

Defendant was arrested and charged with driving while intoxicated, following a single vehicle accident near Bloomfield, San Juan County, New Mexico, on January 18, 1986. An employee of the Hilltop Thriftway called the New Mexico State Police to report the incident. At approximately 9:25 a.m., Officer Noe Galvan was notified by police radio to investigate an accident at the Hilltop Thriftway Store. The radio call characterized the matter as a "10-44" with a "10-47." At trial, Officer Galvan testified to receiving the call directing him to the accident scene. He was then asked to relate the meaning of the specific codes contained in the radio dispatch he had received. Defendant objected on hearsay grounds. The state explained to the trial court that the definition of the code call was not offered for the truth of the matter asserted, but for the convenience of the jury in understanding why the officer was called to the scene. The officer was permitted to testify as to the meaning of the two codes, and stated that "10-44" refers to a vehicular accident without injuries, and "10-47" refers to a drunk driver.

Upon arriving at the scene, Officer Galvan parked his patrol car behind a brown pickup truck and observed the defendant and another man standing to the left of the truck. Officer Galvan approached the men and asked which of them was the owner of the vehicle. Defendant admitted that he was the owner. Galvan then proceeded to the front of the truck, observing that the front wheels were suspended and that the vehicle was "high centered" on a rail post. Defendant admitted, in response to an inquiry from the officer, that he had been driving the truck. The officer then asked defendant how the accident had occurred. Defendant stated that he had left the store, gotten into his vehicle, and driven straight into the railing. While questioning defendant, the officer noticed the smell of alcohol on his breath. Defendant, upon being asked whether he had been drinking, admitted that he had been drinking "all night." The officer then asked defendant to perform several field sobriety tests, and thereafter, Galvan concluded that defendant was intoxicated and placed him under arrest for driving while intoxicated. Officer Galvan did not actually ever observe defendant in the act of imbibing alcohol or operating the motor vehicle.

After his arrest, defendant was taken to the San Juan County Detention Center where an "Intoxalator" breath test was administered. Defendant's breath test indicated that he had a 0.18—0.19 blood alcohol level. Prior to trial, defendant moved for suppression of the breath test results, arguing that, since the officer had not personally observed the defendant drink alcohol or operate a motor vehicle, the officer had been without authority to arrest the defendant; the breath test was, therefore, excludable as the fruit of an illegal arrest. The trial court denied defendant's motion.

Defendant requested a preliminary hearing before trial, alleging that the charge of a second or subsequent DWI is a felony charge such that a preliminary hearing is required. The trial court also refused this request.

At trial, defendant objected to the admission of any of his oral statements to the officer prior to being placed under arrest. Over objection, the trial court permitted the officer to testify as to defendant's statements.

Following a jury trial, defendant was convicted of the charge of driving while intoxicated and sentenced to one year in

the custody of the Department of Corrections.

I. EVIDENTIARY ISSUES

(A) Questioning at Scene of Accident.

Defendant argues that his statements to Officer Galvan at the scene of the accident were taken in violation of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as the officer's preliminary questions were in the nature of custodial interrogation. Defendant also argues that his motion to exclude portions of his testimony to the arresting officer should have been granted because he was not given the warnings required under *Miranda.*

The constitutional right of an accused person to be informed of his right to remain silent attaches once an investigation has reached an accusatory stage and has focused on the accused. *Miranda; State v. Tapia,* 81 N.M. 365, 467 P.2d 31 (Ct.App. 1970). The accusatory stage has been equated with being in custody, under indictment or being interrogated. *Miranda; State v. Tapia.* However, the right to the administration of *Miranda* warnings does not attach until an accused is in custody or deprived of freedom in some significant way. *State v. Swise,* 100 N.M. 256, 669 P.2d 732 (1983). General on-the-scene questioning or other general questioning of citizens in the fact-finding process is not considered custodial, and a person in these circumstances need not be informed of his rights before being questioned. The mere fact that police may have focused their investigation on a defendant at the time of the interview does not raise questioning to a level required to warrant *Miranda* warnings. *State v. Lopez,* 79 N.M. 282, 442 P.2d 594 (1968); *State v. Montano,* 95 N.M. 233, 620 P.2d 887 (Ct.App.1980); *See generally* Stelzner, *Criminal Procedure,* 12 N.M.L.Rev. 271, 295–297 (1982); Annot., 31 A.L.R.3d 565 (1970 & Supp.1986).

The facts of this case establish that, upon arriving at the scene, the investigating officer approached the only two individuals present to ask general investigatory questions. One of the two individuals was defendant, who voluntarily answered the officer's questions as to ownership of the vehicle and what had happened. Defendant argues that it is not unreasonable to assume that he was in custody after the arrival of the officer at the scene. We disagree. Nothing in the record of this case would suggest that the officer's initial questioning was anything more than purely investigatory. The questions did not occur in a custodial situation, hence defendant's rights under *Miranda* did not attach. The trial court properly refused to exclude defendant's answers. *See State v. Swise; State v. Montano.*

(B) Statement of Police Dispatcher

Defendant argues that the trial court erred in admitting Officer Galvan's hearsay testimony concerning statements made by the police dispatcher when he directed the officer to the scene by radio message. The record shows that the officer gave the information as an explanation of the "ten code" radio messages he received from the dispatcher. The evidence was not admitted to show defendant's guilt, and the testimony was therefore not hearsay. *See* SCRA 1986, Rule 11–801(C).

(C) Motion to Suppress

Defendant filed a pretrial motion to suppress the results of the breath test administered to him at the San Juan County Detention Center after his arrest. In support of his motion, defendant argued that his arrest had been unlawful in that the police officer had not observed defendant commit a misdemeanor. The trial court denied defendant's pretrial motion, and defendant again raises this issue on appeal.

The evidentiary fruits of an unlawful misdemeanor arrest are subject to a motion to suppress. *State v. Warren,* 103 N.M. 472, 709 P.2d 194 (Ct.App.1985). New Mexico recognizes the requirement that police officers may validly make misdemeanor arrests only where they have witnessed the offense committed. *Cave v. Cooley,* 48 N.M. 478, 152 P.2d 886 (1944); *State v. Warren.* Although it is uncontested in the case at bar that Officer Galvan did not personally see the defendant drink alcohol

or actually operate his pickup truck, nevertheless, the "in presence" requirement was satisfied here.

The purpose of the "in presence" requirement is to prevent warrantless arrests based on information from third parties. *State v. Lyon,* 103 N.M. 305, 706 P.2d 516 (Ct.App.1985). In *Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986), *aff'g in part and rev'g in part,* 24 SBB 1145 (Ct.App.1985), the New Mexico Supreme Court recognized that being in control of a vehicle was synonymous with driving the vehicle for purposes of the DWI statute. In the present case, defendant was in possession of his vehicle, admitted that he was the owner, had been drinking, and had driven the vehicle into the railing. These facts, coupled with the additional facts that defendant smelled of alcohol and failed field sobriety tests administered by the officer, were sufficient to make defendant's arrest valid. *Boone v. State.* The trial court correctly denied defendant's motion to suppress.

II. PRELIMINARY HEARING

Defendant also contends that under N.M. Const. art. II, Section 14, he was deprived of his constitutional right to a preliminary hearing on the charge of driving while intoxicated. He further contends that, because he was not accorded a preliminary hearing, the district court lacked jurisdiction in the cause. We disagree. Defendant was not convicted of a felony, but a misdemeanor. NMSA 1978, §§ 66–8–7 and –102 (Cum.Supp.1986). *Cf. Boone v. State,* 105 N.M. 223, 731 P.2d 366; *State v. Peavler,* 88 N.M. 125, 537 P.2d 1387 (1975); *State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct.App.1971); *State v. Vasquez,* 80 N.M. 586, 458 P.2d 838 (Ct.App.1969). An accused has no right to a preliminary hearing on a misdemeanor charge. N.M. Const. art. II, § 14. The trial court therefore had no duty to conduct a preliminary hearing prior to trial. *See id.; State v. Vaughn,* 74 N.M. 365, 393 P.2d 711 (1964). An accused is either entitled to a preliminary hearing as a matter of law, or he is not entitled to one at all. *Williams v. Sanders,* 80 N.M. 619, 459 P.2d 145 (1969). Because the preliminary hearing requirement does not apply to the offense for which defendant was charged, there was no error in denying the request for the preliminary hearing.

III. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence supporting his conviction. In so doing, defendant relies heavily on the fact that there were no eyewitnesses to his actual drinking or driving of an automobile. However, there was sufficient circumstantial evidence presented at trial for the jury to infer, beyond a reasonable doubt, that defendant had been driving his vehicle while intoxicated. *Cf. State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977); *State v. Sanchez,* 98 N.M. 428, 649 P.2d 496 (Ct. App.1982). Defendant admitted to the investigating officer that he had been drinking "all night." Defendant further admitted leaving the liquor store and driving into the rail. Furthermore, the level of alcohol found in the defendant's blood could reasonably lead the jury to infer that defendant had been drinking for several hours prior to when the accident occurred. Officer Galvan testified that he smelled alcohol on defendant's breath and that defendant failed the field sobriety tests given at the scene. On appeal, we review the evidence in the light most favorable to the verdict, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. *State v. Lucero,* 88 N.M. 441, 541 P.2d 430 (1975). Defendant's conviction of driving while intoxicated was supported by substantial evidence.

IV. SENTENCE

Defendant was sentenced to serve a term of one year in the custody of the State Department of Corrections. At the sentencing hearing, evidence was presented indicating defendant had been convicted of several prior DWI charges.

Defendant was convicted of violating Section 66–8–102 of the Motor Vehicle Code. This section provides that where the conviction is for a second or subsequent DWI, the offense is punishable by impris-

onment for not less than ninety days nor more than one year. § 66–8–102(E).

In adopting the Criminal Sentencing Act, the legislature directed that determinate sentencing would replace indeterminate sentencing. Following defendant's conviction, the Act requires the court to impose a specific sentence in accordance with the degree of the offense involved. Since most of this state's statutes defining criminal offenses and their penalties prescribe both a minimum and maximum sentence, the Criminal Sentencing Act specifies that a definite sentence shall be imposed in lieu of a sentence prescribing a minimum and maximum period to be served. NMSA 1978, § 31–18–15 (Repl.Pamp.1981). *See also Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act,* 9 N.M.L.Rev. 131 (1978–79).

NMSA 1978, Section 31–18–13 (Repl. Pamp.1981), provides the method for establishing the applicable determinate sentence for offenses not contained in the Criminal Code. In *State v. Sparks,* 102 N.M. 317, 694 P.2d 1382 (Ct.App.1985), this court ruled that sentencing for offenses outside the Criminal Code is controlled by Section 31–18–13(B). *Id.* at 324–25, 694 P.2d at 1389–90. The state responds that the DWI statute is "special" legislation evincing a legislative intent to provide indeterminate sentencing, and should control over "general" legislation such as Section 31–18–13(B). The state cites legislative history in support of its position. The state's argument is not persuasive, and we vacate the sentence imposed, remanding for reimposition of sentence.

Section 31–18–13(B) provides in pertinent part:

> Whenever a defendant is convicted of a crime under ... a statute not contained in the Criminal Code, which specifies the penalty to be imposed on *conviction, the court must set as a definite term of imprisonment the minimum term prescribed by such statute* ... and may impose the fine prescribed by such statute ... for the particular crime for which such person was convicted. [Emphasis added.]

This subsection was interpreted in *State v. Sparks,* wherein a defendant was convicted of nine counts of making false statements on tax returns (an offense not contained within the Criminal Code). The applicable statute provided for a sentencing range, and the defendant was sentenced to not less than six months nor more than three years on each count. This court found the sentence to be unauthorized under Section 31–18–13(B), holding that the trial court should have imposed the minimum sentence for each count. 102 N.M. at 325, 694 P.2d at 1390. *See State v. Muzio,* 105 N.M. 352, 732 P.2d 879 (Ct.App.1987).

The rationale in *Sparks* is controlling here. Section 66–8–102(E) provides that the sentence to be imposed for a "second or subsequent conviction ... shall be ... imprisonment for not less than ninety days nor more than one year or by a fine of not more than one thousand dollars ($1000), or both...." The minimum sentence applicable under Section 66–8–102(E) and the Criminal Sentencing Act is also the maximum sentence. *See* § 31–18–13. We are bound by the rules of statutory construction. Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction. *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977); *State v. McHorse,* 85 N.M. 753, 517 P.2d 75 (Ct.App.1973). We are guided by the New Mexico Supreme Court's decision in *Burch v. Foy,* 62 N.M. 219, 223, 308 P.2d 199, 202 (1957), in which the court stated:

> A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.... Courts must take the act as they find it and construe it according to the plain meaning of the language employed.

It is the legislature's province and not the court's to enlarge the penalty for violation of an offense. *Perea v. Baca,* 94 N.M. 624, 614 P.2d 541 (1980). *See Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973). Accordingly, we affirm defendant's convic-

tion, but vacate the sentence imposed. We direct that the case be remanded to the district court for resentencing and imposition of a sentence consistent with the provisions of Section 31–18–13(B) and this opinion. Any sentence of confinement is to be served in the county detention facility and not with the New Mexico Department of Corrections. *See* NMSA 1978, § 31–19–1(A) (Cum.Supp.1986).

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

734 P.2d 794

Ernestine ABALOS, Plaintiff-Appellant,

v.

The BERNALILLO COUNTY DISTRICT ATTORNEY'S OFFICE, Steven Schiff, Louis Mande, John Does 4 and 5, Defendants-Appellees.

Ernestine ABALOS, Plaintiff-Appellee,

v.

BERNALILLO COUNTY DETENTION CENTER, Mike Hanrahan and the City of Albuquerque, Defendants-Appellants.

Ernestine ABALOS, Plaintiff-Appellant,

v.

E.L. HANSEN, the City of Albuquerque, and John Doe 6, Defendants-Appellees.

Nos. 9313, 9430 and 9513.

Court of Appeals of New Mexico.

Feb. 17, 1987.

Randi McGinn, Albuquerque, for plaintiff-appellant and plaintiff-appellee, Ernestine Abalos.

Rebecca A. Houston, Paula Z. Hanson, Keleher & McLeod, P.A., Albuquerque, for defendants-appellants Bernalillo County Detention Center, M. Hanrahan and The City of Albuquerque.

Karen C. Kennedy, Butt, Thornton & Baehr, P.C., Albuquerque, for defendants-appellees Bernalillo County Dist. Atty.'s Office, S. Schiff, L. Mande and John Does 4 and 5.

John S. Thal, Timothy R. Van Valen, Modrall, Sperling, Roehl, Harris & Sisk,

P.A., Albuquerque, for defendants-appellees E.L. Hansen and the City of Albuquerque.

OPINION

BIVINS, Judge.

Plaintiff, Ernestine Abalos, brought this action under the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 to -29 (Repl.1986), claiming personal injuries and damages resulting from her rape by John Moody following his allegedly negligent release from jail. Plaintiff sued three groups of defendants whom we label and identify as (1) the Detention Center defendants, including the Bernalillo County Detention Center (BCDC), the City of Albuquerque (the City), as operator of BCDC, Mike Hanrahan, its director, and John Does 1, 2 and 3, as employees of BCDC; (2) the District Attorney defendants, including the Bernalillo County District Attorney's Office, Steven Schiff, as District Attorney, Louis Mande, Assistant District Attorney, and John Does 4 and 5, as employees of the District Attorney's Office; and (3) the Albuquerque Police Department (APD) defendants, including the City of Albuquerque, E.L. Hansen, as Chief of Police for the APD, and John Doe 6, an employee of the APD.

A review of the record reveals that John Does 1, 2, 3 and 6 were not served with process and no appearance was made on their behalf. Moreover, neither did the motions to dismiss nor the respective orders thereon mention those defendants. Therefore, John Does 1, 2, 3 and 6 are not before this court on appeal. As to John Does 4 and 5, an entry of appearance was made on their behalf and they are included in the District Attorney defendants' answer and motion to dismiss. The order granting their motion to dismiss also includes John Does 4 and 5. Therefore, we include John Does 4 and 5 in this appeal.

The trial court denied the motion to dismiss filed by the Detention Center defendants, but granted those defendants the right to apply for an interlocutory appeal under NMSA 1978, Section 39-3-4. The trial court granted the respective motions to dismiss filed by the District Attorney defendants and the APD defendants. Plaintiff appeals directly from these orders dismissing her complaint. We granted the Detention Center defendants' interlocutory appeal and plaintiff's motion to consolidate the three appeals. During the pendency of this appeal, plaintiff and the APD defendants settled their differences, and an order was entered dismissing the appeal in Cause No. 9513. The issue in the remaining appeals involves the propriety of the trial court's ruling on the respective motions to dismiss plaintiff's complaint.

According to plaintiff's complaint, John Moody, who would later plead guilty to the crime of criminal sexual penetration of plaintiff, was arrested in Texas on December 27, 1983, on a warrant issued by the State of New Mexico for armed robbery and aggravated assault arising from an unrelated crime committed in Albuquerque in September 1983. Waiving extradition, Moody was returned to Albuquerque and booked into the Bernalillo County Detention Center on $25,000 bond. At the time of his arrest, Moody had a prior felony conviction for murder and theft, and a separate felony conviction for kidnapping.

Moody was arraigned in metropolitan court on January 2, 1984. Plaintiff alleges that under NMSA 1978, Metro. Rule 52(d) (Repl.1985),[1] the district attorney had ten days within which to obtain an indictment on Moody "in order to keep him in custody." The grand jury returned an indictment against Moody on January 12, 1984, with a suggested bond of $25,000. The indictment was filed in district court and a bench warrant issued on January 13, 1984.

Whether the bench warrant was delivered before or after Moody was released

1. Metro.R. 52(d) provides:
A preliminary examination shall be held within a reasonable time but in any event no later than ten days following the initial appearance if the defendant is in custody and no later than sixty days if he is not in custody. Failure to comply with the time limits shall not affect the validity of any indictment for the same criminal offense.

from custody is unclear. In any event, the pleadings recite, and none of the parties seem to question, that he was released on the afternoon of January 13, 1984, pursuant to a metropolitan court order, and that within six weeks after release he raped plaintiff.

Plaintiff generally claims breach of duty on the part of defendants in releasing Moody and in failing to warn the public, including plaintiff, of his release. These appeals require that we determine as to each defendant whether immunity was waived under the Tort Claims Act.

> The Tort Claims Act shields both governmental entities and public employees from liability for torts except when immunity is specifically waived in the Act. If a public employee, while acting in the scope of duty, commits a tort falling within one of the waivers, the entity which employs him is liable. *See* § 41–4–4(A) (Repl.Pamp.1982).

Wittkowski v. State, 103 N.M. 526, 529, 710 P.2d 93, 96 (Ct.App.1985). As to all defendants, plaintiff relies on Section 41–4–12 as the basis for waiver of immunity. That section provides:

> The immunity granted pursuant to Subsection A of Section 41–4–4 * * * does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

A law enforcement officer is defined in Section 41–4–3(D) as

> any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor[.]

We now examine each group of defendants, except for APD, to determine whether immunity from liability was waived.

I. THE DETENTION CENTER DEFENDANTS

These defendants filed their motion to dismiss under SCRA 1986, Rule 1–012(B)(6) based on a failure to state a claim. Although the deposition of Steven Schiff was before the court, and the parties refer to it in their briefs, the parties agree that the deposition has no bearing on the legal issue before this court and that the Rule 1–012(B)(6) standard of review should apply. Accordingly, we must accept all well pleaded facts as true, and resolve all doubts in favor of the sufficiency of the complaint. *Wittkowski.*

From the matters before us, including the parties' briefs and applicable statutes, it appears that BCDC is a joint county-municipal facility operated by the City of Albuquerque under NMSA 1978, Section 33–3–2 (Cum.Supp.1986). Without conceding waiver of immunity for either, the Detention Center defendants urged, at oral argument, that BCDC is not a separate governmental entity and that the proper governmental entity, if any, is the City. They base this argument on the claim that BCDC is a building and that the City operates the detention center housed in that building as a department. Plaintiff does not disagree as long as one governmental entity, responsible for holding in custody persons charged with a criminal offense, remains a defendant in the lawsuit. Without deciding the correctness of defendants' position, we accept, for the purposes of the case, that the City is the proper governmental entity directly responsible for operating the detention center.

Defendants here concede, for the purposes of their motion, that the City is a governmental entity and that it employed Hanrahan and John Does 1, 2 and 3, identified as jailers. They argue, however, that the City, like the corrections department in

Wittkowski, does not fit within the definition of a law enforcement officer.

Whether the City should be named as a party defendant raises an issue that has caused confusion and inconsistency in this court. We must now clarify two points of law: (1) whether a governmental entity can be a named party defendant; and (2) if the entity can be sued, which entity should be named.

1. Governmental Entity as Named Defendant

In two recent cases, this court either held or implied that a governmental entity cannot be named as a defendant. Without expressly so holding, in *Wittkowski,* we stated:

> The particular agency which was allegedly negligent is the corrections department. Plaintiffs allege that the law enforcement officer waiver applies to the corrections department. As quoted above, however, Section 41–4–3 defines law enforcement officers as "any full-time salaried public employee of a governmental entity." The corrections department is a governmental entity under the act. The statute is to be given effect as written. *Methola* [*v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980)]. The corrections department is not within the definition.

Id., 103 N.M. at 530, 710 P.2d at 97.

In *Silva v. State,* Ct.App.No. 9267 (Filed December 14, 1986), we followed *Wittkowski* and held:

> Plaintiffs contend that CCRD [Corrections and Criminal Rehabilitation Department] is liable under Sections 41–4–6, –9, and –10. Each of these sections waives immunity for negligence of "public employees." A "public employee" is defined as an officer, employee, or servant of a governmental entity. § 41–4–3(E). The corrections department is a governmental entity under the Tort Claims Act, not an employee of a governmental entity. *See Wittkowski.* Therefore, CCRD does not fall within any of these sections, and the trial court properly dismissed the claims against CCRD.

Id., slip op. at 4.

We reasoned in each case that the Tort Claims Act provides waivers of immunity for certain activities. An examination of the Tort Claims Act, Sections 41–4–5 to –11, reveals that each of those waivers speaks in terms of "the negligence of public employees while acting within the scope of their duties." Section 41–4–12, which provides a waiver for law enforcement officers and the one with which we are concerned, refers to "law enforcement officers while acting within the scope of their duties." The definition of "public employee" includes law enforcement officers. § 41–4–3(E). Because a governmental entity is not by definition a public employee or law enforcement officer, we decided in those cases that an entity was immune from suit, despite the waivers.

This reasoning was incorrect and is contrary to other sections of the Tort Claims Act that contemplate clearly that a governmental entity can be a named defendant and can have judgment entered against it. *See, e.g.,* §§ 41–4–14, –15(A), –17(A) and (B), –19(A) and (B) and –23(B)(5). Also, numerous New Mexico cases, although not addressing the question, have included an action under the Tort Claims Act naming various governmental entities. *See, e.g., Wells v. County of Valencia,* 98 N.M. 3, 644 P.2d 517 (1982); *Tompkins v. Carlsbad Irrigation District,* 96 N.M. 368, 630 P.2d 767 (Ct.App.1981); *Sugarman v. City of Las Cruces,* 95 N.M. 706, 625 P.2d 1223 (Ct.App.1980); *Garcia v. Albuquerque Public Schools Board of Education,* 95 N.M. 391, 622 P.2d 699 (Ct.App.1980); *O'Brien v. Middle Rio Grande Conservancy District,* 94 N.M. 562, 613 P.2d 432 (Ct.App.1980).

We erred in implying that a governmental entity cannot be a named defendant, and to the extent that *Silva* and *Wittkowski* state otherwise, they are hereby modified.

An entity or agency can only act through its employees. Without its employees, the entity is an empty shell. Each

of the eight waivers listed in Sections 41–4–5 to –12 identifies public employees; it follows that one can sue the public employee and the agency or entity for whom the public employee works. While the waivers all require negligence or conduct of public employees while acting within the scope of their duties, one need not expressly find liability in the Tort Claims Act against the governmental entity under the doctrine of respondeat superior as plaintiff contends, *see Silva;* rather, the statute itself makes the entity liable. § 41–4–4(B), (C) and (D). *See Gonzales v. State,* 29 Cal.App.3d 585, 105 Cal.Rptr. 804 (1972).

A governmental entity, however, cannot be sued randomly. Certain criteria must be met before an entity can be named as a party defendant.

2. When an Entity Can be Sued

Again, New Mexico's law is confusing and inconsistent regarding which entity can be sued and when. One line of cases suggests the city or county is a properly named defendant. *See, e.g., Methola v. County of Eddy,* 96 N.M. 274, 629 P.2d 350 (Ct.App.1981); *Doe v. City of Albuquerque,* 96 N.M. 433, 631 P.2d 728 (Ct.App. 1981); *Miera v. Waltemeyer,* 95 N.M. 305, 621 P.2d 522 (Ct.App.1980). In a second line of cases, the state is an improper party and only the particular agency that caused the alleged harm is the party that can be named. *Silva; Wittkowski; Begay v. State,* 104 N.M. 483, 723 P.2d 252 (Ct.App. 1985), *rev'd on other grounds, Smialek v. Begay,* 104 N.M. 375, 721 P.2d 1306 (1986).

The reasoning behind naming the particular entity rather than the state is that only the party responsible for the alleged harm should be named. *Silva.* Where there is no indication that the state did anything wrong or had any responsibility for the alleged harm suffered by plaintiffs, the state is properly dismissed. *Begay.* We agree with this approach. While *Silva, Wittkowski* and *Begay* dismissed the state as being too remote an actor, we can logically extend the same analysis to the city. To force the city or state to defend an action in which it has little direct involvement would be unduly burdensome and unnecessary. Only the particular agency involved should be named. In so deciding, we do not intend to relieve any unnamed entity from liability imposed by Section 41–4–4.

Here, the City is not a remote actor; rather, according to its own admission, it is the particular entity that operates the detention center and it would be the governmental entity responsible for the alleged harm. Accordingly, BCDC, although perhaps not a separate agency, should be dismissed from the lawsuit. Whether the City can be sued as the particular entity responsible requires further analysis.

To name a particular entity in an action under the Tort Claims Act requires two things: (1) a negligent public employee who meets one of the waiver exceptions under Sections 41–4–5 to –12; and (2) an entity that has immediate supervisory responsibilities over the employee. If a public employee meets an exception to immunity, then the particular entity that supervises the employee can be named as a defendant in an action under the Tort Claims Act. If the city or state directly supervises the employee, then the city or state can be named. We, therefore, hold today that the waivers in Sections 41–4–5 to –12 contemplate suing the immediate supervisory entity of the public employee involved.

We apply this analysis to the City. First, we must determine if John Does 1, 2 and 3 are public employees who fall within a waiver under Sections 41–4–5 to –12. Plaintiff includes within her pleading alleged violations while acting within the scope of their duties by John Does 1, 2 and 3, as jailers. Plaintiff argues that jailers have been held to be law enforcement officers, *Methola,* and are not immune from suit under Section 41–4–12. We agree.

Before a law enforcement officer (the jailers in this case) or the City can be found liable under the Tort Claims Act, we must find that the employees breached some duty required by law. *Schear v. Board of County Commissioners,* 101 N.M. 671, 687 P.2d 728 (1984). Section

41–4–3(D) requires law enforcement officers to hold people in custody. Plaintiff's complaint sets forth allegations of negligence which, if proved, are sufficient to establish breach of a duty under Section 41–4–3(D). Since John Does 1, 2 and 3 are employees of the City, the trial court was correct in denying its motion to dismiss.

Having held that plaintiff can sue the City, we must determine if Hanrahan, as Director of BCDC, can also be sued. The determining factor is whether Hanrahan falls within the definition of a law enforcement officer. The answer turns on that portion of the definition which includes "any full-time salaried public employee * * whose principal duties under law are to hold in custody any person accused of a criminal offense * * *." § 41–4–3(D).

Defendants rely on *Anchondo v. Corrections Department,* 100 N.M. 108, 666 P.2d 1255 (1983). They liken the director of the Detention Center to the warden of the state penitentiary who was held, in that case, not to be a law enforcement officer under Section 41–4–3(D). The supreme court looked to what the individual actually did, his duties and responsibilities. In *Anchondo,* the supreme court found, after reviewing the statutory duties of the secretary of corrections and the warden, that their principal duties were administrative in nature and that they did not deal directly with the daily custodial care of prison inmates.

Plaintiff claims that while the duties of the warden of the state penitentiary may not deal directly with the daily custodial care of prison inmates, such is not the case of the director of a county jail facility. She contends that the director of BCDC is no different than a county sheriff, who manages jails and who has been held as being a law enforcement officer while acting in that capacity. *Methola.*

While, from a strict analysis of statutory provisions, we can see a parallel between the director of the Detention Center and the warden of the state penitentiary, we can also see a parallel between the director of BCDC (jail administrator) and a sheriff. NMSA 1978, Sections 33–3–1 to –25 (Repl.Pamp.1983 & Cum.Supp.1986) outline the duties of both sheriffs and jail administrators. In light of *Methola,* we hold as a matter of law that the director's duties are principally to hold in custody persons accused of a criminal offense. Hanrahan, therefore, falls within the definition of law enforcement officer. Plaintiff's complaint sets forth allegations of negligence including, among other things, that Hanrahan had a duty to formulate and implement procedures to prevent the mistaken release of violent criminals. Such allegations, if proven, are sufficient to establish breach of a duty under Section 41–4–3(D), and Hanrahan is properly included as a defendant. We point out that no matter how many defendants plaintiff names, she is limited to a maximum amount whether she succeeds against one or all defendants on her claim. § 41–4–19(A).

We affirm the denial of summary judgment for Hanrahan and the City, but reverse as to BCDC.

II. THE DISTRICT ATTORNEY DEFENDANTS

While these defendants, as did the others, filed their motion to dismiss under Rule 1–012(B)(6), it appears the deposition of Mr. Schiff was before the trial court. Therefore, the standard of review under SCRA 1986, Rule 1–056 applies. *Transamerica Insurance Co. v. Sydow,* 97 N.M. 51, 636 P.2d 322 (Ct.App.1981).

The question on appeal is whether a genuine issue of material fact exists that the district attorney, the assistant district attorney and John Does 4 and 5 acted as law enforcement officers. Unlike the Detention Center defendants and the APD defendants, an entry of appearance was made on behalf of John Does 4 and 5 and they were included in the order of dismissal. Plaintiff identified these John Does as employees of the district attorney. In this case, one of the employees was responsible for processing the paper work so that the Detention Center personnel would be notified of the indictment and warrant before

the expiration of the ten days and another employee may have delivered the warrant to BCDC.

Under the definition of law enforcement officer, Section 41–4–3(D), the only portion relied on relates to public employees whose principal duties under the law "are to hold in custody any person accused of a criminal offense." Following the directive of *Anchondo,* we must look to what the person actually does, his duties and responsibilities.

From a review of the material before us, including the deposition of Mr. Schiff, there is not the slightest indication that any of these defendants have, as their principal duty under the law, the responsibility to hold in custody any person accused of a criminal offense. *See* NMSA 1978, § 36–1–18 (Repl.Pamp.1984). In applying the definition to these defendants, plaintiff seeks to make them law enforcement officers on the basis that their alleged failure to timely process the paperwork resulted in Moody's release from custody. An action or inaction indirectly affecting the release of a prisoner does not rise to a "principal dut[y] * * * to hold in custody" under law. Plaintiff has not directed our attention to any provision in the law that requires the district attorney, his assistants or personnel to hold prisoners in custody. That is the statutory function of jails and detention centers. By definition, then, these defendants are not law enforcement officers within the context of the facts of the present case.

Plaintiff argues that *Candelaria v. Robinson,* 93 N.M. 786, 606 P.2d 196 (Ct.App. 1980), is overly broad in holding that "[n]either Robinson [the district attorney] nor Singer [assistant district attorney] was a 'law enforcement officer' as that term is defined in § 41–4–3(D), supra." *Id.* at 790, 606 P.2d at 200. We read this to mean neither was a law enforcement officer in the context of the claim made, a defamation suit. Whether a district attorney or any of his assistants could be law enforcement officers under other circumstances was not decided in *Candelaria.*

Nor do we need to decide that question here. Plaintiff refers us to federal cases decided under 42 U.S.C.A. Section 1983 (West 1981) where prosecutors may lose immunity while performing various functions. We are not concerned with Section 1983 actions or any function other than processing paperwork in the presentation of indictments returned by the grand jury. In that role, the District Attorney defendants did not act as law enforcement officers within the statutory definition.

Plaintiff raises an equal protection constitutional argument, contending that to allow immunity for the District Attorney defendants who were "performing the identical custodial task as BCDC and the APD liason [sic]" would create an arbitrary and unreasonable classification in violation of the United States and New Mexico Constitutions. Since we have held that the District Attorney defendants were *not* performing identical custodial tasks as BCDC, we need not answer plaintiff's equal protection argument. We have not held that the Tort Claims Act universally excludes all district attorneys; we have only held that the District Attorney defendants do not fall within the definition of law enforcement officers as applied to the allegations and facts of the instant case. We note, however, that a claim similar to plaintiff's claim has been addressed and rejected in *Garcia v. Albuquerque Public Schools Board of Education.*

We affirm the dismissal of the District Attorney defendants. We answer the Detention Center defendants' interlocutory appeal by holding that BCDC should be dismissed, but that the City and Hanrahan fall within the law enforcement waiver of immunity under Section 41–4–12.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

734 P.2d 802

Pauline DOLEZAL, Plaintiff-Appellant,

v.

Roy F. BLEVINS, Defendant-Appellee.

No. 8514.

Court of Appeals of New Mexico.

Feb. 24, 1987.

Randall L. Thompson, Albuquerque, for plaintiff-appellant.

W. Ken Martinez, Grants, for defendant-appellee.

OPINION

DONNELLY, Chief Judge.

Appellant, the former wife of appellee, appeals from an order dismissing her suit against her ex-husband for nonpayment of a debt arising out of a final decree of divorce and property settlement agreement. The pivotal issue before us is whether the statute of limitations, based upon a judgment, is tolled on a cause of action by a wife against her husband during the period of their marriage. We reverse.

The parties were initially married in 1949. On July 16, 1973, they were divorced pursuant to a decree entered by the District Court of Valencia County. Pursuant to a property settlement agreement approved in the final decree, appellee was to pay appellant the sum of $50,000 in order to equalize the distribution of property between the parties. Payments were to be made in the following manner: $5,000 was to be paid on or before August 1, 1973; $4,500 was to be paid on or before October 1, 1973; and $500 was to be paid on January 2, 1974. The remaining balance, together with interest at the rate of 4%, was to be paid by appellee in installments of $4,000 per year for ten years.

Appellee paid the first installment of $5,000 and thereafter made no other payments. On November 1, 1973, the parties were remarried. Early in 1979 the parties again separated, leading to a second divorce on December 17, 1981.

On May 18, 1984, appellant filed a complaint against her former husband seeking judgment on the unpaid indebtedness in the sum of $45,000 together with interest on the unpaid balance. On June 8, 1984, appellee filed a motion to dismiss the complaint for failure to state a claim. At the hearing on the motion, appellee asserted that appellant's complaint was unenforceable because it was barred by the statute of limitations under NMSA 1978, Section 37-1-2 (formerly NMSA 1953, Section 23-1-2), which provided for a seven-year limitation on actions founded upon judgments. Following a hearing the trial court entered an order dismissing appellant's complaint with prejudice.

APPLICABILITY OF STATUTE OF LIMITATIONS

Appellant contends that the trial court erred in determining that her cause

of action was barred under the provisions of Section 37–1–2 because the running of the statute was tolled during the remarriage of the parties. We agree.

Between the date of the second marriage of the parties and their divorce in December 1981, a period of over seven years elapsed. During this interval the running of the statute of limitations was tolled. In *Newton v. Wilson,* 53 N.M. 480, 484–485, 211 P.2d 776, 778 (1949), the court observed:

> It is the policy of the Law to prevent litigation between husband and wife, not to promote it as would be the case if the wife had to sue her husband to avoid limitations and laches. *Cary et al. v. Cary,* 159 Or. 578, 80 P.2d 886, 121 A.L.R. 1371, and *Bennett v. Finnegan, et al.,* 72 N.J.Eq. 155, 65 A. 239. See also Annotation in 121 A.L.R. 1384, and *Torrez et al. v. Brady, et al.,* 37 N.M. 105, 19 P.2d 183, [holding] that limitations do not run by adverse possession as between husband and wife.

Appellee argues that *Newton* is no longer controlling as precedent because under *Maestas v. Overton,* 87 N.M. 213, 531 P.2d 947 (1975), the doctrine of interspousal immunity for intentionally and negligently inflicted torts was abrogated. Appellee contends this ruling renders the rationale in *Newton* no longer applicable. We conclude that the holding in *Maestas* permitting suits between spouses based upon an injury arising in tort does not negate the expressed policy of the law to encourage the amicable resolution of disputes between marital partners instead of promoting litigation between the parties by not tolling the statute of limitations. Further, as recognized in *Newton, Primus v. Clark,* 48 N.M. 240, 149 P.2d 535 (1944), does not assist appellee because the parties there (husband and wife) were divorced for more than the applicable period of limitation.

The policy of the law adhered to in a majority of jurisdictions is to refrain from fostering domestic discord which would follow from litigation between spouses if the statute of limitations or laches were not tolled during the continuance of the marital relationship. *See, e.g., Linker v. Linker,* 28 Colo.App. 131, 470 P.2d 921 (1970); *Cord v. Neuhoff,* 94 Nev. 21, 573 P.2d 1170 (1978). *See also* Annot., 121 A.L.R. 1382 (1939). Hence, we determine that the statute of limitations on appellant's cause of action, based upon the judgment against appellee, was tolled during the marriage of the parties.

The briefs of both appellant and appellee proceed on the basis that the applicable period of limitations under Section 37–1–2 is seven years. Appellant's suit to enforce the judgment was filed in 1984. The legislature in 1983 amended Section 37–1–2 by extending the period of limitations from seven to fourteen years. 1983 N.M.Laws, ch. 259, Section 3, of the amendatory act provided that, "Nothing in this act shall be construed to revive a judgment for which the statute of limitation has expired under prior law." The great preponderance of authority supports the general view that the legislature may validly enlarge the period of limitation and make it applicable to existing causes of action, provided that it does not revive a cause of action already barred. *See People v. United States Fire Insurance Co.,* 61 Cal.App.3d 231, 132 Cal. Rptr. 139 (1976); *In re Straight's Estate,* 329 Mich. 319, 45 N.W.2d 300 (1951); *State Tax Commission v. Spanish Fork,* 99 Utah 177, 100 P.2d 575 (1940); Annot., 79 A.L.R.2d 1080 (1961).

We determine that by virtue of the tolling of the statute of limitations during the second marriage of the parties, appellant's cause of action was not barred under Section 37–1–2 or by laches, and that suit was timely filed within both the fourteen-year period prescribed by Section 37–1–2 and the seven-year period as it existed prior to the 1983 amendment.

The order dismissing appellant's suit to enforce the judgment is reversed and the cause is remanded for trial on the merits.

IT IS SO ORDERED.

FRUMAN and APODACA, JJ., concur.

734 P.2d 804

Jeff JOHNSON and Titus Edwin Aaron, Petitioners-Appellants,

v.

Michael FRANCKE, Secretary of Corrections, Respondent-Appellee.

No. 8775.

Court of Appeals of New Mexico.

Feb. 24, 1987.

Jeff Johnson, Titus Edwin Aaron, pro se.

P. Scott Eaton, Keleher & McLeod, P.A., Albuquerque, for respondent-appellee.

OPINION

APODACA, Judge.

Petitioners, prisoners at the New Mexico State Penitentiary in Santa Fe,[1] appeal from the trial court's order granting respondent's motion to dismiss filed pursu-

1. We note the appeal record reflects Petitioner Titus Edwin Aaron has been granted parole subsequent to the filing of his appeal. A question therefore arises whether the issue in connection with his claim has become moot, since the rules he seeks be declared invalid apply only to inmates of penal institutions. As a general rule, an appeal will be dismissed if the issues have become moot. *Mowrer v. Rusk,* 95 N.M. 48, 618 P.2d 886 (1980). But well-recognized exceptions to the rule exist when, for example, the appeal involves issues of "substantial public interest" or issues "capable of repetition, yet evading review." *Id.* Concluding the exceptions may be applicable, this court has opted to rule on petitioner's appeal.

ant to SCRA 1986, Rule 1–012(B)(6) (failure to state a claim upon which relief can be granted). Petitioners filed their petition pro se in the trial court, seeking a declaratory judgment that rules and regulations governing the conduct and discipline of prisoners were invalid and unenforceable because they had not been filed in accordance with the State Rules Act, NMSA 1978, Sections 14–4–1 to –9. Although it is not entirely clear from a review of the record, we assume petitioners take issue with some or all of the disciplinary rules governing inmates' conduct within the penitentiary.

The trial court entered the order dismissing petitioners' petition on the grounds that "as a matter of law * * * the State Rules Act does not require that respondent's disciplinary rules be recorded." Petitioners contend the trial court erred in dismissing their petition. We disagree and affirm the trial court's order.

The sole issue on appeal is whether the disciplinary rules promulgated by respondent, the Secretary of Corrections, in governing the conduct of prisoners confined within a penitentiary, are invalid and unenforceable if not filed with the state's record center in the manner required under the State Rules Act. We hold that such rules need not be so filed to be valid and enforceable.

Dismissal Under Rule 1–012(B)(6)

Petitioners first argue that the trial court erred in dismissing their petition under Rule 1–012(B)(6) without a hearing and prior to "the time of trial." Additionally, although it is not readily apparent from their brief, petitioners seem to suggest that procedurally, Rule 1–012(B)(6) was not the proper avenue for a dismissal of their claim. We disagree.

"The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim, that is, to test the law of the claim, not the facts that support it." *Gonzales v. United States Fidelity & Guaranty Co.*, 99 N.M. 432, 433, 659 P.2d 318, 319 (Ct.App.1983); *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct.App.1978); *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct.App.1975). Petitioners' suggestions that the dismissal was premature and should have awaited a hearing on the facts is without merit, since a dismissal under the rule is a legal, not an evidentiary, determination. *Vigil v. Arzola*, 101 N.M. 687, 687 P.2d 1038 (1984). In considering whether a petition states a cause of action upon which relief can be granted, the trial court must accept as true all the facts pled. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977); *Gonzales*. In considering such a motion, the allegations of the petition are accepted by the trial court as true; the motion may be granted only when it appears that petitioners cannot be entitled to relief under any state of facts provable under the claim. *Runyan*. These same criteria apply on appeal. *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct.App.1981).

Respondent's motion raised no factual matters outside the petition. Instead, the sole issue raised by the motion was whether, as a matter of law, accepting the factual allegations of the petition to be true, petitioners were entitled to the relief sought under their petition. The motion to dismiss sought to test the validity of petitioners' claim. This is exactly what petitioners sought in their petition. Additionally, as stated by respondent, "this was precisely the type of situation which was amenable to a determination under Rule 12." It matters not that petitioners were not granted a hearing "on the merits." That is what Rule 1–012(B)(6) is intended to avoid when a petition fails to state a claim. We hold that granting the motion to dismiss under Rule 1–012(B)(6) was proper.

Filing Requirement Under State Rules Act

Petitioners next insist the disciplinary rules governing their conduct as penitentiary inmates were invalid because respondent failed to file them "in accordance with the State Rules Act."

A summary of the pertinent provisions of both the Corrections Department Act, NMSA 1978, Sections 9–3–1 to –12 (Repl.Pamp.1983), and the State Rules Act,

Sections 14–4–1 to –9, is necessary. The Corrections Department Act, in establishing the Corrections Department, describes the duties of respondent. Those duties include the making and adoption of "such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions." § 9–3–5(E). The statute requires hearings and public notice for rules and regulations "affecting any person or agency outside the department." *Id.* The statute also provides: "All rules and regulations shall be filed in accordance with the State Rules Act." *Id.* Petitioners argue that the rules and regulations promulgated by respondent with respect to disciplinary matters are invalid solely because they were not filed pursuant to the requirements of the State Rules Act. This court notes no argument has been made by petitioners that any other provisions of Section 9–3–5(E) have not been followed, including the requirements of the hearing process and public notice. This court therefore assumes all other requirements under the statute have been met, since petitioners have not complained otherwise. Contentions not raised in the trial court are not before this court. SCRA 1986, Rule 12–216; *Edwards v. First Federal Savings & Loan Ass'n,* 102 N.M. 396, 696 P.2d 484 (Ct.App.1985).

The State Rules Act, on the other hand, provides for the filing of rules in the state's record center and further provides: "No rule shall be valid or enforceable until it is so filed and shall only be valid and enforceable upon such filing and compliance with any other law." § 14–4–5.

Subsection (C) of Section 14–4–2 defines the term "rule". It states: "Such term shall not include rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution * * *."

In addressing the issue on appeal, we are guided by several principles of statutory construction: state statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction, *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977); where the meaning of statutory language is plain, and words used by the legislature are free from ambiguity, there is no basis for interpreting the statute, *State v. Mobbley,* 98 N.M. 557, 650 P.2d 841 (Ct.App.1982); where two statutes pertain to the same general subject, the court's duty is to construe them so that effect is given to every provision of each, *First National Bank v. Southwest Yacht & Marine Supply Corp.,* 101 N.M. 431, 684 P.2d 517 (1984).

Keeping the foregoing principles in mind, the initial question this court must resolve is whether the last sentence of Section 9–3–5(E) is free of ambiguity. As noted above, that sentence reads: "All rules and regulations shall be filed in accordance with the State Rules Act." We first observe the sentence clearly does not mandate the simple filing of rules, but only that they be filed *in accordance with the State Rules Act.* A second question arises: what is meant by the phrase "in accordance with?" Black's Law Dictionary defines the phrase as meaning "in a manner not repugnant to or in conflict or inconsistent therewith." Black's Law Dictionary 34 (4th ed. 1951), citing *City of Norfolk v. Norfolk Landmark Publishing Co.,* 95 Va. 564, 28 S.E. 959 (1898). Therefore, we conclude the phrase "in accordance with" as used in the statute means that the filing must be conducted consistent with the *entire* State Rules Act, encompassing *all* of the Act's provisions, and in a manner not repugnant to *any* of them. This necessarily includes Section 14–4–2(C), which unambiguously provides that the term "rule" does not include any rules relating to the management, confinement, discipline or release of inmates of a penal institution.

We see no conflict between Section 9–3–5(E) and the State Rules Act. Section 9–3–5(E) clearly directs respondent to follow the mandate of the State Rules Act with respect to the filing of rules promulgated by him. The State Rules Act in turn clearly requires respondent to file a required number of copies of the rules with the records center, but with one important exception—he need not file those particular

rules relating to the management, confinement, discipline or release of inmates. All other rules (unrelated to inmates) must be filed. As noted by respondent, "It is difficult to envision how the Legislature could have made it more clear that rules relating to the management, confinement, discipline or release of inmates are not subject to filing under the State Rules Act."

Petitioners surprisingly concede the legislature, in enacting Section 9–3–5, is presumed to have been aware of the State Rules Act exempting prisoner disciplinary rules and regulations from the filing requirement, citing *City Commission v. State ex rel. Nichols,* 75 N.M. 438, 405 P.2d 924 (1965). It should therefore be fairly obvious that the legislature, presumably aware of the noted exception, in essence affirmed its application by simply referring to the State Rules Act.

In summary, this court has done what petitioners have urged it to do—we have applied the requirements of Section 9–3–5(E) to the rules promulgated by respondent. We conclude that respondent is not required to file disciplinary rules governing the conduct of penitentiary inmates, since the legislature has exempted such rules from the filing requirements.

We hold the trial court was correct in dismissing the petition for failure to state a claim upon which relief could be granted. The order of dismissal is affirmed.

IT IS SO ORDERED.

BIVENS and ALARID, JJ., concur.

734 P.2d 807

Thomas MEIER, Petitioner-Appellee,

v.

Cheryl DAVIGNON, Respondent-Appellant.

No. 9703.

Court of Appeals of New Mexico.

Feb. 24, 1987.

Lowell E. McKim, McKim, Head and Ionta, P.C., Gallup, for petitioner-appellee.

Joseph L. Rich, Schuelke & Rich, Gallup, for respondent-appellant.

OPINION

MINZNER, Judge.

This appeal involves a child custody dispute under the New Mexico Child Custody Jurisdiction Act (CCJA). *See* NMSA 1978, §§ 40–10–1 to –24 (Repl.1986). The mother, a resident of Oklahoma, appeals from the trial court's ruling transferring physical custody of the parties' only child to the father, a resident of New Mexico. Two issues are presented: (1) whether the New Mexico court had jurisdiction under the CCJA; and (2) if the court had jurisdiction, whether it should have declined jurisdiction on the ground that New Mexico was an inconvenient forum for a custody determination. Our calendaring notice proposed summary affirmance. The parties have responded with memoranda in support and in opposition to our proposed disposition. We affirm.

FACTS.

The child was born in 1980 while the parties were living together. In May 1982 in Gallup, New Mexico, the parties married. Seven months later the father filed for divorce and was granted temporary custody of the child during the pendency of the divorce proceeding. A final divorce decree was entered by the New Mexico court on January 21, 1983. The decree incorporated a stipulation between the parties; it provided for joint legal custody of the child and joint physical custody alternating between the parties on a weekly basis. Custody was subsequently modified on three occasions by the New Mexico court, but notably, each modification order retained the feature of joint physical custody on an alternating basis.

The mother moved to Oklahoma in June 1984. Father petitioned for a review of custody, alleging that the mother moved in order to frustrate his relationship with the child. Following a hearing, at which the mother appeared, the New Mexico court modified custody so that each parent was granted custody of the child for alternating five-month periods of time until the child entered school in September 1986. The order further provided that after the child entered school, the mother would have custody of the child through the school year and the father would have custody during the summer months. In addition, the father was granted visitation for one week at Christmas and for spring school vacations. A subsequent modification provided that the noncustodial parent would pay the other parent child support during their respective periods of physical custody.

The child spent the summer of 1986 with the father and then returned to Oklahoma to enter school. Shortly thereafter, in October 1986, the father filed a petition in New Mexico seeking a transfer of custody. The motion alleged, inter alia, that (1) the mother was deliberately intending to "ultimately deprive him of his son;" (2) the mother, without notifying the father or his attorney, obtained an order from an Oklahoma court changing the child's surname to "Davignon," which is the mother's maiden name; and (3) the best interests of the child required that physical custody be granted to the father. Attached to the motion was an order issued by an Oklahoma court changing the child's surname

to "Davignon," and a letter written by the mother in which she claimed to be a "single, unwed mother" and the "sole supporting parent" of the child.

At the subsequent hearing, the mother entered a special appearance through her attorney solely to contest the court's jurisdiction under the New Mexico CCJA. The court rejected the jurisdictional challenge and recessed the hearing on the merits until a later date so that the mother could be present. She chose not to appear or to present evidence. Following the hearing, the court entered an order stating the basis of its jurisdiction and finding that it was in the best interest of the child that custody be transferred to the father.

JURISDICTION.

If a court of one state has made a custody decree, under the UCCJA other states are required to defer to the jurisdiction of the original court as long as that court continues to have jurisdiction under one or more of the jurisdictional prerequisites set forth in the Act. *See* § 40–10–15(A); *State ex rel. Department of Human Services v. Avinger*, 104 N.M. 255, 720 P.2d 290 (1986). Indeed, the concept of continuing jurisdiction in the original court is "central to the UCCJA scheme of discouraging resort to another state to get a new custody decree superseding an existing one." *See* R. Crouch, *Interstate Custody Litigation: A Guide to Use and Court Interpretation of the Uniform Child Custody Jurisdiction Act* (BNA 1981) at 13. In this case, New Mexico is the court of original jurisdiction.

The trial court found it had jurisdiction on the basis of Section 40–10–4(A)(2), which employs the "best interest of the child" standard. Jurisdiction exists under that standard when it is in the best interest of the child that a New Mexico court assume jurisdiction, provided:

> (a) the child and his parents, or the child and at least one contestant, have a significant connection with New Mexico; and
>
> (b) there is available in New Mexico substantial evidence concerning the child's present or future care, protection, training and personal relationships * * *.

In determining the child's best interest, the court made the following unchallenged findings of fact:

> 24. There has been a change of circumstances which * * * shall be deemed to include but not be limited to [the mother's] attempted and purported name change of the child, the misstatements in connection therewith, the age of the child and [the mother's] actions in effectively thwarting attempts of the [father] to talk to his son on the telephone.
>
> 25. The actions of the [mother] * * * in pursuing the change of name of her son without notification to the [father] herein, together with the misstatements made in connection therewith indicates an intent on the part of [the mother] to deprive the child of the association, love, influence and control of his father and to deprive the father * * * of the child's association, love, rearing, education and name right; such actions are not in the best interests of the child.

In a recent case, *Alfieri v. Alfieri*, 105 N.M. 373, 733 P.2d 4 (Ct.App.1987), this court affirmed the authority of trial courts to modify custody based on a custodial parent's actions in undermining the noncustodial parent's relationship with the child. By analogous reasoning, we conclude that trial courts may rely on such actions in ruling that an exercise of jurisdiction under Section 40–10–4(A)(2) is in the best interest of the child.

The mother claims the court erred in finding that (1) the child had "significant contacts" with New Mexico; and (2) there is available in New Mexico substantial evidence concerning the child's present and future care, training, and relationships. We disagree. The child has resided in New Mexico for at least one-third of his life and has been in his father's physical custody for lengthy periods since moving from the state in 1984. In light of these facts, we must disagree with the mother's characterization of the case as one in which "the facts are old, memories faded and evidence almost nonexistent." *Cf. Trask v. Trask*, 104 N.M. 780, 727 P.2d 88 (Ct.App.1986).

The mother also cites various facts in support of her contention that the child has more "significant contacts" with the state of Oklahoma than with New Mexico. Because respondent chose not to present evidence at trial, she has relied on the statements of her counsel, which cannot be considered on appeal. *See Phillips v. Allstate Insurance Co.,* 93 N.M. 648, 603 P.2d 1105 (Ct.App.1979). Respondent has also filed with this court a partial transcript of child custody proceedings commenced by respondent in an Oklahoma district court. The partial transcript covers a motion hearing that occurred *after* the New Mexico court had entered its modification order. Respondent would have this court rely on evidence presented in the subsequent Oklahoma proceeding to reverse the New Mexico district court. This we cannot do. Our review is limited to matters that are of record in the cause before us. *See, e.g., Strickland v. Roosevelt County Rural Electric Cooperative,* 99 N.M. 335, 657 P.2d 1184 (Ct.App.1982), *cert. denied,* 463 U.S. 1209, 103 S.Ct. 3540, 77 L.Ed.2d 1390 (1983). A determination of jurisdiction under Section 40–10–4 involves a mixed question of law and fact, and an evidentiary record is necessary for a review of the factual claims in this appeal.

Even if respondent's belated factual claims could be considered, we agree with other courts that the UCCJA does not call for a balancing of contacts or evidence with jurisdiction going to the state with the greater volume of evidence or contacts. *See, e.g., Potter v. Potter,* 104 Misc.2d 930, 430 N.Y.S.2d 201 (Fam.Ct.1980). Rather, under the facts of this case it was enough that there remained sufficient significant contacts with New Mexico to preserve the continuing jurisdiction of the original forum. *See In re Marriage of Cope,* 49 Or.App. 301, 619 P.2d 883 (1980), *aff'd on other grounds,* 291 Or. 412, 631 P.2d 781 (1981).

The mother's final contention under this point is directed at the court's finding that the father is a permanent resident of New Mexico. She contests the finding by claiming that he lived in Window Rock, Arizona for several months in 1986. Assuming this fact was established at trial, we disagree that it is sufficient to defeat the trial court's finding of permanent residency. "Domicile" within the state does not require continuous physical presence, but rather, physical presence in the state at some time in the past and concurrent intention to make the state one's home. *Hagan v. Hardwick,* 95 N.M. 517, 624 P.2d 26 (1981). The trial court found that the father intends to remain a permanent resident of New Mexico, and the mother does not contest this finding. Under these circumstances, the trial court's finding as to permanent residency is supported by substantial evidence. *See id.*

FORUM NON CONVENIENS.

The mother also claims the trial court should have declined jurisdiction under a proper application of the doctrine of forum non conveniens. *See* § 40–10–8. This section provides that a court *may* decline to exercise jurisdiction if it finds that a court of another state is a more appropriate forum. The court's determination is discretionary, *see* Crouch, *Interstate Custody Litigation,* supra, at 19, and will not be reversed unless the decision is contrary to the reason, logic, evidence, and equities in the case. *Hester v. Hester,* 100 N.M. 773, 676 P.2d 1338 (Ct.App.1984).

Here, the trial judge who refused to decline jurisdiction was the same trial judge who had heard and granted the original divorce and who had heard and ruled on the various ensuing disputes concerning custody and visitation. As a result, the trial judge was and had been familiar with the entire matter since the parties' divorce four years earlier. In making its determination, the court considered that no custody proceeding had been commenced in Oklahoma at the time father's petition was filed in New Mexico. The trial court also properly considered that the mother had previously invoked the jurisdiction of the New Mexico court even after moving to Oklahoma. On these facts we are persuaded that the court properly exercised its discretion under Section 40–10–8. *See*

Breneman v. Breneman, 92 Mich.App. 336, 284 N.W.2d 804 (1979); *see generally* Annot., 96 A.L.R.3d 968 (1979).

CONCLUSION.

We conclude that the trial court had jurisdiction and properly exercised that jurisdiction. There being no other claim that the order modifying custody is not proper, it should be affirmed.

IT IS SO ORDERED.

BIVENS and APODACA, JJ., concur.

734 P.2d 811

Johnny Wayne JOY,
Petitioner-Appellant,

v.

Annette Christine JOY,
Respondent-Appellee.

No. 8658.

Court of Appeals of New Mexico.

Feb. 26, 1987.

Richard L. Kraft, Sanders, Bruin, Coll & Worley, P.A., Roswell, for petitioner-appellant.

Kevin J. Hanratty, Klipstine & Hanratty, Artesia, for respondent-appellee.

OPINION

DONNELLY, Chief Judge.

Husband appeals from an order entered pursuant to NMSA 1978, Civ.P.Rule 60(b) (Repl.Pamp.1980) (recompiled as SCRA 1986, Rule 1–060(B)), vacating a decree of divorce approximately six months after it was entered and dismissing the action without prejudice. The central issue raised on appeal is whether the evidence adduced at the motion to vacate the decree, indicating that the parties continued to live together and share the same residence for approximately one week after the filing of a petition for dissolution of marriage, deprived the court of jurisdiction to enter a decree dissolving the marriage of the parties. Reversed and remanded.

Husband filed a petition for dissolution of marriage on November 14, 1984, in the Chaves County District Court. The verified petition alleged, among other things, that "a state of incompatibility has arisen between [the parties] making it impossible for them to live together as husband and wife." Wife did not file an answer to the petition for divorce nor did she deny husband's allegations of incompatibility. Thereafter, wife, who was unrepresented by counsel, signed a stipulated marital settlement agreement providing for division of community property, debts, and custody of the two minor children of the parties. Wife agreed in the marital settlement that a final decree of divorce could be entered "on the grounds of incompatibility." Wife also filed a waiver of notice of hearing as to any further proceedings in the cause. The trial court approved the marital settlement agreement and entered a final decree dissolving the marriage on November 29, 1984, based upon the incompatibility of the parties.

On December 26, 1984, wife, through newly employed counsel, filed a motion under Civ.P.Rule 60(b), seeking to modify the decree and to set aside the property settlement agreement based upon the existence of alleged mutual mistake, unawareness of the parties of the nature and extent of community assets and other equitable grounds. At the hearing on the above motion, wife's counsel also argued that the trial court lacked jurisdiction because the parties continued living together after the filing of the petition for dissolution of marriage.

Wife testified at the hearing on the motion that she had continued to live with husband, sharing the same residence and bed, for approximately one week after the petition for divorce had been filed. Wife further testified that she had no knowledge

that the petition for divorce had been filed until husband came home and informed her that he had been to his lawyer's office and had filed the petition. Husband was questioned as to whether he had continued to reside with wife at the time the petition for divorce was filed and he invoked his fifth amendment privilege.

Thereafter, on May 24, 1985, the trial court entered an order vacating the prior judgment and dismissing the cause based upon the following finding:

1. The original petition in this cause was filed on November 14, 1984. At that time the parties were not separated; they continued to live together in cohabitation as husband and wife for at least one week following filing of the petition.

2. By reason of the foregoing, the Court lacked jurisdiction of the cause and the judgment should be set aside.

On June 4, 1985, husband filed a motion to set aside the order vacating the judgment and dismissing the case. The trial court denied the motion on June 12, 1985.

PROPRIETY OF DISMISSAL

Husband argues that the trial court erroneously concluded that continued residence by the parties in the same home deprived the court of jurisdiction to grant dissolution of the marriage. Husband contends he satisfied all jurisdictional requisites under NMSA 1978, Sections 40–4–4 and –5 (Repl. 1986), regarding domicile and residence for granting the divorce and that no other statute or requirement deprived the trial court of jurisdiction. Husband also asserts that he presented sufficient evidence to establish that a state of incompatibility existed and continues to exist between the parties. He also argues that the fact that the parties temporarily continued to reside together after the filing of the petition for divorce only went to the weight of the evidence concerning the issue of incompatibility and not to the jurisdiction of the court. *See Buckner v. Buckner,* 95 N.M. 337, 622 P.2d 242 (1981); NMSA 1978, § 40–4–2 (Repl.1986). Husband also contends that once a finding is made that the parties are incompatible, a divorce must be entered. *See Buckner; Garner v. Garner,* 85 N.M. 324, 512 P.2d 84 (1973).

The legislature's adoption of incompatibility as a ground for dissolution of marriage carried with it the correlative effect of abolishing the traditional or common-law defenses to divorce. *See Garner.* The essential prerequisites to establish a party's right to a dissolution of marriage on the ground of incompatibility are proof of domicile, residence and the existence of facts showing that the parties are irreconcilably incompatible. §§ 40–4–2, –5. *See also State ex rel. DuBois v. Ryan,* 85 N.M. 575, 514 P.2d 851 (1973); *Garner; Poteet v. Poteet,* 45 N.M. 214, 114 P.2d 91 (1941). *Cf. Heckathorn v. Heckathorn,* 77 N.M. 369, 423 P.2d 410 (1967).

New Mexico recognizes four separate grounds for divorce, including incompatibility. NMSA 1978, § 40–4–1(A) (Repl. 1986). Where petitioner seeks a dissolution of marriage on a ground other than incompatibility, cohabitation or continued residence together by the parties, following the filing of a petition for divorce, gives rise to the affirmative defense of condonation. Condonation is forgiveness, either express or implied, of antecedent matrimonial misconduct. *Richardson v. Richardson,* 124 Colo. 240, 236 P.2d 121 (1951) (en banc). Whether or not condonation exists, requires a factual determination based upon the evidence before the court. *Zildjian v. Zildjian,* 8 Mass.App. 1, 391 N.E.2d 697 (1979). Condonation, however, is a "fault defense" which no longer exists under our no-fault statute. *Peltola v. Peltola,* 79 Mich.App. 709, 263 N.W.2d 25 (1977). *See also In re Marriage of Franks,* 189 Colo. 499, 542 P.2d 845 (1975) (en banc); *Ryan v. Ryan,* 277 So.2d 266 (Fla.1973). *Cf. Chester v. Chester,* 76 Cal.App.2d 265, 172 P.2d 924 (1946).

Husband denies that the parties' sharing of the home and sleeping in the same bed for a week amounted to cohabitation as man and wife and challenges the sufficiency of the evidence to support this finding of the trial court. Husband further argues that the fact that the parties may have continued to temporarily reside together,

absent a showing of reconciliation, does not constitute justification to deny dissolution of the marriage where the basis for the divorce is premised upon the incompatibility of the parties and both parties agree to the fact of incompatibility. *See Smith v. Smith,* 322 So.2d 580 (Fla.App.1975) (court required clear showing of intent to reconcile to justify denying dissolution under Florida's no-fault dissolution of marriage laws).

We agree with that portion of husband's argument that evidence of cohabitation or continued residence together by the parties after filing a petition for divorce based on incompatibility does not automatically deprive the court of jurisdiction or mandate dismissal of the divorce proceedings as a matter of law. *Cf. McGaughy v. McGaughy,* 410 Ill. 596, 102 N.E.2d 806 (1951); *Claude v. Claude,* 180 Or. 62, 174 P.2d 179 (1946). Continued cohabitation following commencement of a divorce action may, however, indicate that the marriage is not, after all, irretrievably broken. As a general rule, it is not the policy of the law to separate parties who have not separated themselves. *See Berman v. Berman,* 277 A.D. 560, 101 N.Y. S.2d 206 (1950). The actions of the parties may serve to indicate that the marriage is still viable, and a party alleging incompatibility as a basis for dissolution of marriage must present evidence to establish the fact of incompatibility.

In the present case, however, wife did not file an answer to husband's complaint nor contest husband's allegation that the parties were in fact incompatible. Wife expressly agreed in the marital settlement agreement "that a final decree may be entered granting the dissolution of marriage ... on the grounds of incompatibility." Additionally, wife's written motion under Rule 60(b) for modification of the decree and property settlement did not seek nullification of the decree of divorce. Generally, where a party does not controvert a fact in a responsive pleading, the fact is not in issue. *Carew v. Carew,* 175 Cal.App.2d 706, 346 P.2d 845 (1959); *Makovsky v. Makovsky,* 158 Cal.App.2d 738, 323 P.2d 562 (1958). *Cf. Romero v. S.S. Kresge Co.,* 95 N.M. 484, 623 P.2d 998 (Ct.App.1981). Here, both husband and wife agreed concerning the fact of incompatibility. In New Mexico, where jurisdiction, residence and the fact of incompatibility is shown to exist, the court has no discretionary right to deny the divorce. *Buckner.* Public policy favors the finality of judgments and a decree of divorce once entered should not be vacated or set aside, except upon a showing of an absence of jurisdiction, or good cause supported by facts found by the court justifying the relief. *See Harder v. Harder,* 49 Or.App. 582, 619 P.2d 1367 (1980); *see also* Rule 60(b).

The trial court's order vacating the decree of divorce and dismissing the action was erroneously premised upon the belief that the district court lacked jurisdiction. The cause is reversed and remanded with directions to reinstate the decree of divorce and to address wife's Rule 60(b) motion for modification of the decree and property settlement agreement on the merits.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

734 P.2d 1258

Archie VALDEZ, Plaintiff-Appellant,

v.

CILLESSEN & SON, INC., a New Mexico corporation, Defendant-Appellee.

No. 16617.

Supreme Court of New Mexico.

Feb. 25, 1987.

Rehearing Denied April 10, 1987.

Simon and Oppenheimer, Morton Simon, Melinda J. Silver, Santa Fe, for plaintiff-appellant.

Donald D. Montoya, Montoya, Murphy, Kauffman & Garcia, Santa Fe, for defendant-appellee.

OPINION

WALTERS, Justice.

This case was certified to us on interlocutory appeal to determine the propriety of summary judgments granted in favor of defendant on certain of plaintiff's claimed causes of action, and the denial of summary judgment on a remaining count. Both parties appeal. We affirm in part and reverse in part.

Facts

Defendant Cillessen and Son, Inc. contracted with the Indian Housing Authority to construct housing at Picuris Pueblo, Cillessen subcontracting the lathing and plastering work to All State Lathing and Plastering. All State hired plaintiff Archie Valdez as a lather and plasterer, and on May 2, 1984, a lean-to scaffolding, which was owned and had been erected by All State, collapsed beneath Valdez and he was injured. All State did not carry workmen's compensation insurance. After All State had filed a petition in bankruptcy, Valdez amended his complaint against Cillessen and other defendants to name only Cillessen as defendant, and alleged the following six counts:

Count I: Alleges that Cillessen, as the general contractor, knew or should have known of dangerous construction of the scaffolding, and failed to warn plaintiff or to take any other steps to prevent exposure to danger and is, therefore, liable in compensatory and punitive damages.

Count II: Alleges that Cillessen was negligent per se, predicating the claim on Cillessen's alleged violation of state and federal regulations concerning the type of scaffolding that should have been used, and claims compensatory and punitive damages for Cillessen's gross negligence.

Count III: Alleging that Cillessen retained the right of control over All State, plaintiff claims All State was Cillessen's agent and, therefore, is vicariously liable in compensatory and punitive damages.

Count IV: Asserts that Cillessen negligently hired All State, and is liable for compensatory and punitive damages.

Count V: Alleges that Valdez was a third party beneficiary of the contract between Cillessen and Indian Housing Authority requiring workmen's compensation coverage, and Cillessen breached the contract.

Count VI: Alleges that Valdez was a third party beneficiary of the contract between Cillessen and All State requiring workmen's compensation coverage, and Cillessen breached the contract.

The trial court granted defendant's motion for summary judgment on Counts II–VI and on the issue of punitive damages in Count I. These judgments were certified for interlocutory appeal. Accordingly, Valdez appeals the summary judgments granted, and Cillessen cross-appeals denial of the summary judgment on the remainder of Count I.

I.

With respect to Count II, Valdez contends that genuine issues of fact and law exist regarding violations of OSHA regulations. He argues that the alleged violations constitute negligence per se; therefore, it was error for the trial court to grant summary judgment on Count II of the complaint.

Citing *Archibeque v. Homrich,* 88 N.M. 527, 543 P.2d 820 (1975), Valdez says that negligence per se is "easily applicable" to this case, because all of the elements are present. In *Archibeque* we stated the test for finding negligence per se:

> (1) there must be a statute which prescribes certain actions or defines a standard of conduct, either explicity or implicitly, (2) the defendant must violate the statute, (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the legislature through the statute sought to prevent.

Id. at 532, 543 P.2d at 825.

Cillessen, claiming it has never conceded there was a violation of the New Mexico Occupational Health and Safety Act, NMSA 1978, Sections 50–9–1 to –25 (Orig. Pamp. and Cum.Supp.1985), or The Federal Occupational Safety and Health Act (OSHA), 29 U.S.C. Sections 651 to 678 (1982), argues that if there were OSHA violations, it was All State who violated them, not Cillessen. Cillessen contends that violations of regulations promulgated under federal authority may not be used to create civil liability, and that the New Mexico codification of OSHA does not allow the creation of civil liability based upon our act. *See* NMSA 1978, § 50–9–21.

The federal regulations and the New Mexico regulations contain substantially the same language. Section 50–9–21 of the New Mexico Act reads:

> Nothing in the Occupational Health and Safety Act shall be construed or held to * * * enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases, or death of employees arising out of or in the course of employment. (Citations omitted.)

In similar language, 29 U.S.C. Section 653(b)(4) of the Federal Act provides:

> Nothing in this chapter shall be construed to * * * enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

In support of its argument, Cillessen relies on *Gutierrez v. Kent Nowlin Construction Co.,* 99 N.M. 394, 658 P.2d 1121 (Ct.App.1981), *rev'd on other grounds,* 99 N.M. 389, 658 P.2d 1116 (1982) (jury instruction permissible which instructs the jury that it may consider a violation of federal OSHA standards as evidence of negligence). "[T]he instruction did not, by any stretch of the imagination, tell the jury that violation of the standards was in and of itself negligence." *Id.* at 402, 658 P.2d at 1129); *Casillas v. S.W.I.G.,* 96 N.M. 84, 628 P.2d 329 (Ct.App.), *cert. denied,* 96 N.M. 116, 628 P.2d 686 (1981) (violation of the New Mexico Occupational Health and Safety Act cannot serve as the basis of an increase in benefits under the Workmen's Compensation Act); *Arvas v. Feather's Jewelers,* 92 N.M. 89, 582 P.2d 1302 (Ct. App.1978) (in dicta, the court noted that there was no legislative intent to allow civil actions based on violations of New Mexico OSHA standards).

Valdez distinguishes *Arvas v. Feather's Jewelers* on the basis that plaintiff there claimed negligence per se on "the general language in OSHA" whereas Valdez has "presented specific OSHA violations."

The courts are not in agreement on the question whether OSHA violations constitute negligence per se. *Compare Kelley v. Howard S. Wright Construction Co.*, 90 Wash.2d 323, 582 P.2d 500 (1978); *with Wendland v. Ridgefield Construction Services, Inc.*, 184 Conn. 173, 439 A.2d 954 (1981). We believe the better reasoned view to be, however, that OSHA violations do not constitute a basis for assigning negligence as a matter of law.

In *Wendland*, the Connecticut Supreme Court declared that a negligence per se theory of liability "operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles * * *." *Id.* at 178, 439 A.2d at 956. An instruction on negligence per se would affect the standard of care and thus affect "common law rights, duties and liabilities of employers * * *." *Id.* at 178–79, 439 A.2d at 956–57. Although the *Wendland* court refused to allow a claim of negligence per se to rest upon the alleged violation of OSHA regulations, it did hold that evidence of violation of OSHA regulations could be considered in determining the required standard of care.

To negate the defendant's general standard of care and impose negligence as a matter of law in a case such as this, *cf. Silva v. City of Albuquerque*, 94 N.M. 332, 610 P.2d 219 (Ct.App.1980), based upon an OSHA violation, would "affect ... the common law * * * duties * * * or liabilities of employers" and would be contrary to the clear intent of Congress. *See* 29 U.S.C. § 653(b)(4) (1982).

Even though OSHA violations would be admissible against Cillessen as evidence on the question of negligence under both the federal and state Acts, summary judgment on the theory pleaded in Count II was not improper. *Wendland v. Ridgefield Construction Services, Inc.*

II.

The allegations of Count I and Count III effectively state the same claim. The trial court, however, denied summary judgment on Count I and granted summary judgment on Count III.

Valdez's theory under Count I was that Cillessen, having general contractor control over the project, should have been aware that the lean-to scaffolding was in violation of state and federal OSHA regulations, and that Cillessen should have warned Valdez of the hazard. In Count III, Valdez alleged that Cillessen's right of control over All State made All State Cillessen's agent, implying that negligence of All State was therefore negligence of Cillessen.

With respect to Count I, Valdez notes the general rule that a general contractor is not liable for an injury sustained by a subcontractor's employee, *Tipton v. Texaco*, 103 N.M. 689, 712 P.2d 1351 (1985), but asserts exceptions to the rule upon which to claim Cillessen's liability. *See Fresquez v. Southwestern Industrial Contractors and Riggers, Inc.*, 89 N.M. 525, 554 P.2d 986 (Ct.App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976). Two of the exceptions are found in the Restatement (Second) of Torts Sections 414 and 424 (1965).

Section 414 provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Section 424 provides:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

In Count III an agency relationship was raised by the allegation that Cillessen had retained the right to control the method and manner of All State's work, thus becoming liable for All State's negligence.

In both Count I and Count III the critical issue is the degree of control alleged to have been maintained by Cillessen. Valdez contends that there is an issue of material fact regarding that control; in opposition, Cillessen maintains that there is no such genuine issue of fact.

Although it is true that, generally, the employer of an independent contractor is not liable for injuries to an employee of the independent contractor, this does not mean that he is absolutely shielded from liability. *See Moulder v. Brown,* 98 N.M. 71, 644 P.2d 1060 (Ct.App.1982). If he has the right to, and does, retain control of the work performed by the independent contractor, he owes the duty of care to the independent contractor's employee which, if breached, can result in liability to the employee. *Moulder v. Brown.* That theory of liability is expressed in Restatement (Second) of Torts Section 414 (1965). Comment (b) of that section notes:

> The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. *So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition,* and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so. (Emphasis added.)

In some cases, the trial court can decide as a matter of law whether the employer of an independent contractor owes a duty to an employee of an independent contractor. *See Moulder v. Brown.* "But where the facts are disputed ... it is not the function of the trial court to weigh the evidence in a summary judgment proceeding." *Id.* at 73, 644 P.2d at 1062. On a motion for summary judgment the opposing party is given the benefit of all reasonable doubt when determining whether a genuine issue of material fact exists, *Poorbaugh v. Mullen,* 96 N.M. 598, 633 P.2d 706 (Ct.App.1981), and the motion cannot be granted if such a factual issue is in dispute. *Paperchase Partnership v. Bruckner,* 102 N.M. 221, 693 P.2d 587 (1985).

It is undisputed that All State purchased, owned, and erected the scaffolding which caused the injury to Valdez. Cillessen argues that those facts alone warrant summary judgment on Count I. Cillessen urges us to apply the rule of *Fresquez v. Southwestern Industrial Contractors and Riggers, Inc.,* wherein the court held that liability would not be imposed on the general contractor when the injury to a subcontractor's employee occurred from faulty equipment owned and operated by the subcontractor performing inherently dangerous work. At this point, *Fresquez* is not applicable. We are concerned first with Cillessen's *right to control* the work of All State. If there was such control, Cillessen could be held liable if he knew or should have known of the unsafe condition created by All State. *Cf. Tipton v. Texaco. See also* Restatement (Second) of Torts § 414 comment b (1965).

Evidence in the record regarding the control of Cillessen over the work of All State shows that Cillessen agreed to be ultimately responsible for any infractions by All State of labor standards provisions contained in the contract between Cillessen and Indian Housing Authority. Cillessen issued detailed instructions to All State

concerning its work, including directions regarding the required temperature to apply stucco, the manner in which scaffolding should be erected so as not to interfere with other work, the type of cement to be used, the type of lime to be used, how to apply building paper and mesh, how to mix cement and sand for proper application of the stucco, how the stucco should be applied, and what should be done in the event the stucco needed to be repaired.

There was also a showing that Cillessen, through its superintendent at the job site, fired the employees of subcontractors, instructed employees on how, when, and where to do their jobs, and assigned employees to tasks other than those which they had been hired to do.

Viewing this evidence in the light most favorable to Valdez, it appears that there are genuine issues of fact regarding the extent of control by Cillessen. We are satisfied that the trial court properly denied summary judgment on Count I.

Having already noted that the critical issue under both Count I and Count III is the retention of control by Cillessen over All State's work, and that Counts I and III depend to a considerable extent upon the same evidence, we necessarily conclude that the trial court improperly granted summary judgment on Count III. Accordingly, summary judgment on Count III is reversed and is remanded for further proceedings therein.

III.

Under Count IV, referring again to Restatement (Second) of Torts, Valdez argues that Cillessen negligently hired All State. Section 411 of the Restatement reads:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

We said in *New Mexico Electric Service Co. v. Montanez,* 89 N.M. 278, 551 P.2d 634 (1976), that an employee of an independent contractor is not a third party under Restatement (Second) of Torts, Sections 413, 416 and 427 (1965). Those sections describe the duty of a general contractor to third parties when the work is inherently dangerous. In *Montanez,* we quoted with approval the following from *King v. Shelby Rural Electric Cooperative Corp.,* 502 S.W.2d 659, 663 (Ky.1973), *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 235 (1974):

> There does not seem to be any valid reason why an employer of an independent contractor for the performance of specific work should be subjected to a greater liability than he would have if he had utilized his own employees on that particular work.

89 N.M. at 282, 551 P.2d at 638.

The general contractor is not an insurer of the employees of an independent contractor. *See Tipton v. Texaco.* Nor should he be penalized in a case, such as the one here, for the independent contractor's failure to obtain workmen's compensation insurance. *New Mexico Electric Service Co. v. Montanez.*

As a matter of law, then, Valdez was not a third party to whom Cillessen might become liable for failure to hire a competent and careful subcontractor, unless it should be found under Count III that All State was only an agent, not a subcontractor of Cillessen's. In that event, Valdez might be able to recover under Cillessen's workmen's compensation coverage, if such coverage exists, but he still could not prevail on the theory pleaded in this count. *Id.* Consequently, we affirm summary judgment on Count IV.

IV.

In Counts V and VI, Valdez claims he is a third party beneficiary under the Cilles-

sen-Indian Housing Authority contract and the Cillessen-All State contract, citing *Hoge v. Farmers Market and Supply Co.*, 61 N.M. 138, 296 P.2d 476 (1956). Additionally, he maintains that the contracts are ambiguous regarding the parties' intent, and parole evidence should be allowed to clarify the intention of the parties. *See id.*

Cillessen concedes that Valdez may be an incidental beneficiary, but disputes that he is a third party beneficiary. Cillessen relies on *McKinney v. Davis*, 84 N.M. 352, 503 P.2d 332 (1972), as support for his argument that nothing in the documents indicates that the motivating cause of the contracts was to benefit Valdez.

The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries. *See McKinney v. Davis; see also Hoge v. Farmers Market and Supply Co.* Such intent must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary. *See Hoge v. Farmers Market & Supply Co.*

Section 24 of the contract between Indian Housing Authority and Cillessen provides:

> *Sec. 24. Insurance*
>
> (a) Before commencing work, the Contractor and each of his subcontractors shall furnish the IHA with evidence showing that the following insurance is in force and will cover all operations under the Contract:
>
> (1) Workmen's Compensation Insurance in accordance with applicable laws.

In the Cillessen-All State contract, the following appears:

> 12. The Subcontractor shall carry and pay for workmen's compensation and public liability insurance, with satisfactory limits and in acceptable companies.... The Subcontractor shall furnish the Contractor with certificates showing names of the carriers, numbers of the policies and expiration dates.

Although Cillessen points to *McKinney v. Davis* as the "singularly relevant" New Mexico case on this issue, and contends that it is controlling, we do not agree. In *McKinney*, the contract explicitly provided that the required insurance was to protect plaintiff's employer, the defendant in that case. Clearly, there was no ambiguity with respect to the intended beneficiary under that term in the contract. In the present case nothing in either of the Cillessen contracts indicates which workmen were to be protected by the workmen's compensation provisions of those contracts. The intentions of the parties to both contracts are unclear; therefore, other evidence may be considered to clarify the ambiguities and determine what the parties intended. *Schaefer v. Hinkle*, 93 N.M. 129, 597 P.2d 314 (1979). When construction of an agreement depends upon extrinsic evidence, the terms of the agreement become a question of fact for the trier of fact to decide. *Paperchase Partnership v. Bruckner.*

If one of the purposes of Section 24 of the Indian Housing Authority-Cillessen contract was to protect the workers of subcontractors in case of injury on the job, a genuine issue of material fact exists. The same would hold true with respect to the ambiguity in the Cillessen-All State contract. Ergo, the grant of summary judgment on Counts V and VI was improper. *See Paperchase Partnership v. Bruckner.* Those judgments are therefore reversed and remanded for further proceedings.

V.

Lastly, on the propriety of awarding summary judgment against plaintiff for his claim of punitive damages under Count I, Valdez argues that All State's acts and omissions, as Cillessen's agent, rose to the level of gross negligence, thus presenting a factual issue to be decided after trial and not on a motion for summary judgment.

We agree that recovery for punitive damages may be based upon gross

negligence, *Ruiz v. Southern Pacific Transportation Co.*, 97 N.M. 194, 638 P.2d 406 (Ct.App.), *cert. quashed*, 97 N.M. 242, 638 P.2d 1087 (1981), and that gross negligence may sometimes be shown by violation of a statute, depending on the circumstances, *see Hernandez v. Brooks*, 95 N.M. 670, 625 P.2d 1187 (Ct.App.), *cert. quashed*, 94 N.M. 675, 615 P.2d 992 (1980). That is a fact question to be resolved by the jury. *Id.*

Valdez, as the opposing party, is not required upon motion for summary judgment to prove his case. The burden is on the moving party to show, by affidavit or other evidence, that no material issue of fact remains on the matter to be decided. *Security Bank & Trust v. Parmer*, 97 N.M. 108, 637 P.2d 539 (1981). We have said that fact issues remain concerning the degree of Cillessen's control. Depending upon the jury's determination of that issue, the decision on whether or not Cillessen could be found to be responsible for wilful, wanton conduct or utter disregard of plaintiff's safety must be held in abeyance. If, upon trial of the issues remaining in this case, it appears that insufficient evidence has been adduced to show the necessary control that would permit the jury to reach the questions of such indifference or disregard on defendant's part, or any obligation to provide a safe place or to warn of a dangerous condition, the trial court may then dismiss the claim for punitive damages. *See Ruiz v. Southern Pacific Transportation Co.*

In summary, the trial court's grant of summary judgment on punitive damages in Count I was error and is reversed. The trial court's grant of summary judgment on Counts II and IV is affirmed and its grant of summary judgment on Counts III, V, and VI is reversed. Counts I, III, V and VI are remanded for reinstatement and trial. IT IS SO ORDERED.

SCARBOROUGH, C.J., SOSA, Senior Justice and RANSOM, J., concur.

STOWERS, J. specially concurs in part and dissents in part.

STOWERS, Justice, specially concurring in part and dissenting in part.

I concur with the portions of the majority's opinion holding that summary judgments were inappropriate on Counts I, III and V and with the majority's decision to affirm the trial court's summary judgments on Counts II and IV. However, I believe that the trial court properly could have concluded from the language of the Cillessen—All State contract alone that Cillessen made no promise that Valdez could enforce by bringing an action in contract against Cillessen. I therefore believe that the trial court did not err in granting summary judgment in favor of Cillessen on Count VI, and dissent from the majority's disposition of that count.

I agree with the majority that both the Cillessen—All State and Cillessen—Indian Housing Authority contracts are distinguishable from the contract at issue in *McKinney v. Davis*, 84 N.M. 352, 503 P.2d 332 (1972), because they do not explicitly describe the intended beneficiaries of their provisions regarding workmen's compensation insurance. Under these circumstances, I agree that the third party may show by extrinsic evidence that the parties to the contract intended those provisions for his benefit. *See Permian Basin Investment Corp. v. Lloyd*, 63 N.M. 1, 7, 312 P.2d 533, 537 (1957); *see also Stotlar v. Hester*, 92 N.M. 26, 30, 582 P.2d 403, 407 (Ct.App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978). However, the parties' intention to benefit Valdez was not the issue determinative of Cillessen's motion for summary judgment on Count VI.

The trial court's grant of summary judgment on Count VI was proper, I believe, because it is clear from the language of the contract itself that, although he may have had a right of action against All State, Valdez had no right of action against Cillessen as a third party beneficiary of the Cillessen—All State contract. This Court long has held that an action lies against the promisor by the third party to enforce the promise made for his benefit. *See John-*

son v. Armstrong & Armstrong, 41 N.M. 206, 210, 66 P.2d 992, 994 (1937); *see also* Restatement (Second) of Contracts §§ 304, 307 (1979); 4 A. Corbin, *Corbin on Contracts* §§ 773, 775, 782 (1951); 2 S. Williston, *A Treatise on the Law of Contracts* §§ 347, 356–359, 364A, 368 (3d ed. 1959). This right of action is premised upon a recognition that the third party who in fact suffers from the promisor's breach of his contractual obligations has greater incentive to enforce the contract and to carry out the intentions of the promisee than does the promisee. *See* 4 A Corbin, *supra,* § 775, at 8; 2 S. Williston, *supra,* § 357, at 843–44.

In paragraph 12 of the Cillessen—All State contract, the subcontractor, All State, promised to carry and pay for workmen's compensation insurance and to furnish the contractor, Cillessen, with evidence of its insurance policies. Nowhere in the contract, however, did Cillessen promise to compel All State to perform its promises regarding workmen's compensation insurance. Whether an agreement is ambiguous is a question of law for the trial court, as is the construction of an unambiguous contract. *See Boatwright v. Howard,* 102 N.M. 262, 264, 694 P.2d 518, 520 (1985); *see also McKinney v. Davis,* 84 N.M. at 353–54, 503 P.2d at 333–34. The trial court here properly could have concluded that the contract was unambiguous, and properly could have found in its language no promise by Cillessen to act for the benefit of Valdez.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Westgate Families v. County Clerk,* 100 N.M. 146, 148, 667 P.2d 453, 455 (1983); NMSA 1978, Civ. P.R. 56 (Repl.Pamp.1980). Because the construction of the Cillessen—All State contract presented a question of law, not fact, and because Valdez had no right of action against Cillessen to enforce promises made to, not by, Cillessen, I believe that the trial court did not err in granting a summary judgment in favor of Cillessen on Count VI.

On the other hand, in paragraph 24 of the Cillessen—Indian Housing Authority contract, the contractor, Cillessen, promised to furnish the Indian Housing Authority with evidence that workmen's compensation insurance was in force and would cover all operations under that contract. An action may lie against the promisor, Cillessen, to enforce this promise. Because the construction of this ambiguous contractual promise made by Cillessen and the intention of the parties to benefit Valdez raised material questions of fact, I agree with the majority that the trial court erred in granting a summary judgment in favor of Cillessen on Count V.

For the foregoing reasons, I believe that the majority correctly disposed of Counts I through V but that the trial court's ruling on Count VI should be affirmed. Therefore, I respectfully dissent in part.

734 P.2d 1266

BANQUEST/FIRST NATIONAL BANK OF SANTA FE, a national banking corporation, Plaintiff-Appellee,

v.

LMT, INC., Ted C. Luna, and Fern Kimball Luna, et al., Defendants-Appellants.

No. 16475.

Supreme Court of New Mexico.

March 18, 1987.

Rehearing Denied April 9, 1987.

Popejoy & Leach, Thomas L. Popejoy, Albuquerque, for defendants-appellants.

White, Koch, Kelly & McCarthy, John F. McCarthy, Larry White, Santa Fe, for plaintiff-appellee.

Johnson & Lanphere, Robin Dozier Otten, Albuquerque, for defendant-appellant Albuquerque Federal Sav. & Loan.

OPINION

SCARBOROUGH, Chief Justice.

Banquest/First National Bank of Santa Fe (bank) brought suit against LMT, Inc., Ted C. Luna, and Fern Kimball Luna (Lunas) to recover judgment on a promissory note and personal guarantees and to foreclose a mortgage. Lunas answered and counterclaimed on grounds of fraud, fraud in the inducement, fraudulent and negligent misrepresentation, and other claims. The trial court granted the bank summary judgment on the note and personal guarantees, ordered foreclosure, and entered several other orders relating to costs and attorney's fees, but reserved ruling on the counterclaim. We reverse.

In 1979, Ted Luna, a Santa Fe architect, began work to build an eleven unit solar condominium project in Santa Fe. In seeking permanent financing for the project, Luna contacted several Santa Fe financial institutions. He also undertook to negotiate a construction contract with two Santa Fe contractors, neither of whom proved satisfactory. Luna contacted Gene Jones, a lending officer at the bank, and was referred to Larry Eastridge, a local contractor engaged in home construction. Luna asked Eastridge for credit references and was referred to the bank where Luna spoke to loan officer Charles Gerrell. Gerrell told Luna that Eastridge was financially stable and that the bank would finance the project.

On June 1, 1981, Lunas borrowed $400,000 from the bank. Additional funds were advanced to Lunas in the sum of $140,000. The bank required Lunas to mortgage their personal residence to obtain the additional money. Much of this money was paid to Eastridge.

Eastridge eventually abandoned the project and declared bankruptcy. Negotiations between the bank and Lunas followed in an attempt to save the project. Lunas fell behind on payments. The bank filed suit on the note and personal guarantees, and to foreclose the mortgage. Lunas then renegotiated their loan with the bank, signing a new note for $687,000, and the bank dismissed the lawsuit.

In 1983, Lunas began to investigate the relationship between the bank and Eastridge. They learned that the bank had made loans to Eastridge; that the bank had recommended him for other projects; that he had built homes for bank officers; that he had declared bankruptcy before; and that his credit was questionable. This information was known to the bank but was

not disclosed by the bank to Lunas prior to their loan transactions. In fact, much of this information was not acquired by Lunas until January 1984, when they obtained the loan file from the bank.

Lunas again fell behind in payments. They initiated further negotiations with the bank. The negotiations proved fruitless and the bank again filed suit against the Lunas on the new note and mortgage. After Lunas answered and counterclaimed for fraud, fraud in the inducement, misrepresentation, and emotional distress, the bank moved for summary judgment.

The trial court granted the bank's motion for summary judgment on the note and mortgage, but reserved ruling on the counterclaim. This appeal followed. Lunas seek reversal of the partial summary judgment and decree of foreclosure, as well as reversal of several orders relating to costs and collection activity.

Lunas claim they were induced to borrow from the bank because the bank, through its officers, in effect sponsored Eastridge and misrepresented Eastridge's financial condition. Lunas advance this position as a defense to the suit on the note and as a part of their counterclaim against the bank. Lunas also complain about the trial court's entry of an order awarding attorney's fees to the bank for its work on the counterclaim as well as for work in the suit on the note. The bank argues that the trial court, by entering judgment on the note, found as a matter of law that there was no support for Luna's defense to the note. Yet the trial court reserved ruling on the same features of the Luna counterclaim. Lunas argue that there are material controverted facts which preclude the entry of summary judgment. The bank disagrees. Several other conflicting claims remain unresolved. We do not reach the merits of these contentions, but reverse on policy grounds.

It may have been proper for the trial court to grant partial summary judgment in this case, but our analysis suggests that the trial court's decision to do so may have a substantial impact on the Luna counterclaim which remains unresolved. It appears likely that there may be a need for future review of this case if we address the merits of this appeal. We may be required to consider the same issues a second time.

We are not unmindful of a counterclaim which might result in a substantial setoff against the bank's judgment. Questions remain concerning the trial court's award of attorney's fees for work on the counterclaim. What will happen if the trial court, on further consideration of the counterclaim, determines that it is meritorious?

We are not faced here with an appeal from a final order disposing of entirely separate claims. The claims and counterclaims asserted by the parties are intertwined in many respects. As a matter of policy, we wish to avoid "fragmentation in the adjudication of related legal or factual issues." *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 370 (3rd Cir.1975) (Gibbons, J., dissenting); *see also TPO Inc. v. FDIC*, 487 F.2d 131, 134 (3rd Cir.1973).

The proper resolution of these issues rests within the sound discretion of the trial court. In the absence of abuse, the decision of the trial court will not be disturbed. We feel, however, that the trial court abused its discretion in this case by finding that there was no just reason for delay of entry of judgment. *See* NMSA 1978, Civ.P.R. 1-054(C) (Recomp.1986). All the issues in this case should be resolved by the trial court before any judgment becomes final.

Moreover, as a matter of policy, this Court does not favor piecemeal appeals. *Cf. Allis-Chalmers Corp. v. Philadelphia Electric Co.* (referring to the undesirability of piecemeal appeals). We are not inclined to allow this case to be appealed on a piecemeal basis.

The decision of the trial court is reversed and this case is remanded for further proceedings consistent herewith.

IT IS SO ORDERED.

SOSA, Senior Justice, and WALTERS, J., concur.

734 P.2d 1269

GRAIN DEALERS MUTUAL INSURANCE COMPANY, Plaintiff-Appellee,

v.

Gay Lynn REED, Defendant Third-Party Plaintiff-Appellee,

v.

FIRTH INSURANCE AGENCY OF NEW MEXICO, Richard W. Firth and Karen Witt, Third-Party Defendants-Appellants.

No. 16739.

Supreme Court of New Mexico.

April 1, 1987.

Butt, Thornton & Baehr, Louis R. Mande, Albuquerque, for third party defendants-appellants.

McCormick, Forbes, Caraway & Tabor, Michael E. Dargel, Carlsbad, for plaintiff-appellee.

W.T. Martin, Jr., Carlsbad, for defendant third-party plaintiff-appellee.

OPINION

STOWERS, Justice.

We allowed this interlocutory appeal to review the district court's denial of a motion to dismiss the third-party defendants from this declaratory judgment action. The third-party defendants argue that their joinder was improper under SCRA 1986, Rule 1–014 (formerly codified at NMSA 1978, Civ.P.R. 14 (Repl.Pamp.1980)). We agree, and we reverse the district court's order.

Seeking a declaration of its rights and duties under an automobile insurance policy issued by plaintiff Grain Dealers Mutual Insurance Company (Grain Dealers) to defendant and third-party plaintiff Gay Lynn Reed (Reed), Grain Dealers brought this action pursuant to our Declaratory Judgment Act, NMSA 1978, Sections 44–6–1 through –15. Reed had demanded that Grain Dealers provide a defense under the policy to a suit against her stepson arising from an accident that occurred while he was driving Reed's automobile. Grain Dealers, however, alleged in its complaint that it was not obligated to provide coverage or defense because the policy had been cancelled for nonpayment of premiums, with notice to Reed, prior to the date of her stepson's accident.

Some eight months after Reed filed an answer denying the material allegations of

the complaint, she sought and obtained leave of the district court to file the third-party complaint at issue here. In it, Reed, as third-party plaintiff, alleged that third-party defendants Firth Insurance Agency, Richard W. Firth, and Karen Witt (Firth), the agents of Grain Dealers with whom Reed did business, had breached the insurance policy or, alternatively, had negligently failed to procure insurance for Reed. Firth moved to dismiss the third-party complaint. After a hearing, the district court denied that motion and certified its decision for interlocutory appeal to this Court.

The Declaratory Judgment Act provides a remedy that affords relief from uncertainty with respect to rights and other legal relations. NMSA 1978, § 44-6-14. That remedy is to be obtained in accordance with our Rules of Civil Procedure for the District Courts. SCRA 1986, 1-057; *see generally* SCRA 1986, 1-001 to 1-102. Rule 1-014(A) governs third-party practice in declaratory judgment actions, as well as in other civil actions, and provides that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." SCRA 1986, 1-014(A) (formerly codified at NMSA 1978, Civ.P.R. 14(a) (Repl. Pamp.1980)).

Rule 1-014(A) does not authorize a defendant to bring into a lawsuit every party against whom he may have a claim arising from the transaction at issue between the defendant and the plaintiff. *See Guitard v. Gulf Oil Co.*, 100 N.M. 358, 363, 670 P.2d 969, 974 (Ct.App.), *cert. denied sub nom. Harrison Western Corp. v. Gulf Oil Co.*, 100 N.M. 327, 670 P.2d 581 (1983); *Baldonado v. Navajo Freight Lines, Inc.*, 90 N.M. 284, 287, 562 P.2d 1138, 1141 (Ct.App.), *rev'd on other grounds*, 90 N.M. 264, 562 P.2d 497 (1977). *Cf.* 3 J. Moore, *Moore's Federal Practice* ¶¶ 14.04, 14.07[1] (2d ed.1985); 6 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1442, 1446 (1971); 26 *Federal Procedure, L Ed* §§ 59:196, :198, :212 (1984) (discussing Fed.R.Civ.P. 14(a)). Traditionally, the third-party defendant must be secondarily liable to the defendant third-party plaintiff on a theory such as contribution or indemnity, in the event that the defendant is held liable to the plaintiff. *See First Nat'l Bank v. Espinoza*, 95 N.M. 20, 21, 618 P.2d 364, 365 (1980); *see also Downing v. Dillard*, 55 N.M. 267, 268-69, 232 P.2d 140, 141 (1951) (contribution); *Guitard v. Gulf Oil Co.*, 100 N.M. at 362-63, 670 P.2d at 973-74 (indemnity). *Cf.* 3 J. Moore, *supra*, at ¶¶ 14.03, 14.10-14.12; 6 C. Wright & A. Miller, *supra*, at §§ 1446, 1448, 1449; 26 *Federal Procedure L Ed*, *supra*, at §§ 59:197, :210-221 (discussing Fed.R. Civ.P. 14(a)). *But cf. American Fidelity & Casualty Co. v. Greyhound Corp.*, 232 F.2d 89, 92 (5th Cir.1956); *Old Republic Ins. Co. v. Concast, Inc.*, 99 F.R.D. 566, 568 (S.D.N.Y.1983) (exception to traditional rule in declaratory judgment actions, under Fed.R.Civ.P. 14(a)). This Court recently "adjusted" that rule in order to allow third-party complaints against concurrent tortfeasors, whose liability for contribution has been abolished under our comparative negligence system. *See Tipton v. Texaco, Inc.*, 103 N.M. 689, 693, 712 P.2d 1351, 1355 (1985). Our liberal construction of Rule 1-014 in *Tipton* was not intended to abrogate the traditional requirements of the rule, but was designed to prevent sweeping changes in third-party practice by keeping within the rule a category of cases we have long considered appropriate for consolidated adjudication. *See id.*, 103 N.M. at 692, 712 P.2d at 1354; *see also Guitard v. Gulf Oil Co.*, 100 N.M. at 362, 670 P.2d at 973.

Furthermore, Rule 1-014(A) does not authorize a defendant to bring into a lawsuit a third party who may be liable to the *plaintiff*. Prior to the 1949 amendment of our third-party practice rule, the defendant was allowed to file a third-party complaint against a person "who [was] or [might have been] liable to him *or to the plaintiff* for all or part of the plaintiff's claims against him." *See* NMSA 1941,

§ 19-101(14)(Rule 14(a)) (emphasis added); *see also* NMSA 1953, Repl.Vol. 4 (1970), § 21-1-1(14), Compiler's Notes and Amendments. This amendment, conforming our rule to the 1946 amendment of the federal rule, was designed to preserve the plaintiff's choice of parties and to prevent the defendant from compelling the plaintiff to amend his pleadings in order to seek relief against a third-party defendant tendered by the original defendant. *See Salazar v. Murphy,* 66 N.M. 25, 31, 340 P.2d 1075, 1079-80 (1959); *cf.* 3 J. Moore, *supra,* at ¶ 14.01; 6 C. Wright & A. Miller, *supra,* at §§ 1444, 1446; *Federal Procedure L Ed, supra,* at § 59:197 (discussing amendment to Fed.R.Civ.P. 14(a)).

Grain Dealers chose not to sue Firth when it brought the present declaratory judgment action against Reed. If Reed prevails, and Grain Dealers is obligated to provide defense and coverage under her policy, Grain Dealers' agents Firth may be liable to it. Rule 1-014(A), however, does not permit Reed to bring a third-party complaint on the basis of the third-party defendants' liability to the original plaintiff. On the other hand, if Grain Dealers prevails, a judgment will issue declaring Grain Dealers to be relieved of any obligations to provide defense or coverage under the policy, but not holding Reed liable to Grain Dealers. Firth therefore cannot possibly be secondarily liable to Reed. Rule 1-014(A), however, does not permit Reed to bring a third-party complaint unless there is a possibility that the third-party defendants will be secondarily liable to her. We therefore hold that the third-party defendants were not properly joined under Rule 1-014(A).

Regardless of the propriety of Firth's joinder as third-party defendants under Rule 1-014(A), Reed and Grain Dealers assert that the district court's order is independently supported on other grounds. Reed contends that the granting of leave to join a third-party defendant rests in the sound discretion of the trial court and that the district court's decision in this case was supported by the language and the purpose of our Declaratory Judgment Act. *See* NMSA 1978, § 44-6-12. Grain Dealers argues that the district court's decision was supported by SCRA 1986, Rule 1-019 ((formerly codified at NMSA 1978, Civ.P.R. 19 (Repl.Pamp.1980)), which governs the joinder of persons needed for just adjudication. We do not agree.

The provisions cited by Reed and Grain Dealers pertain to mandatory joinder, as parties to the original action, of persons who claim an interest in the subject matter of that action or whose absence would prevent complete relief from being accorded to those already parties. *See* NMSA 1978, § 44- 6-12; SCRA 1986, Rule 1-019(A). The third-party defendants do not claim an interest in the subject matter of the lawsuit brought by Grain Dealers. Neither Reed nor Grain Dealers has argued that they are necessary parties who must be joined as plaintiffs or defendants to the complaint for declaratory relief. Nor did the district court under Rule 1-019 order Firth to be joined as parties to that claim.

The present case involves the permissive joinder of Firth, as third-party defendants, to a separate but related claim raised only by defendant Reed. *See Salazar v. Murphy,* 66 N.M. at 31, 340 P.2d at 1079. Rule 1-014, not Rule 1-019, governs third-party actions, and only third parties who meet the standards set forth in Rule 1-014 may be brought into litigation as third-party defendants. *Cf.* 6 C. Wright & A. Miller, *supra,* at § 1446 (discussing Fed.R.Civ.P. 14(a)). The district court abused its discretion when it denied Firth's motion to dismiss a third-party complaint that did not meet the standards of Rule 1-014. We therefore reverse the district court's order and remand this case for further proceedings consistent with this opinion.

IT IS SO ORDERED.

WALTERS and RANSOM, JJ., concur.

734 P.2d 1272

Benjamin J. ROSCOE and Geraldine Roscoe, Plaintiffs-Appellants,

v.

U.S.LIFE TITLE INSURANCE CO. OF DALLAS, a Texas Corporation and U.S. Life Title Company of Albuquerque, a New Mexico Corporation, Defendants-Appellees.

No. 16333.

Supreme Court of New Mexico.

April 6, 1987.

Thomas J. Clear, Jr., Clear & Clear, P.A., Albuquerque, for plaintiffs-appellants.

Leonard G. Espinosa, Anne D. Goodman, Moses, Dunn, Beckley, Espinosa & Tuthill, Albuquerque, for defendants-appellees.

OPINION

WALTERS, Justice.

Benjamin and Geraldine Roscoe (Roscoes) brought suit against USLife Title

Company of Albuquerque and its underwriter, USLife Title Insurance Company of Dallas (USLife), allegedly to enforce a title insurance contract in connection with Roscoes' purchase of real property. USLife's motion to dismiss the original complaint was granted with leave to amend. Roscoes' amended complaint for damages was dismissed on USLife's motion for summary judgment, and Roscoes appeal. We affirm.

In 1976, Benjamin Roscoe negotiated to purchase from Anne Macy an apartment complex in Albuquerque. He prepared and signed a document of purchase, agreeing to assume the existing mortgage lien on the property. After the agreement was signed, it was taken to USLife for preparation of the closing documents. An attorney employed by USLife on behalf of both buyer and seller reviewed those documents. At the closing on July 30, 1976, Roscoes signed a real estate contract subject to a mortgage in the amount of $119,055.04. Neither the assumption purchase agreement nor the real estate contract mentioned that a balloon payment was due under the terms of the mortgage on or before October 1, 1984.

Early in 1984, Roscoes decided to sell the property and at that time the balloon payment came to their attention. Roscoes made a demand on USLife for damages claimed because the balloon payment had not been mentioned as a term of the real estate contract. USLife denied Roscoes' claim, and this suit followed.

We address two issues on appeal:

1. Whether Roscoes' claim is barred by the statute of limitations.

2. Whether USLife had a duty to disclose or notify Roscoes of the balloon payment contained in the underlying real estate mortgage note, or include it as a term in the closing documents.

I.

Roscoes' original complaint was entitled "Complaint to Enforce Contract." That complaint was dismissed with leave to amend. The first amended complaint alleged damages suffered because of USLife's "negligence or oversight" in not informing Roscoes of the balloon payment. The statute of limitations for contract actions under NMSA 1978, Section 37-1-3(A) is six years. The following Section 37-1-4 provides a four-year limitation for actions in negligence. Since nearly eight years had elapsed between the date of closing and the initiation of this action, either claim normally would be barred.

Roscoes argue, however, that NMSA 1978, Section 37-1-7 applies:

> In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion claimed of, shall have been discovered by the party aggrieved.

On a motion for summary judgment, the party claiming that the statute of limitations should be tolled has the burden of alleging sufficient facts that, if proven, would toll the statute. *Stringer v. Dudoich,* 92 N.M. 98, 583 P.2d 462 (1978). Roscoes' complaint does contain an allegation that they did not discover the balloon payment until early in 1984, but the complaint attributes to USLife none of the grounds enumerated in Section 37-1-7 as a reason for their own failure to discover the terms of the assumed mortgage. We recognize that summary judgment is a drastic remedy. *Cebolleta Land Grant v. Romero,* 98 N.M. 1, 644 P.2d 515 (1982). We also agree that a statute which tolls the statute of limitations should be liberally construed to reach the merits if possible. *In re Goldsworthy's Estate,* 45 N.M. 406, 115 P.2d 627 (1941). Nevertheless, even the most liberal construction of Section 37-1-7 cannot lead, as Roscoes urge, to equating a general allegation of negligence with the narrow legal concept of mistake or fraud for purposes of tolling the statute.

Even if Roscoes' allegations could be construed to allege mistake or a kind of

constructive fraud—a construction we do not think possible—we are of the opinion that the statute would still bar the complaint. In *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates,* 99 N.M. 95, 654 P.2d 548 (1982), we refused to allow a defendant the equitable defense of mistake of fact where he had the opportunity to learn the truth and had failed to exercise reasonable diligence to do so. Similarly, in an action for constructive fraud the court of appeals, construing the predecessor of Section 37-1-7, held that the statute is tolled until the right of action is discovered *or* until, by the exercise of ordinary diligence, it could have been discovered. *Hardin v. Farris,* 87 N.M. 143, 530 P.2d 407 (Ct.App.1974); *cf. Krupiak v. Payton,* 90 N.M. 252, 561 P.2d 1345 (1977).

Mr. Roscoe was aware of the existing mortgage when he agreed to buy the property, since he wrote the purchase agreement. It is well-settled that a person entering into a contract has a duty to read and familiarize himself with its contents before he signs and delivers it. *Smith v. Price's Creameries,* 98 N.M. 541, 650 P.2d 825 (1982). Roscoe's failure to read and familiarize himself with the terms of the mortgage he agreed to assume, when that information was readily available, clearly indicates a lack of reasonable diligence. Had Roscoe made reasonable inquiry or examined the original mortgage, he would have discovered the balloon payment.

II.

In addition to determining on summary judgment that Roscoe's claim was barred, the trial court properly concluded in the first order of dismissal that as a matter of law USLife had no duty to disclose or notify Roscoe of any balloon payment contained in the underlying real estate mortgage. Although the precise question of a title insurance company's duty to disclose an existing balloon payment on an assumed mortgage is a question of first impression in New Mexico, there is New Mexico law relevant to the question. In *Horn v. Lawyers Title Ins. Corp.,* 89 N.M. 709, 557 P.2d 206 (1976), this Court said:

> The rights and duties of the parties are fixed by the contract of title insurance.

Id. at 711, 557 P.2d at 208. The Court there held that a title insurer's duty to search records must be expressed or implied from the policy, and a title company has no duty to search the records for matters it excluded from coverage. *Id.* Here, USLife's policy insures against loss or damages due to "[a]ny defect or lien or encumbrance on such title." Schedule B of the policy specially excludes from coverage any loss or damage resulting from the mortgage in question. This exception is clear and unambiguous.

In *Devlin v. Bowden,* 97 N.M. 547, 641 P.2d 1094 (Ct.App.1982), a case addressing similar issues, the court affirmed a summary judgment in favor of a title company on a claim brought by the seller of property for the alleged failure of the title company to show a reserved mineral interest as a defect in title. Like Roscoes' claim, Bowden's third-party claim was grounded in negligence for failure to adequately search and disclose discoverable information about the property. There, the title policy exempted mineral rights from coverage. Citing *Horn,* the court held there was no tort duty to search the records for mineral interests excluded from a title company's contractual duty under the terms of its policy. *Id.* In other words, in cases such as these, the distinction between tort and contract claims is a "distinction without a difference," since a court would overstep its authority in holding a title company negligent for failing to search records regarding an interest expressly excluded from coverage under the policy contracted for. *Id.* at 552, 641 P.2d at 1099.

Negligence is generally a question of fact for the jury, but a finding of negligence is dependent upon the existence of a duty on the part of the defendant. *Schear v. Bd. of County Comm'rs,* 101 N.M. 671, 687 P.2d 728 (1984). The existence of a duty is a question of law for the judge to

decide. *Id.* The trial court property concluded that USLife owed no duty to Roscoes to recite in the closing documents or elsewhere the terms of the underlying mortgage assumed by Roscoes. Accordingly, judgment of the lower court is AFFIRMED.

IT IS SO ORDERED.

SOSA, Senior Justice, and RANSOM, J., concur.

734 P.2d 1275

STATE of New Mexico, Plaintiff-Appellee,

v.

Rogelio TARANGO, Defendant-Appellant.

No. 9464.

Court of Appeals of New Mexico.

Feb. 19, 1987.

Certiorari Denied March 26, 1987.

Jacquelyn Robins, Chief Public Defender, Deborah A. Moll, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

BIVINS, Judge.

Defendant appeals his conviction for escape from an inmate-release program under NMSA 1978, Section 33-2-46 (Repl. Pamp.1983). Following a trial by jury, defendant was sentenced to three years imprisonment. One year was suspended and the sentence was enhanced by one year under the habitual offender statute, for a total of three years imprisonment plus two years of parole.

We affirm.

BACKGROUND

On June 30, 1983, defendant began serving a sentence of three years for forgery and probation violation. He was incarcerated at the New Mexico Penitentiary and later transferred to the Roswell Correctional Center (RCC). On April 30, 1984, defendant left RCC on a sixty-six-hour furlough, being scheduled to return at 8:30 a.m. on May 3, 1984. Defendant failed to return to RCC. On May 3, the deputy warden swore out a complaint and an affidavit for arrest warrant, and the warden of RCC issued a fugitive writ that same day. All of these events occurred in Chaves County.

The record reflects that defendant was subsequently incarcerated in federal correctional institutions in El Reno, Oklahoma, and Bastrop, Texas. The parties agree that a detainer was sent by New Mexico to federal officials. While imprisoned, defendant sent various documents, pro se, to courts and agencies in New Mexico.

On December 5, 1985, defendant was released from federal prison and transferred to New Mexico. A criminal information was filed February 3, 1986, charging defendant with escape under the inmate-release program. On March 6, 1986, defendant, represented by counsel, filed a motion to dismiss for lack of a speedy trial. After a hearing, the motion was denied. Defendant was tried on June 4, 1986, and convicted by a jury.

Defendant raises two issues on appeal: (1) whether the trial court erred in failing to grant defendant's motion to dismiss for lack of a speedy trial; and (2) whether the trial court erred in failing to submit to the jury defendant's requested instruction on general criminal intent.

The first issue has two parts: whether New Mexico violated the provisions of the Interstate Agreement on Detainers, and whether defendant was denied his constitutional right to a speedy trial. We discuss each issue separately.

1. WHETHER NEW MEXICO VIOLATED THE PROVISIONS OF THE INTERSTATE AGREEMENT ON DETAINERS

New Mexico has adopted the Interstate Agreement on Detainers (IAD). NMSA 1978, § 31-5-12 (Repl.Pamp.1984). The speedy trial provisions of the IAD may be activated by either the defendant (under Article 3) or by the prosecutor in the state that issued the detainer (under Article 4). In this case, it is defendant who is alleging the IAD applies because of his actions; therefore Article 3 applies.

Article 3 states in part:

> A. Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made

of the indictment, information or complaint, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. *The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner,* stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner.

B. The written notice and request for final disposition referred to in Subarticle A *shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him* who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested. [Emphasis added.]

Defendant alleges he substantially complied with these provisions, thereby triggering the 180–day limit for being tried in New Mexico and, since he was not tried within that period, the charges must be dismissed. The state contends defendant's actions were insufficient to trigger the IAD, at least prior to October 1985, and, even if the notice defendant sent in October 1985 did substantially comply with the IAD requirements, New Mexico was not bound by the 180–day requirement because defendant was released from prison in Texas before 180 days had elapsed.

When a defendant is discharged by a sending state, the purpose of the IAD loses significance and defendant can no longer rely on its provisions. *State v. Quiroz,* 94 N.M. 517, 612 P.2d 1328 (Ct.App. 1980). The IAD only applies to individuals while they are serving a prison term. *State v. Thompson,* 19 Ohio App.3d 261, 483 N.E.2d 1207 (1984); *see State v. Duncan,* 95 N.M. 215, 619 P.2d 1259 (Ct.App. 1980). Once the prisoner is released, his rights regarding a speedy trial are the same as those of any other individual. *Thompson; see State v. Smith,* 353 N.W.2d 338 (S.D.1984) (where prisoner's term of imprisonment in another jurisdiction ended within the IAD's speedy trial time period, the IAD was not applicable to him and the trial court did not err in failing to dismiss); *see also* Annot., 98 A.L.R.3d 160, 185–6 (1980). Therefore, even if defendant activated the IAD in October or November 1985, the trial court correctly denied his motion to dismiss, as defendant was released from the federal prison on December 5, 1985.

The question then becomes whether defendant did anything earlier than 180 days before his release, i.e., before June 5, 1985, that would trigger the IAD provisions. The only exhibit in the record dated prior to June 1985 is a "DEMAND FOR SPEEDY TRIAL" dated January 25, 1985. The document is addressed to "UNITED STATES COURT DISTRICT OF NEW MEXICO, SANTA FE, COUNTY." The record includes a return receipt for certified mail, presumably for this document. The receipt, however, does not list the addressee. It is simply checked "Certified," date stamped Albuquerque, N.M., February 8, 1985, and signed on the line for "Agent." The signature is illegible. It seems likely, however, that the document was delivered to the United States District Court in Santa Fe.

The demand for a speedy trial does not mention the IAD, detainer, or New Mexico law. The document was not addressed to the prosecuting officer or to the appropriate court. It does indicate that defendant is a prisoner at the El Reno, Oklahoma, correctional institution, and mentions trial "within the statutory time" citing to a nonexistent statute. Even if it can be inferred that defendant was requesting a speedy trial under the IAD, the document refers to matters pending in the "City/County of New Mexico, Santa Fe District Court."

Defendant alleges the New Mexico authorities were notified that he was requesting to be tried within 180 days. However, even if the request was delivered to the state district court in Santa Fe, which defendant has not established, there is no reference to any case pending in Chaves County.

New Mexico courts have not determined what action on the part of a prisoner is necessary to trigger the provisions of the IAD. Although a few cases from other jurisdictions have required strict compliance with the requirements of the Act, *see, e.g., Whitley v. State,* 392 So.2d 1220 (Ala. Cr.App.1980), the majority of jurisdictions addressing the issue found substantial compliance sufficient. *State v. Roberts,* 427 So.2d 787 (Fla.App.1983). The jurisdictions have not, however, agreed on what constitutes "substantial compliance." *Id.* One court held that the question should turn on whether the defendant has done everything the jurisdiction could reasonably expect, given its own degree of compliance with a scheme that the jurisdiction has the principal responsibility to implement. *McBride v. United States,* 393 A.2d 123 (D.C.App. 1978).

Several states held that the only requirement for a prisoner to activate the IAD is for him to send a request to the prison official who has custody over him. *See, e.g., McCallum v. State,* 407 So.2d 865 (Ala.Cr.App.1981); *Rockmore v. State,* 21 Ariz.App. 388, 519 P.2d 877 (1974); *Pittman v. State,* 301 A.2d 509 (Del.1973); *People v. Daily,* 46 Ill.App.3d 195, 4 Ill. Dec. 756, 360 N.E.2d 1131 (1977). We believe these jurisdictions are correct. *See State v. Alderete,* 95 N.M. 691, 625 P.2d 1208 (Ct.App.1980) (Lopez, J., dissenting). "Other than providing prison officials with the required notice, *which the defendant must undertake to do,* the duty of carrying out the statutory provisions belongs entirely to the authorities involved." *People v. Diaz,* 94 Misc.2d 1010, 1012, 406 N.Y.S.2d 239, 241 (1978) (emphasis added).

Cases holding that the IAD provisions were activated even though there was something less than strict compliance have involved mistakes by state officials that were outside a defendant's control. *See, e.g., Rockmore; Pittman; Daily; State v. Seadin,* 181 Mont. 294, 593 P.2d 451 (1979). Where a prisoner attempts to communicate directly with the requesting state and there has been no mistake by state officials, defendants have generally been held to a high standard of compliance. *See Beebe v. State,* 346 A.2d 169 (Del.1975); *State v. Savage,* 522 S.W.2d 144 (Mo.App.1975).

If a defendant, acting pro se, elects to bypass the custodial official and send a request for a speedy trial directly to the receiving state, most states hold him to the same standard of compliance required of state officials. *See McCallum; Daily; State v. Grizzell,* 584 S.W.2d 678 (Tenn.Cr. App.1979). But if the proper officials had actual notice, at least one state has held that a "technical deficiency" will not prevent defendant from benefitting under the Act. *Wise v. State,* 30 Md.App. 207, 351 A.2d 160 (1976). Many states, however, deem the certificate from the custodial official mandatory and, if it is not sent, generally because the prisoner bypassed the custodian, the IAD is not invoked. *See People v. Jacobs,* 198 Colo. 75, 596 P.2d 1187 (1979) (en banc); *Greathouse v. State,* 156 Ga. App. 491, 274 S.E.2d 835 (1980); *People v. Collins,* 85 Ill.App.3d 1056, 41 Ill.Dec. 373, 407 N.E.2d 871 (1980); *State v. Thomas,* 275 N.W.2d 211 (Iowa 1979); *Hines v. State,* 58 Md.App. 637, 473 A.2d 1335 (1984); *State v. Cox,* 12 Or.App. 215, 505 P.2d 360 (1973).

After reviewing the various approaches in other jurisdictions, we conclude the following. We agree that a prisoner need only transmit the written notice and request for final disposition to the appropriate custodial officials to complete his or her responsibility under the agreement. *See Commonwealth v. Martens,* 398 Mass. 674, 500 N.E.2d 282, 284 (1986), and cited cases. We agree also that if custodial officials of the sending state fail or refuse to forward the prisoner's request to the re-

ceiving state, the receiving state, not the prisoner, is bound by the failure. *Id.* at 284–5. The prisoner must prove that the proper request was filed. Where a prisoner bypasses the statutory procedure and attempts to communicate directly with the receiving state, we hold that, absent actual notice by the receiving state, he or she has the burden of complying substantially with the requirements of the IAD.

Substantial compliance for purposes of the IAD means the prisoner must file the proper documents, including the certificate of status, with the proper prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction, using registered or certified mail, return receipt requested. While we are not requiring absolute, strict compliance, we will not tolerate more than minor technical violations. Courts must analyze violations on a case-by-case basis. The purpose of the statutory requirements is to ensure clear official notice that the prisoner is proceeding under the IAD. *Martens.* Absent such notice, the receiving state cannot make a rational decision regarding the disposition of the case. *Daily.* When a prisoner, acting pro se, fails to comply substantially with the requirements of the IAD, he or she cannot invoke its protections.

We understand that many prisoners lack the sophistication and expertise to achieve substantial compliance with the IAD. That is why a prisoner should utilize the procedures set out in Section 31–5–12, Article 3. The warden, commissioner of corrections or other official having custody of the prisoner has a duty to promptly inform the prisoner of the source and contents of any detainer lodged against him or her. Article 3(C). The prisoner should then file a written request with that official, retaining a copy stamped with the date of receipt.

We now apply the substantial compliance standard to the facts in our case and conclude that defendant failed to meet the statutory requirements. There is no indication that defendant notified a custodial official at either federal prison where he was incarcerated or that the certificate required by Article 3(A) was ever sent. Further, there is no evidence that any request was ever sent to the appropriate prosecutor or court as required. While copies of two documents, dated November 18, 1985, were sent to the district attorney and district court in Chaves County, there is no evidence that copies of the January 25 speedy trial demand were sent. Thus, not only did defendant fail to comply with procedures, but the prosecuting officer and court had no actual notice of any request by defendant.

Under the substantial compliance standard, the document sent by defendant on January 25 is not sufficient. *Cf. Beebe* (letter addressed to "Clerk of Circuit Courthouse" did not comply with requirement that request be sent to the custodial official); *Rhodes v. Commonwealth,* 622 S.W.2d 677 (Ky.App.1981) (no record that pro se request to "Jefferson County, Frankfort, Kentucky," ever received by Jefferson Circuit Court, Louisville, Kentucky). Defendant has the burden of providing a sufficient record to establish claims of violation of the agreement on detainers. *Alderete.* In this case, defendant has not established that he met any of the requirements to trigger the IAD provisions. *See McCallum* (defendant failed to notify proper officials or to send certificate of status; IAD not applicable).

2. WHETHER DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

Defendant argues that he was denied his right to a speedy trial because he was not tried until twenty-five months after the criminal complaint was filed against him. He alleges this is presumptively prejudicial and, therefore, the balancing factors set out in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) must be considered. *State v. Kilpatrick,* 104 N.M. 441, 722 P.2d 692 (Ct.App.1986).

Unless the length of the delay is presumptively prejudicial, inquiry into the

other balancing factors is unnecessary. *State v. Santillanes,* 98 N.M. 448, 649 P.2d 516 (Ct.App.1982). Speedy trial rights apply to the period after a defendant becomes an accused. *Kilpatrick v. State,* 103 N.M. 52, 702 P.2d 997 (1985).

Defendant alleges he became accused of escape when the deputy warden filed the complaint on May 3, 1984. Even if the speedy trial period could be found to run from this date, and were determined to be presumptively prejudicial so that the four factors set out in *Barker* must be considered, the record does not support a finding that defendant was denied his right to a speedy trial. The four-part test requires that the following factors be balanced: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. *Santillanes.*

Assuming the delay was as long as twenty-five months (from date of arrest in Texas to trial), since defendant was a fugitive and then imprisoned in another state, most, if not all, of the delay was attributable to him. Where defendant causes or contributes to a delay, he cannot complain of the denial of a speedy trial. *State v. Mascarenas,* 84 N.M. 153, 500 P.2d 438 (Ct.App.1972); *see State v. Harvey,* 85 N.M. 214, 510 P.2d 1085 (Ct.App.1973).

The state cannot be held responsible for any delay prior to the point where it was notified of defendant's whereabouts. While this could arguably have been in August 1985, when a detainer action letter was sent to the department of corrections indicating the date of defendant's anticipated release in Texas, any benefit to defendant of being tried immediately instead of after his release is speculative.

Defendant's motion to dismiss for lack of a speedy trial satisfies the third requirement. Defendant argues that he was prejudiced because his sentence in Texas was to run concurrently with any sentence in New Mexico. As evidence to support this contention, defendant refers to his demand for a speedy trial sent to Santa Fe in January 1985. There is no supporting evidence from the federal courts. The possibility of serving a sentence concurrently is not a right and cannot be construed as actual prejudice. *State v. Powers,* 97 N.M. 32, 636 P.2d 303 (Ct.App.1981). Even if defendant were to serve concurrent sentences, the New Mexico sentence would be for the underlying felony, and not for the escape charges, which is the subject of this appeal. The escape sentence cannot be served concurrently with the original sentence. NMSA 1978, § 31–18–21 (Repl. Pamp.1981).

Finally, the interests to be protected by a speedy trial are not present under the facts of this case.

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

United States v. MacDonald, 456 U.S. 1, 8, 102 S.Ct. 1497, 1502, 71 L.Ed.2d 696 (1982); *see also Kilpatrick,* 103 N.M. at 52, 702 P.2d at 997. Since defendant was incarcerated in Texas, and still had time to serve on his sentence in New Mexico, these interests are not involved.

Defendant has not established a violation of his right to a speedy trial.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUBMIT TO THE JURY DEFENDANT'S REQUESTED INSTRUCTIONS ON GENERAL CRIMINAL INTENT

Defendant alleges that the trial court's refusal to give the general criminal intent instruction, NMSA 1978, UJI Crim. 1.50 (Cum.Supp.1985), was reversible error. He argues that because the instruction was not given, there was a failure to instruct on an essential element of the crime.

New Mexico case law has distinguished between jury instructions on an essential element of a crime, and those that are merely definitional. *See, e.g., State v. Stephens,* 93 N.M. 458, 601 P.2d 428 (1979); *State v. Gunzelman,* 85 N.M. 295, 512 P.2d 55 (1973); *State v. Padilla,* 90 N.M. 481, 565 P.2d 352 (Ct.App.1977). Failure to instruct on an essential element of an offense is jurisdictional error and requires reversal. *State v. Otto,* 98 N.M. 734, 652 P.2d 756 (Ct.App.1982).

However, failure to give a definitional instruction is not failure to instruct on an essential element, *Padilla,* and such error is not jurisdictional; the issue must be preserved for review by tendering an instruction or by objecting to the failure of the court to give an instruction. *State v. Doe,* 100 N.M. 481, 672 P.2d 654 (1983). In this case, defendant tendered UJI Crim. 1.50 and it was refused by the trial court. Thus, the question of whether the trial court erred in failing to give the instruction is properly before this court.

The Use Note to UJI Crim. 1.50 was amended in 1985 to make the instruction mandatory for all crimes except no intent crimes "or those crimes in which the intent is specified in the statute or instruction." Thus, under the 1985 amendments, UJI Crim. 1.50 is not required for specific intent crimes.

The 1985 amendments to the Criminal Uniform Jury Instructions became effective October 1, 1985. Supreme Court Order of July 2, 1985, NMSA 1978, UJI Crim. (Cum.Supp.1985). Since the criminal information in this case was filed in 1986, the new Use Note for UJI Crim. 1.50 applies.

Defendant cites *State v. Norush,* 97 N.M. 660, 642 P.2d 1119 (Ct.App.1982), for the proposition that the applicable Use Note was the one in effect at the time of the offense. However, in *Norush,* use of an amended Uniform Jury Instruction deprived the defendant of a defense that was available to him at the time he committed the offense. This court held that the effect, under those circumstances, was of an ex post facto law. A change in a definitional instruction does not rise to the level of an ex post facto law. It did not modify a substantial right of defendant vested in him at the time of the offense upon which he had a right to rely. *See State v. Kavanaugh,* 32 N.M. 404, 258 P. 209 (1927).

Under the current Use Note, the instruction is not mandatory if the crime involved is a specific intent crime. The crime with which defendant is charged, escape from work release, is such a crime. Defendant admits this. A specific intent crime involves some intent beyond the intent to commit the act of the crime. *See generally* R. Perkins & R. Boyce, *Criminal Law,* ch. 7, § 3 (3d ed.1982).

Defendant was charged under Section 33-2-46, which states: "Any prisoner whose limits of confinement have been extended, or who has been granted a visitation privilege under the inmate-release program, who *willfully fails to return* to the designated place of confinement within the time prescribed, *with the intent not to return,* is guilty of an escape." (Emphasis added.) The statute thus requires not only that the defendant willfully fail to return, but that he intend not to return. Thus, this is a specific intent crime, or, as the current Use Note for UJI Crim. 1.50 states, it is a crime "in which the intent is specified in the statute or instruction." It is, in fact, specified not only in the statute but also in NMSA 1978, UJI Crim. 22.28 (Repl.Pamp. 1982), which was given in this case. Therefore, UJI Crim. 1.50 was not mandatory.

CONCLUSION

Defendant did not fulfill any of the requirements for activating the IAD. Therefore, New Mexico was not bound by the speedy trial provisions of that Act. Defendant's constitutional right to a speedy trial was not violated. UJI Crim. 1.50 was not required and, therefore, the trial court did not err in refusing to give it. Defendant's conviction is affirmed.

IT IS SO ORDERED.

GARCIA and APODACA, JJ., concur.

734 P.2d 1283

Laury W. WHITE, Petitioner-Appellant and Cross-Appellee,

v.

Philip J. WHITE, Respondent-Appellee and Cross-Appellant.

No. 8675.

Court of Appeals of New Mexico.

Feb. 26, 1987.

Martin E. Threet, B. Paula Kavanagh, Threet & King, Albuquerque, for petitioner-appellant and cross-appellee.

Ann Steinmetz, Albuquerque, for respondent-appellee and cross-appellant.

OPINION

GARCIA, Judge.

Both petitioner and respondent appeal from a final decree of dissolution of marriage. Petitioner (wife) raises the following issues: 1) whether the trial court erred in failing to provide a dollar equalization for the community personal property divided by stipulation; 2) whether the trial court's analysis in determining the dollar figure of wife's interest in certain retirement pay was proper; 3) whether the trial court's award of child support was erroneous; 4) whether the trial court's determination as to the separate character of certain property was supported by substantial evidence; 5) whether the trial court erred in failing to award wife a share of the community income from the date of filing the petition for dissolution of marriage to the date of entry of the final decree; 6) whether the trial court erred in refusing to find a community debt to wife's mother; 7) whether the trial court erred in failing to find that Sandia Airways was a community

asset, or in the alternative, that the community was entitled to reimbursement for the value of husband's services in establishing, promoting and maintaining the corporation; and 8) whether the trial court abused its discretion in its award of attorney fees.

On cross-appeal, respondent (husband) raises the following issues: 1) whether the Uniformed Services Former Spouses' Protection Act requires that the parties be married for ten years during the active service of the military spouse before that spouse's retirement pay can be considered community property; 2) whether the trial court erred in holding that the residence of the parties was community property; 3) whether child support should be based on net monthly income; 4) whether the award of custody of the minor child was in error; 5) whether the trial court's award of attorney fees to wife was proper; and, 6) whether the trial court erred in failing to account for $1,500 husband was ordered to pay wife as an advance on her community property distribution. We affirm in part and reverse and remand in part.

FACTS

There are numerous issues advanced by the parties, and a full factual recitation of each would be unduly lengthy. Many of the parties' contentions may be resolved summarily. Accordingly, we limit our discussion to the salient facts.

We note that the Honorable Rozier Sanchez tried the case and entered findings. Thereafter, the Honorable Anne Kass signed the judgment and heard and ruled on post-judgment motions.

DISCUSSION

WIFE'S ISSUES

ISSUE NO. 1: Equalization of Division of Property

Prior to trial, the parties agreed to divide their personal property. They executed a partial marital settlement agreement apportioning the bulk of their personalty without assigning any fixed value to the items of property. The trial court divided the remaining assets equally between the parties. Wife contends that the full value of husband's award, including the items divided by stipulation, greatly exceeds the value of her share of the property. This issue is without merit. In the absence of fraud, a stipulation entered into a divorce case is enforceable. *Harkins v. Harkins,* 101 N.M. 296, 681 P.2d 722 (1984); *Barker v. Barker,* 93 N.M. 198, 598 P.2d 1158 (1979). The stipulation entered into by the parties in this case was clear and unambiguous. No valuations or conditions of set-off were discussed within the four corners of the document. For that reason, the trial court need not have provided a dollar equalization to correct an inequity that resulted from the community personalty distribution to which the parties stipulated.

ISSUE NO. 2: Military Retirement

Husband is retired from the military and draws retirement benefits. He was married to wife for eight of his 27 years of military service. The court determined that wife was entitled to half of 8/27ths of husband's non-disability retirement benefits. The parties do not challenge the court's retirement equation, but dispute whether wife's share should be based on husband's gross or net disposable pay. Husband's deductions totaled $583.00, and included items such as federal tax, life insurance, disability retirement, allotment and a survivors' benefit plan.

Wife convincingly argues that division of net benefits, rather than gross, places her at a significant economic disadvantage. For example, she notes that the methodology utilized by the trial court allows husband to deduct federal withholding prior to figuring wife's share of retirement. Since the amount wife will receive is a deductible amount to husband and yet taxable to her, she in effect pays two sets of federal taxes: a portion based on the amount withheld from husband's retirement check and taxes on the amount she receives individually.

Wife urges us to find that the trial court erred in basing the award of her community property share of husband's military retirement pay on net rather than gross benefits.

In dividing the interests of the parties in the community property, the court is required to consider the tax consequences of its allocation of property. *Cunningham v. Cunningham,* 96 N.M. 529, 632 P.2d 1167 (1981). This is true unless the tax consequences are speculative. *See Mattox v. Mattox,* 105 N.M. 479, 734 P.2d 259 (Ct.App.1987).

Husband contends on appeal that under the Federal Uniform Services Former Spouses' Protection Act (FUSFSPA), New Mexico trial courts can declare a community property interest in only a portion of military retirement pay: that part defined as disposable. *See* U.S.C. § 1408(C)(1) (1982). In particular, he relies on the language of Section 1408(c)(1), which states: "[s]ubject to the limitations of this section, a court may treat disposable retired or retainer pay * * * as property of the member and his spouse in accordance with the law of the jurisdiction * * *"

While this is an issue of first impression in New Mexico, we are impressed with the equitable approach taken in a similar case by the California Supreme Court. In *Casas v. Thompson,* 42 Cal.3d 131, 228 Cal. Rptr. 33, 720 P.2d 921 (1986) (en banc), the court sought to avoid the unfair and disparate treatment that affects the non-military spouse when the division of retirement pay is based on net rather than gross benefits. There, the court said in part:

> Assuming we reject his other arguments, Max [military husband] relies on Section 1408(a)(4) and (c)(1) to argue that California can only declare a community property interest in a portion of his retirement pay; that part which is defined as "disposable." In essence, the "disposable" retirement pay is the gross pay less statutorily specified deductions which, except for the retiree's individual withholding tax liability, are under the direct or indirect control of the retiree, and will significantly vary among retirees with the same gross retirement pay * * *
>
> We find Max's proposition illogical. Applying his theory, former spouses whose community property interests were acquired over exactly the same time period, whose military retiree spouses receive exactly the same gross retirement benefits, are subject to receiving different sums if, for example, their respective spouses are in different tax brackets, or if one understates his dependents, or if one commits torts against the government or incurs other indebtednesses to it for which the ex-spouse bears no liability. We can conceive of no legitimate governmental interest, nor has Max suggested any, which would rationally support such disparate treatment.

Id., 228 Cal.Rptr. at 40–41, 720 P.2d at 928–929.

We also agree with the California Supreme Court's analysis of husband's argument that FUSFSPA limits the New Mexico trial courts in dividing military pay. In *Casas v. Thompson,* that court concluded that the statute was not intended and did not operate to affect the characterization of retirement pay; the court concluded, and we agree, that characterization of retirement pay is a state law question. *See also Austin v. Austin,* 103 N.M. 457, 709 P.2d 179 (1985). The court in *Casas* analyzed Section 1408(c)(1) as follows:

> We read section 1408(c)(1) as being aimed at an entirely different proposition. Direct payments were not available to ex-spouses for judgments awarding marital property interests against military retirement pay before the enactment of FUSFSPA. Section 1408 is primarily devoted to establishing a scheme to permit the ex-spouse to "garnish" retirement pay and, at the same time, to afford the military retiree similar protections previously given other retired federal employees by limiting the amount of funds subject to garnishment.

228 Cal.Rptr. at 43–44, 720 P.2d at 931–32.

For these reasons, we conclude that FUSFSPA is not inconsistent with a divi-

sion of gross, rather than disposable, military retirement pay. *See also Bullock v. Bullock,* 354 N.W.2d 904 (N.D.1984); *Deliduka v. Deliduka,* 347 N.W.2d 52 (Minn. App.1984). Because the characterization of military retirement pay is a state law question, and because the trial court apparently understood FUSFSPA limited its division of retirement pay, we will remand to permit the trial court to reconsider the division of respondent's military retirement pay.

By adopting California's equitable approach, we do not mean to foreclose a trial court from authorizing appropriate deductions when the failure to do so would work an injustice or would be inequitable. For example, it would be unfair to disallow a deduction for sums withheld from the military retiree's benefits for an IRS tax lien imposed against the community prior to the dissolution of marriage. Moreover, if husband is required to pay income taxes on wife's share of the retirement benefits, he is entitled to deduct from his payments to her a proportionate amount for taxes attributable to that share, assuming no other income to him. *See Hutcheson v. Hutcheson,* 71 Or.App. 541, 693 P.2d 50 (1984); *Doering v. Doering,* 71 Or.App. 101, 691 P.2d 120 (1984).

We do not establish a fixed, inflexible rule mandating division of gross benefits, but rather, adopt the view, as in *Casas,* that the court's division of benefits should treat both parties fairly and equitably. We reverse the trial court's decision to divide only the net disposable benefits and remand for a redetermination of wife's share of the retirement.

ISSUE NO. 3 and HUSBAND'S ISSUE NO. 3: Child Support

We discuss both issues here because of their similarity.

■ Wife complains that the child support awarded by the trial court was less than that contemplated by the Child Support Guidelines. An award of child support is within the sound discretion of the trial court. *Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978). The Child Support Guidelines are merely guidelines, not rigid amounts which must be awarded regardless of other factors. *Henderson v. Lekvold,* 99 N.M. 269, 271, 657 P.2d 125, 127 (1983). The parties' stipulation to use the Child Support Guidelines cannot rob the court of its authority to set child support at an amount the court determines to be fair, taking into account all of the *Spingola* facts, even if that amount is higher or lower than that suggested by the parties. *See Hopkins v. Guin,* 105 N.M. 459, 734 P.2d 237 (Ct.App.1986).

■ An additional problem here, however, is that the amount of child support specified in the trial court's findings of fact and conclusions of law differs from that contained in the final decree. Generally, "[w]hen a finding supported by substantial evidence conflicts with an opinion, the finding prevails." *Roybal v. Chavez Concrete & Excavation Contractors, Inc.,* 102 N.M. 428, 430, 696 P.2d 1021, 1023 (Ct.App.1985). Nevertheless, because we remand this case for a redetermination of the retirement benefits, the trial court may also resolve the conflict between the amount of support specified in its finding and that indicated in the final decree. The trial court is in the best position to resolve the inconsistency and determine which was the intended figure.

■ Husband's argument that wife's portion of the military retirement should be deducted before the trial court sets child support is without merit. We take judicial notice of the Bernalillo County Child Support Guidelines, *see Spingola,* and note that they contemplate only state and federal tax, social security deductions, hospitalization (if children are included) and union dues. Additionally, the trial court may accept or reject deductions in its discretion. *See Luxton v. Luxton,* 98 N.M. 276, 648 P.2d 315 (1982).

ISSUE NO. 4: Separate Property

■ Where findings of fact are supported by substantial evidence, refusal to

make contrary findings is not error. *Fierro v. Murphy,* 85 N.M. 179, 510 P.2d 112 (Ct.App.1973). In this case, the trial court found that a cash management account, an automobile, a Cessna aircraft and Sandia Airways were husband's sole and separate property. The management cash account was established prior to the marriage and there was evidence that money accumulated in that account prior to the marriage was used to purchase the other items. We recognize that contrary evidence favoring wife's view was presented on this issue, but the existence of that evidence does not benefit her. Our task on appellate review is to determine whether substantial evidence supports the trial court's findings. *McCauley v. Ray,* 80 N.M. 171, 453 P.2d 192 (1968). Consequently, since there was evidence from which the court could find that the source of funds used to acquire these items was separate property, wife has not demonstrated reversible error.

ISSUES NO. 5, 6 and 7: Failure to Award Community Income for a Period Prior to Entry of the Final Decree, to Find a Specific Debt and to Order Reimbursement

In these three issues, wife asks us to make factual determinations contrary to those found by the trial court. This we will not do. It is not our function to weigh the evidence or its credibility, and we will not substitute our judgment for that of the trial court as to the facts established by the evidence, so long as the findings are supported by substantial evidence. *Getz v. Equitable Life Assurance Society of United States,* 90 N.M. 195, 561 P.2d 468 (1977). Consequently, these issues have no merit.

ISSUE NO. 8: Attorney Fees

"Determination of whether to grant an award of attorney fees or the amount of the award rests within the sound discretion of the trial court." *Berry v. Meadows,* 103 N.M. 761, 770, 713 P.2d 1017, 1026 (Ct.App.1986). Here, wife was awarded $7,000 in attorney fees. In view of the size of the community estate and the distribution of community assets received by the wife, we do not see the trial court's attorney fee award as an abuse of discretion.

HUSBAND'S ISSUES ON CROSS-APPEAL

ISSUE NO. 1: Uniformed Services Former Spouses' Protection Act

Husband's claim of error is resolved by our decision in *Pacheco v. Quintana,* 105 N.M. 139, 730 P.2d 1 (Ct.App. 1986). There, we held that the ten-year requirement referred to in 10 U.S.C. Section 1408(d) (West 1983), was simply a requirement for direct payments to be made by the Secretary of Defense to the non-military spouse. It does not bar a spouse's claim for benefits if the parties were married for less than ten years of the military spouse's service.

ISSUE NO. 2: Communal Residence

Property acquired during marriage is presumed to be community property. NMSA 1978, § 40-3-12 (Repl.1986). Here, both parties' names appear on the warranty deed and no evidence was offered of an intent to make the residence separate property. *Campbell v. Campbell,* 62 N.M. 330, 310 P.2d 266 (1957). *See Wiggins v. Rush,* 83 N.M. 133, 489 P.2d 641 (1971). The contestant asserting the separate character of property has not only the burden of going forward with the evidence, but of establishing separate ownership by a preponderance of the evidence. *Campbell.* The trial court was not in error in determining that husband failed to meet this burden of proof. *Mitchell v. Mitchell,* 104 N.M. 205, 719 P.2d 432 (Ct.App.1986). Since income earned during marriage is community property, *see* Section 40-3-8(B), payments on the residence made from husband's military pay or retirement pay were community payments. Husband relies on the fact that both parties agreed the down payment for the residence came from an

account that the trial court found to be separate property. He contends, further, that the evidence showed each time the parties purchased a residence during marriage, the down payment came from that account. However, the evidence also showed regular deposits of $500 from military pay of retirement income into that account. In addition, there was no evidence of how value should have been apportioned between community and separate property each time the parties sold a residence during the period of the marriage. *See Dorbin v. Dorbin,* 105 N.M. 263, 731 P.2d 959 (Ct.App.1986). Under these circumstances, there was substantial evidence to support the trial court's characterization of the residence.

Husband also argues that the trial court erred in determining the fair market value of the residence. We disagree. The trial court found the residence to be worth $155,000. A market analysis set the market value of the property at a minimum of $155,000 and a maximum of $159,000. Wife testified that, in her opinion, the analysis was fair. An owner of property is competent to give opinion testimony concerning the value of that property. *Lahr v. Lahr,* 82 N.M. 223, 478 P.2d 551 (1970). The trial court resolves factual disputes and was free to accept the valuation testimony it found to be most credible. Consequently, there was substantial evidence from which the trial court could determine the value of the residence to be $155,000.

ISSUE NO. 4: Child Custody

Husband's argument that the trial court had no evidence upon which to base its custody award is erroneous. The court accepted, by stipulation of the parties, a court clinic evaluation recommending that interim custody be awarded to wife. Further, the trial court considered in camera testimony by the child that dealt with custody and visitation issues. A custody award will only be overturned on a showing of a clear abuse of discretion. *Martinez v. Martinez,* 101 N.M. 493, 684 P.2d 1158 (Ct.App.1984). We cannot say that it was an abuse of discretion for the trial court to make a permanent custody award rather than leave the matter pending and unresolved. Moreover, the trial court maintains jurisdiction to modify the award if circumstances should so require. *Cf. Strosnider v. Strosnider,* 101 N.M. 639, 686 P.2d 981 (Ct.App.1984).

ISSUE NO. 5: Award of Attorney Fees

Husband does not contest the award of fees but asserts the trial court erred in awarding fees to wife's attorneys rather than to wife. The trial court's award of attorney fees was proper. The final decree indicates that the award was to wife, while simply directing that the fees be paid to her attorneys. This was appropriate. Wife's attorneys in this case did not acquire an independent right in the judgment. *Compare Lloyd v. Lloyd,* 60 N.M. 441, 292 P.2d 121 (1956) (improper award because payment of attorney fees was awarded to attorney rather than to wife).

ISSUE NO. 6: Failure to Account for a Pre-divorce Distribution

Husband failed to raise this issue in his docketing statement and, therefore, we will not consider it here. *State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct.App.1978).

SUMMARY

We affirm as to all issues, with the exception of wife's issues 2 and 3. On issue 2, we reverse and remand with instructions to the trial court to redetermine wife's share of retirement benefits. We further remand issue 3 to the trial court to resolve the conflict between its findings concerning child support and its award in the final decree. Petitioner and respondent shall be responsible for their own costs and fees.

IT IS SO ORDERED.

DONNELLY, C.J., and MINZNER, J., concur.

[redacted]

735 P.2d 326

Stephen Alan WOLCOTT,
Petitioner-Appellant,

v.

Sandra Lee WOLCOTT,
Respondent-Appellee.

No. 9308.

Court of Appeals of New Mexico.

March 5, 1987.

Certiorari Denied April 9, 1987.

Armand T. Carian, Mark Shapiro, Albuquerque, for petitioner-appellant.

Joseph J. Mullins, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for respondent-appellee.

OPINION

FRUMAN, Judge.

Our opinion, previously filed on February 3, 1987, is withdrawn and the following opinion is substituted therefor.

Husband appeals from the denial of his post-divorce motions to reduce or abate his child support obligation and to terminate or abate his alimony obligation. Husband relied upon his voluntary change of employment, which resulted in a major reduction of his income, as the substantial change of circumstance justifying his motions. In denying these motions, the trial court found that husband had not acted in good faith with regard to his support obligations when he changed employment.

Husband's issues on appeal are: "1. Whether the voluntary career change of a professional never justifies modification of his support obligation, even if undertaken in good faith;" and 2. Whether there is substantial evidence to support the trial court's finding that husband was not acting in good faith when he changed specialty.

As the first issue is presented in the abstract, it would require an advisory opinion on review. This court does not give advisory opinions. *In re Bunnell,* 100 N.M. 242, 668 P.2d 1119 (Ct.App.1983). Although the first issue will not be directly addressed, it will be generally considered in our review of the second issue. We affirm the trial court on the second issue.

FACTS

Following their marriage of thirteen years, the parties were divorced in December 1983. Pursuant to the marital settlement agreement incorporated into the decree of dissolution, husband was to pay $1,500 monthly for the support of the three minor children, and $300 monthly for alimony for a period of five years. At the time of the divorce, husband was a physician specializing in obstetrics and gynecology in Albuquerque.

For a number of years husband had considered changing his specialty to psychiatry. In March 1985, he was accepted in a psychiatric residency program in Washington, D.C. Husband closed his Albuquerque office in June 1985 and commenced his residency the following month. The duration of the program is three to four years, and during this period, husband's annual gross income will range from approximately $21,000 to $24,000. This salary is approximately one-fourth of his annual gross income during the several years prior to and the year following the divorce.

In June 1985, husband unilaterally reduced his combined monthly child support and alimony payment from $1,800 to $550, contrary to the terms of the marital settlement agreement and without judicial approval or forewarning his former spouse.

DISCUSSION

Husband contends that the denial of his motion for reduction of support payments was erroneously based on the trial court's finding of a lack of good faith in changing his specialty and that there was not substantial evidence to support this finding.

To justify modification in the amount of child support already awarded, there must be evidence of a "substantial change of circumstances which materially affects the existing welfare of the child and which must have occurred since the prior adjudication where child support was originally awarded." *Henderson v. Lekvold,* 95 N.M. 288, 291, 621 P.2d 505, 508 (1980). *See Spingola v. Spingola,* 91 N.M. 737, 580 P.2d 958 (1978). A similar change in circumstances of the supported spouse must be shown before the request may be granted as to alimony. *See Brister v. Brister,* 92 N.M. 711, 594 P.2d 1167 (1979). The recipient's actual need for support is the essential criterion. *See Weaver v. Weaver,* 100 N.M. 165, 667 P.2d 970 (1983); *Brister v. Brister.*

Husband, as the petitioner for the modification, had the burden of proving to the trial court's satisfaction that circumstances had substantially changed and, thereby, justified his requests. *See Smith v. Smith,* 98 N.M. 468, 649 P.2d 1381 (1982); *Spingola v. Spingola.* Any change in support obligations is a matter within the discretion of the trial court, and appellate review is limited to a determination of whether that discretion has been abused. *Henderson v. Lekvold.* If substantial evidence exists to support the trial court's findings, they will be upheld. *See Chavez v. Chavez,* 98 N.M. 678, 652 P.2d 228 (1982). *Cf. Pitcher v. Pitcher,* 91 N.M. 504, 576 P.2d 1135 (1978).

The common trend in various jurisdictions is that a good faith career change, resulting in a decreased income, *may* constitute a material change in circumstances that warrants a reduction in a spouse's support obligations. *See Thomas v. Thomas,* 281 Ala. 397, 203 So.2d 118 (1967); *Graham v. Graham,* 21 Ill.App.3d 1032, 316 N.E.2d 143 (1974); *Schuler v. Schuler,* 382 Mass. 366, 416 N.E.2d 197 (1981); *Giesner v. Giesner,* 319 N.W.2d 718 (Minn.1982); *Fogel v. Fogel,* 184 Neb. 425, 168 N.W.2d 275 (1969); *Nelson v. Nelson,* 225 Or. 257, 357 P.2d 536 (1960); *Anderson v. Anderson,* 503 S.W.2d 124 (Tex.Civ.App. 1973); *Lambert v. Lambert,* 66 Wash.2d 503, 403 P.2d 664 (1965). Likewise, where the career change is not made in good faith, a reduction in one's support obligations will not be warranted. *See In re Marriage of Ebert,* 81 Ill.App.3d 44, 36 Ill.Dec. 415, 400 N.E.2d 995 (1980) (evidence of a desire to evade support responsibilities); *Moncada v. Moncada,* 81 Mich. App. 26, 264 N.W.2d 104 (1978) (no evidence that husband acted in bad faith or with willful disregard for the welfare of his dependents); *Bedford v. Bedford,* 49 Mich. App. 424, 212 N.W.2d 260 (1973) (husband voluntarily avoided re-employment opportunities); *Nelson v. Nelson* (no evidence that the sale of a medical practice and assumption of clinic duties, resulting in a decrease in income, was made to jeopardize the interests of the children); *Commonwealth v. Saul,* 175 Pa.Super. 540, 107 A.2d 182 (1954) (husband literally gave away assets available for support payments). *See generally* Annot., 89 A.L.R.2d 1 at 54 (1963).

Husband challenges the trial court's findings that: (1) at the time husband entered

the marital settlement agreement, he had planned to terminate his private practice and return to school, but did not so advise wife; (2) although wife may have had prior knowledge of husband's future employment desires, she had no reason to believe that he would effect a career change upon entering the settlement agreement, if it interfered with the support obligations he was assuming; and (3) husband was not acting in good faith with regard to his child support and alimony obligations when he voluntarily made his career change.

The record contains both direct and reasonably inferred evidence from the testimony of the parties to support the first two challenged findings. The third finding is supported by evidence of husband's disregard for several financial obligations undertaken by him in the marital settlement agreement, by his failure or inability to make a full disclosure of his income and assets to wife and the court, and by his self-indulgence with regard to his own lifestyle and personal necessities without regard to the necessities of his children and his former spouse. We find this evidence sufficient to support the trial court's decision to deny husband's petition for a modification of his child support obligation.

Husband also argues that, during their marriage, wife was willing to make changes in the family's lifestyle as would be necessary to accommodate his career change. Because of this, husband contends that his career change following the divorce does not indicate a lack of good faith. Husband did not, however, request a finding as to this contention, and his failure to do so waives any merit the argument may have. *See Worland v. Worland,* 89 N.M. 291, 551 P.2d 981 (1976).

In the determination of alimony, the recipient's actual need for support is the focal point. *See Brister v. Brister.* While husband did request a finding as to wife's employment and there was testimony as to her employment, there was also testimony indicating her continued need for alimony. We find this evidence sufficient to support the trial court's decision to continue wife's alimony.

Although husband asserts that his voluntary career change was made entirely in good faith, without a disregard of the welfare of his children and former spouse, this change does not automatically mandate a reduction in his support obligation. *See Spingola v. Spingola.* The decision as to reducing or maintaining the support obligation rests within the trial court's discretion. *Id.*

We recognize that the "responsibilities of begetting a family many times raise havoc with dreams. Nevertheless, the duty [to support] persists, with full authority in the State to enforce it." *Romano v. Romano,* 133 Vt. 314, 316, 340 A.2d 63, 64 (1975).

Based upon our review of the record we conclude that the decision of the trial court does not constitute an abuse of its discretion. Its decision is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and ALARID, J., concur.

735 P.2d 528

STATE of New Mexico, and Gene Baca, Director, Purchasing Division, and Michael Trujillo, Director, Property Control Division, General Services Department, State of New Mexico, Plaintiffs-Appellees,

v.

INTEGON INDEMNITY CORPORATION and Luis Araiza, d/b/a Hot Springs Electric, Defendants-Appellants.

No. 16770.

Supreme Court of New Mexico.

April 8, 1987.

Simms & Garcia, Janice D. Paster, Albuquerque, for defendant-appellant Integon Indem.

Stout & Rubin, Jay Rubin, Truth or Consequences, for defendant-appellant Araiza.

Hal Stratton, Atty. Gen., Mary L. Marlowe, Asst. Atty. Gen., Santa Fe, for plaintiffs-appellees.

OPINION

SCARBOROUGH, Chief Justice.

The State of New Mexico, appellee, sought competitive bids for electrical work at the Los Lunas Central New Mexico Correctional Facility. Bids were solicited by an Invitation to Bid which provided as follows:

> Each bid shall be accompanied by a bid security in the amount of five percent (5%) of the bid amount pledging that the bidder will enter into a contract with the Owner on the terms stated in his bid and will furnish bonds covering the faithful performance of the contract and the payment of all obligations arising thereunder. Should the bidder refuse to enter into such contract or fail to furnish such bonds, the amount of the bid security shall be forfeited to the Owner as liquidated damages, not as a penalty.

Appellant Luis Araiza submitted a bid accompanied by a bond as bid security conditioned as required by the Invitation to Bid, on his behalf as principal and for Appellant Integon Indemnity Corporation as surety. The bond was not signed by Araiza.

At the public bid opening, Araiza was informed that he had submitted the low bid, but he failed to provide the performance and payment bonds as required in the Invitation to Bid. Araiza also subsequently signed a letter requesting that his bid be withdrawn. Ultimately, Araiza failed to enter into the contract for the electrical work. This litigation was initiated by the State to recover from Araiza and Integon, his surety, on the bond pledged by both as required by the Invitation to Bid. The trial court granted the State's motion for summary judgment. We affirm.

Appellant's first point asserts that the State failed to establish a prima facie case showing it is entitled to summary judgment as a matter of law. The facts in this case were submitted to the trial court on the record below by means of admissions of the parties and affidavits. The salient facts are not in conflict. Under SCRA 1986, 1-056(C), a summary judgment is proper if it is shown that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. The movant must establish a prima facie case showing there is no genuine issue of material fact in order to be entitled to summary judgment. *Lackey v. Mesa Petroleum Co.*, 90 N.M. 65, 559 P.2d 1192 (Ct.App.1976). The trial court is obliged to view the pleadings, affidavits and depositions in the light most favorable to the party opposing the motion. *Las Cruces Country Club, Inc. v. City of Las Cruces*, 81 N.M. 387, 467 P.2d 403 (1970).

The applicable law, since repealed, is found in NMSA 1978, Section 13-1-1, *et seq.*, the Public Purchases Act. Section 13-1-10 provides that the contract award shall be made by the governing authority of the user. Appellants argue that the contract was to have been awarded only by the Department of Corrections as the governing authority of the user, Los Lunas Central Correctional Facility. We disagree.

The award was actually made by Roy Laub, the State's construction manager. Section 13-1-10 does not preclude the Department of Corrections from using the services of the State construction manager for the purpose of awarding the electrical contract in this case. Appellants now attempt to attach rigidity and inflexibility to the bidding process by a stilted reading of the Public Purchases Act. However, appellants expressed no objection to the bidding procedures until after Araiza withdrew his bid and was faced with the State's efforts to secure forfeiture of the bid bond; nor was there any objection in the record that the State's construction manager lacked authority to handle the bid opening and make the award on behalf of the State. We find that it is not inappropriate for the Corrections Department to act through its designated agent in awarding the contract.

Appellants also object that the State gave no formal notice to Araiza that he was the lowest bidder or that the contract was awarded to him. Appellants assert that a formal notice of award should have been mailed to the bidder, Araiza, and the State's construction manager, under Section 13-1-10. This objection is without merit. The State argues that the actual notice which was given was adequate notice. We agree. The bids were opened at a public hearing and Araiza was informed at that time that he was the low bidder. No other formality was required.

Appellants argue that the trial court erred in granting summary judgment because the State failed to produce evidence that it had reviewed Araiza's bid for legal sufficiency. No authority is cited as support and we decline to review this point.

Appellants also argue that Laub wrongfully induced Araiza to sign the letter requesting withdrawal of his bid. The record does not support this contention. In fact, Araiza had submitted an earlier bid for the same contract which he had also withdrawn. Laub helped Araiza withdraw his first bid without a bond forfeiture.

Within ten days of the second bid opening, Laub spoke to Araiza several times and learned that Araiza had not secured the performance and payment bonds required by the Invitation to Bid. Laub admits that he decided to "exact" a withdrawal of the bid from Araiza so the contract could be awarded to another bidder. This was done. There is nothing sinister in this process. Laub was justifiably concerned about the ability of Araiza to perform the construction contract and Laub took a reasonable course of action to protect the State's interest. Nowhere in appellant's brief is it stated that Araiza was at any time ready, willing or able to perform the work for which he submitted the low bid. Appellants' argument is totally lacking in merit. Indeed it is spurious.

Araiza failed to sign the bond he submitted as bid security to comply with the Invitation to Bid. Appellants argue that a fact question exists as to whether the absence of Araiza's signature on the bid bond rendered the bond unenforceable. We disagree. The bond bound Araiza and Integon in the amount of the bond, jointly and severally, to pay the State 5% of the bid amount unless Araiza entered into a contract with Los Lunas Correctional Facility on the terms stated in his bid and furnished the requisite performance and payment bonds covering the contract.

The State argues that the absence of the signature did not affect the validity of the bond. We approve the rule which provides that the failure of the principal to sign a bond or similar undertaking does not render the bond unenforceable absent a showing that the surety's obligation was in some way conditioned upon the signature of the principal. *Johnson v. Gray,* 75 N.M. 726, 729, 410 P.2d 948, 950 (1966). The State was not put on notice to make further inquiry because Araiza's signature was missing from the bond. Integon has not shown that its obligation as surety on the bond was conditioned upon the signature of the principal and Integon's obligation on the bond is not in dispute otherwise. There are no factual issues in dispute here. The question is one of law which the trial court correctly decided. We note that the appellants' citations to *M.J. O'Fallon Supply Co. v. Tagliaferro,* 29 N.M. 562, 224 P. 394 (1924) and *Hendry v. Cartwright,* 14 N.M. 72, 89 P. 309 (1907) are misleading in that those cases involved the absence of the surety's signature on the bond in contrast to the present case in which the principal's signature is missing.

The trial court's award of summary judgment was proper and we affirm.

IT IS SO ORDERED.

SOSA, Senior Justice, and RANSOM, J., concur.

735 P.2d 530

Jessie VALLEJOS, Petitioner,

v.

KNC, INC.—A ROGERS COMPANY and Fireman's Fund Insurance Company, Respondents.

No. 16501.

Supreme Court of New Mexico.

April 8, 1987.

Alonzo J. Padilla, Albuquerque, for petitioner.

Butt, Thornton & Baehr, Carlos G. Martinez, Albuquerque, for respondents.

Alan M. Malott, Albuquerque, for amicus curiae New Mexico Chiropractic Ass'n.

OPINION

STOWERS, Justice.

We granted certiorari in this workmen's compensation action to consider whether the testimony of a chiropractor may be admissible as "expert medical testimony" required in contested cases, under NMSA 1978, Subsection 52-1-28(B), to establish the causal connection between an employee's work-related accidental injury and his disability. The trial court ruled that the testimony of plaintiff's treating chiropractor was not admissible on the issue of causation and, considering only the testimony of a licensed medical doctor tendered by defendant, denied various workmen's compensation benefits on the ground that plaintiff's disability at the time of trial was not the direct result of his work-related injury. Plaintiff appealed and, relying upon its decision in *Fierro v. Stanley's Hardware*, 104 N.M. 401, 722 P.2d 652 (Ct.App.1985), *rev'd on other grounds*, 104 N.M. 50, 716 P.2d 241 (1986), the Court of Appeals affirmed the trial court's decision in a memorandum opinion. In light of our recent opinion in *Madrid v. University of California*, 105 N.M. 715, 737 P.2d 74 (1987), we hold that a chiropractor may offer expert medical testimony regarding causation under Subsection 52-1-28(B). We therefore reverse the decisions of the Court of Appeals and the trial court and remand to the trial court for the entry of new findings of fact and conclusions of law.

It is uncontested that plaintiff Jessie Vallejos (plaintiff) sustained a work-related low back injury on October 1, 1984, while employed by defendant KNC, Inc. (defendant). Within days, defendant sent plaintiff to a medical doctor for examination. The medical doctor told plaintiff not to return to work and prescribed a course of treatment that included physical therapy. Within two weeks of his initial examination, however, plaintiff became dissatisfied with the painful physical therapy sessions and the lack of improvement in his back condition. He discontinued his scheduled medical treatment and returned to the chiropractor he had visited, on his own, the day after the injury occurred. Plaintiff thereafter, and until the time of trial, received only chiropractic treatment for his back injury.

At trial, the chiropractor testified that due to his work-related injury, plaintiff was as yet 100% disabled from doing the type of work he was doing at the time of the injury. The medical doctor called by defendant, who had reexamined plaintiff on August 1, 1985, shortly before trial, likewise testified that plaintiff was as yet completely disabled. In his opinion, however, chiropractic treatment was counter indicated for plaintiff's condition and, indeed, was the proximate cause of plaintiff's medical problems at the time of trial. He also testified that plaintiff had reported increased pain after being thrown to the floor in a fight with his ex-wife on October 11, 1984.

The trial court found that plaintiff had suffered a compensable work-related injury on October 1, 1984, for which defendant had provided reasonable medical services and temporary total disability benefits during the period when plaintiff was under the care of the medical doctor. It further found that plaintiff's chiropractic treatment was unnecessary and unreasonable. Accepting only the medical doctor's expert testimony on causation, it found that plaintiff's disability from the time he discontin-

ued treatment by the medical doctor was caused not by his work-related injury, but by the fight with his ex-wife and by the chiropractic treatment. The trial court therefore denied plaintiff further workmen's compensation benefits for temporary total disability, past and future medical expenses, rehabilitation, and attorney's fees.

On appeal, plaintiff contended that the trial court erred in excluding the chiropractor's testimony on causation and alleged that several of the trial court's findings of fact and conclusions of law were not supported by substantial evidence. The Court of Appeals rejected these arguments, concluding that substantial evidence on the record supported the challenged findings and conclusions and that the chiropractor's testimony was properly rejected in accordance with its *Fierro* decision.

In *Fierro,* the Court of Appeals for the first time considered whether the testimony of a witness other than a medical doctor could be offered to satisfy the plaintiff's burden under Subsection 52–1–28(B) to establish the causal connection between his accident and his injury "as a medical probability by expert medical testimony." It held that psychologists, who under NMSA 1978, Subsection 61–6–16(F) (Repl.Pamp. 1986), are expressly excepted from compliance with the licensing statutes pertaining to the practice of medicine, cannot render expert medical testimony on causation. *Fierro v. Stanley's Hardware,* 104 N.M. at 410, 722 P.2d at 661. Because chiropractors, like psychologists, are expressly excepted from compliance with the medical licensing statutes under Subsection 61–6–16(F), the Court of Appeals applied the *Fierro* rationale to the present case and upheld the trial court's rejection of the chiropractor's testimony on causation.

In *Madrid v. University of California,* however, this Court repudiated that rationale and implicitly overruled *Fierro.* We held that Subsection 52–1–28(B) could not be read in pari materia with the medical licensing statutes in order to limit who may give "expert medical testimony," but that the phrase should be interpreted in light of the broad ordinary meaning of "medical." *Madrid v. University of California,* 105 N.M. at 716–717, 737 P.2d at 75–76. We observed that the Legislature in NMSA 1978, Section 52–4–1 (Repl.Pamp.1986), expressed confidence that psychologists and chiropractors, along with medical doctors, are health care providers capable of providing diagnosis and treatment of injuries compensable under the Workmen's Compensation Act, NMSA 1978, Sections 52–1–1 through 52–1–69 (Orig.Pamp. & Repl.Pamp.1986). *Madrid v. University of California,* at 717, 737 P.2d at 76. We concluded that the Legislature did not intend to limit expert medical testimony under Subsection 52–1–28(B) to the testimony of licensed medical doctors, *id.* at 718, 737 P.2d at 77, and that a licensed psychologist accepted by the district court as an expert witness qualified to give opinion testimony in her field was qualified to provide expert medical testimony on causation, *id.* at 718, 737 P.2d at 77.

In the present case, the trial court accepted the chiropractor as an expert witness qualified to give opinion evidence. Its refusal to consider the chiropractor's testimony on the issue of the causal connection between plaintiff's work-related accidental injury and his disability therefore was error, and its findings of fact and conclusions of law regarding whether and when plaintiff's disability ceased to be the direct result of that injury cannot stand.

Accordingly, we reverse and remand to the trial court for the entry of new findings of fact and conclusions of law based upon all the competent evidence presented at trial.

IT IS SO ORDERED.

SCARBOROUGH, C.J., SOSA, Senior Justice, and WALTERS and RANSOM, JJ., concur.

735 P.2d 533

NAVAJO REFINING COMPANY and Navajo Pipeline Company, Plaintiffs-Appellees,

v.

SOUTHERN UNION REFINING COMPANY and Midland-Lea, Inc., (formerly Midland-Lea Pipeline Company), Defendants-Appellants.

No. 16404.

Supreme Court of New Mexico.

April 16, 1987.

Atwood, Malone, Mann & Turner, John S. Nelson, Russell D. Mann, Roswell, for defendants-appellants.

Losee & Carson, A.J. Losee, Ernest L. Carroll, Artesia, for plaintiffs-appellees.

OPINION

SCARBOROUGH, Chief Justice.

Navajo Refining Company and Navajo Pipeline Company (plaintiffs) sued Southern Union Refining Company and Midland-Lea, Inc. (defendants) for sums alleged to be due and owing under the provisions of contracts and agreements entered into by the parties. Plaintiffs' original complaint contained seven counts. Defendants counterclaimed. Defendants' first amended counterclaim contained eight counts. The claims and counterclaims are interrelated. The trial court granted partial summary judgment on two of the counts raised by the complaint in favor of plaintiffs and, finding that there was no just reason for delay, made the partial summary judgment a final judgment. After partial summary judgment was entered, a second amended counterclaim and an amended complaint were filed. Defendants appealed from the partial summary judgment and determination of finality; we hold that the trial court abused its discretion in entering final judgment.

This case presents two issues:

(1) Did the trial court abuse its discretion in entering final judgment?

(2) Did the trial court err in entering partial summary judgment in favor of plaintiffs?

As a result of our disposition of the first issue, we do not reach the second issue.

SCRA 1986, Rule 1–054(C)(1) provides in part:

> [W]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an ex-

press determination that there is no just reason for delay.

The determination of whether there is no just reason for delay lies in the sound discretion of the trial court, and the trial court's determination will not be disturbed absent an abuse of discretion. *Banquest/First Nat'l Bank v. LMT, Inc.*, 105 N.M. 583, 734 P.2d 1266 (1987).

In *Banquest/First Nat'l Bank v. LMT, Inc.*, we stated that we disfavor " 'fragmentation in the adjudication of related legal or factual issues.' " *Id.* (quoting *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 370 (3d Cir.1975) (Gibbons, J., dissenting)). We also stated that we disfavor piecemeal appeals. *Id.* Relying on three factors, i.e., the interrelation of adjudicated and unadjudicated claims, the presence of claims which might result in setoffs against the judgment sought to be made final, and the possibility that if the judgment were made final we might be obliged to consider the same issues more than once, we held that the trial court abused its discretion by finding that there was no just reason for delay. *Id.* In this case, the same three factors and one additional factor lead us to a similar conclusion.

The issues determined by the summary judgment and some of the unadjudicated issues in this case are interrelated. Because of the numerous claims and counterclaims, the amounts which may ultimately be owed after setoff are uncertain. The complexity of this case makes it possible that we may be obliged to consider some issues more than once if we now review the partial summary judgment on its merits. Additionally, in this case, amended claims and counterclaims continue to be filed even after entry of partial summary judgment. Under these circumstances, the trial court's attempt to finally settle only some of the claims was premature.

The trial court abused its discretion in making the Rule 1–054(C)(1) determination that there was no just reason to delay entering final judgment. We reverse and remand to the trial court for proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, Senior J., and STOWERS, J., concur.

735 P.2d 536

STATE of New Mexico, Plaintiff-Appellee,

v.

Raymond SANCHEZ and Robert N. Landlee, Defendants-Appellants.

Nos. 9551, 9635.

Court of Appeals of New Mexico.

March 3, 1987.

Certiorari Denied April 9, 1987.

Hal Stratton, Atty. Gen., Elizabeth Major, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Lynne Fagan, Appellate Defender, Santa Fe, for defendants-appellants.

OPINION

ALARID, Judge.

Defendants appeal from their convictions for burglary, raising the same issue on appeal. Citing *Arabie v. State,* 699 P.2d 890 (Alaska App.1985), each defendant asks this court to adopt an analysis of the New Mexico burglary statutes that would preclude his conviction for burglary. *See* NMSA 1978, §§ 30–16–3 and –4 (Repl. Pamp.1984). Defendant Sanchez raises this argument at the fourth calendaring notice stage of his appeal. Defendant Landlee raises this argument in his motion for rehearing, a memorandum opinion affirming his conviction having been previously entered by this court. In light of the issue, defendant Landlee's motion for rehearing was granted, and these appeals were consolidated for purposes of disposition. We decline to adopt the analysis proposed, and affirm each defendant's conviction.

Defendant Landlee was convicted of burglary by his unauthorized entry into the

loading dock area of A.P.K. Auto Parts, a retail store, with intent to steal. Defendant Sanchez was convicted of burglary by his unauthorized entry into an office in Presbyterian Hospital in Albuquerque, from which he stole a purse containing credit cards, cash and other valuables. Presbyterian Hospital is a building generally open to the public, as is the auto parts store burglarized by defendant Landlee. The essence of defendants' argument is that this court should follow the Alaska court's holding in *Arabie* and find that the acts committed by these defendants fail to fall within the definition of "burglary." Defendants continue to preserve other issues disposed of in previous calendaring notices and in the memorandum opinion entered in defendant Landlee's appeal, but raise no new arguments and cite no new authority on these other issues. We affirm as to these other issues, for reasons stated in the calendaring notices and the memorandum opinion previously entered.

Narrowly stated, defendant Landlee urges this court to find that entry into the rear entrance of an auto parts store, the store being otherwise open to the public, is not "unauthorized entry" for purposes of sustaining a conviction for burglary. Defendant Sanchez similarly argues that his entry into a particular office at Presbyterian Hospital, a public building not closed at the time of his entry, fails to satisfy the "unauthorized entry" element, and that the facts of his case do not sustain a conviction for burglary.

In *Arabie,* cited by defendants for their proposition, the Alaska Court of Appeals reversed a defendant's conviction for burglary on facts quite similar to those in defendant Landlee's case. Arabie was apprehended inside a walk-in cooler at the back of a 24–hour store with a case of beer in his hands. The Alaska court concluded that, while Arabie's entry into the rear room and beer cooler may have constituted criminal trespass, it did not, in itself, constitute unlawful entry of a building, an element of burglary under the Alaska statute. 699 P.2d at 893. Defendants similarly argue that, while they may have been guilty of larceny under the facts charged, their respective entries into Presbyterian Hospital and A.P.K. Auto Parts did not satisfy the "unauthorized entry" element of burglary under the New Mexico statute. *See* §§ 30–16–3 and –4.

Several differences between the language of the New Mexico and Alaska burglary statutes, coupled with differences in legislative history, convince us that New Mexico's law of burglary is not so strictly defined as that of our sister state. Foremost among those differences is Alaska's commitment to bringing statutory burglary close to its common law ancestor. "At common law, the crime of burglary consisted of a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein." Black's Law Dictionary 179 (5th Ed.1979) ("Burglary"). Although the definition of burglary has been considerably expanded under modern statutes, *id.,* it was the determination of the Alaska Court of Appeals in the *Arabie* case that certain language in the Alaska statute was designed to "bring the law of burglary closer to its common law ancestor." 699 P.2d 893–94; *see* Alaska Stat. § 11.46.350(a) (1986). Consideration was given to the likelihood that the type of entry charged would terrorize occupants. 699 P.2d at 894; *see also Model Penal Code,* § 221.1 commentary at 70.

New Mexico, unlike Alaska, has demonstrated no legislative intent to restrict the definition of burglary nor to bring that crime closer to its common law root. *State v. Rodriguez,* 101 N.M. 192, 679 P.2d 1290 (Ct.App.1984). In New Mexico, the statutory offense of burglary is one against the security of property, and its purpose is to protect possessory rights. *Id.* We find no justification for considering the likelihood of terrorizing occupants as a significant criterion in determining whether a particular entry fits within our statute. Our state statute departs significantly from its common law origins. The court in *Arabie* noted that it did not mean to imply that a broader definition of burglary would ultimately be unsound as a matter of public policy or impermissible as a matter of law. 699 P.2d at 894, n. 3. New Mexico current-

ly recognizes a broader definition of the crime.

The *Arabie* court concluded that the walk-in cooler in that case failed to qualify as a "separate unit" for purposes of determining that Arabie had made unlawful entry into a "building" for burglary purposes. 699 P.2d at 893. Since it was undisputed that the store building itself was open for business, it was determined that the defendant in *Arabie* made lawful entry into the premises. *Id.* Again, New Mexico departs from Alaska. Two cases in our state establish that entry into separate units of a single building, if coupled with the necessary intent, will sustain a burglary conviction. *State v. Harris,* 101 N.M. 12, 677 P.2d 625 (Ct.App.1984); *State v. Ortega,* 86 N.M. 350, 524 P.2d 522 (Ct.App.1974). *Harris* and *Ortega* involved not only separate units, but separate propriety interests. In the case at bar, an argument could be made that an office worker has a separate propriety interest in use and occupancy of her own private office in the situation of defendant Sanchez, but it seems indisputable that a single proprietary interest is represented in the separate sections of the auto parts store in the situation of defendant Landlee. We therefore go further and look to the language of the statutes involved.

In New Mexico, the crime of burglary is defined by Section 30–16–3, which reads:

> Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.
>
> A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.
>
> B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

In Alaska, burglary is defined under Alaska Stat. § 11.46.310(a) (1986), which reads:

> A person commits the crime of burglary * * * if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

"Building" is further defined by Alaska statute as follows:

> "[B]uilding", in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building[.]

Alaska Stat. § 11.81.900(b)(3) (Cum.Supp. 1986). Significant differences between statutes is apparent even on cursory inspection. New Mexico permits a conviction for fourth-degree (commercial) burglary upon entry of any vehicle, not specifying that such a vehicle must be adapted for overnight accommodations or for carrying on of business. *See, e.g., State v. Rodriguez.* Alaska relies exclusively on the definition of "building," as modified by statute, while New Mexico expressly brings not only dwelling houses, but vehicles, watercraft, aircraft and "other structures," movable or immovable, within the definition of its statute. The *ejusdem generis* argument that "other structure" is limited in its definition to the types of structures preceding it in the statute has been rejected by our supreme court, leaving the definition to be literally construed. *State v. Gonzales,* 78 N.M. 218, 430 P.2d 376 (1967).

Black's Law Dictionary definition of "burglary" encompasses a definition of "structure" that is adequate for the broad purposes of New Mexico statutory law. Black's Law Dictionary 179 (5th Ed.1979). That definition of the *actus reus* is:

> A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time, open to the public or the actor is licensed or privileged to enter.

Id. The separately occupied office entered by defendant Sanchez and the separately secured area of the store entered by de-

fendant Landlee fall within the definition of "structure" set forth above, and the necessary violation of "prohibited space" was thus proven at trial. *Cf. State v. Rodriguez.*

The convictions are AFFIRMED.

IT IS SO ORDERED.

BIVINS, J., concurs.

APODACA, J., specially concurs.

APODACA, Judge, specially concurring.

I specially concur with the majority to express some additional concerns raised by these two appeals. It is true, as the majority suggests, that the trend in American jurisprudence has been to expand considerably the definition of burglary under modern criminal statutes. But I believe there is a risk involved in stepping too far afield and I am concerned we may be approaching the limit of our statute's application. The court in *Arabie v. State,* 699 P.2d 890 (Alaska App.1985), cited by the majority, noted the potential problems with a broader definition of burglary if the distinction between burglary and other crimes (such as shoplifting) is blurred. Although we need not address what application our interpretation of the statute would have in every factual situation, I suggest these potential problems may be curbed by our adopting the two definitional standards I discuss below.

An essential element of the crime of burglary is an unauthorized entry. NMSA 1978, § 30-16-3 (Repl.Pamp.1984); *State v. Ortiz,* 92 N.M. 166, 584 P.2d 1306 (Ct.App. 1978). If a structure is open to the public, then an entry into that structure is deemed authorized. *State v. Rogers,* 83 N.M. 676, 496 P.2d 169 (Ct.App.1972). I agree with the majority's determination that where a building is partially open to the public, a defendant may be convicted of burglary if his entry exceeds the scope of the invitation to the public. However, I am troubled because the law in New Mexico provides no guidance on how one is to determine the scope of the invitation.

To be convicted of burglary, a defendant must *know* his entry was not authorized. *State v. Ruiz,* 94 N.M. 771, 617 P.2d 160 (Ct.App.1980). When a building is at least partially open to the public, the prosecution must show defendant knew that his entry into the particular portion of the building was not within the scope of the public invitation. Even if a defendant is not actually authorized to enter, this fact alone does not unequivocally prove defendant *knew* he was unauthorized. The requisite knowledge must usually be inferred from the circumstances of defendant's actions. But when the building is at least in part open to the public, how is the fact finder supposed to measure the evidence presented by the prosecution? How far does the scope of the public invitation extend? The answers lie in the standards I am proposing.

I believe the Oregon statutory definition of "open to the public," which is part of that state's burglary statute, provides an appropriate guide. " 'Open to the public' means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required." Or.Rev.Stat. § 164.-205(4) (1971). In this connection, I am particularly disturbed by the sufficiency of the evidence with respect to defendant Sanchez. I realize a jury found otherwise, but I, myself, am not entirely certain the state met its burden in showing that the hospital basement and the office entered by defendant were "prohibited space" to the public. A mere push of the "B" button on an elevator and a short walk down an open corridor would get anyone there.

As a guide to the bench and the bar, I would expressly adopt the Oregon standard as the law in New Mexico. Colorado and Missouri have already done so. *People v. Bozeman,* 624 P.2d 916 (Colo.Ct.App.1980); *State v. McGinnis,* 622 S.W.2d 416 (Mo.Ct. App.1981).

There is one additional concern I find necessary to address in light of the broadness of our burglary statute. Inasmuch as the decision in these two consolidated appeals holds that under our statute, a person may be convicted of burglary committed

within a building open to the public, I submit the court should expand on its definition of a "structure," by holding there is a violation of "prohibited space" whenever a person enters "any separately secured, *separately delineated* portion of another * * structure." *State v. Shears*, 47 Ohio Misc. 27, 30, 352 N.E.2d 660, 663 (1975) (emphasis added).

By applying these definitional standards, we can address potential problems arising from the historical trend—an expanding application of our burglary statute. The incorporation of these standards as uniform jury instructions may be an appropriate avenue to consider and would assure us the standards are not only known to, but applied by, a jury. I am not advocating that we judicially limit prosecutions under our burglary statute, but only that we take care we do not blur those often fine-line junctures of criminal elements, where one crime ends and another begins. Ultimately, it is the prosecutor who will discretionarily determine what criminal charge to bring against a particular defendant; where one crime does not fit, another may. But let us not lose sight of the constitutional risks involved in applying a criminal statute with too broad a brush.

I concur in the affirmances because I am satisfied that under the above standards, there was sufficient evidence presented to support the convictions.

735 P.2d 540

STATE of New Mexico, Plaintiff-Appellee,

v.

Trinidad CASTILLO, Defendant-Appellant.

No. 9753.

Court of Appeals of New Mexico.

March 3, 1987.

Certiorari Denied April 9, 1987.

Hal Stratton, Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, James C. Kennedy, III, Carlsbad, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals from his sentence as an habitual offender. He contends that the trial court erred in considering entry of a plea of "guilty" as a prior conviction because that plea had not been reduced to a written judgment and sentence at the time the subsequent offense was committed. This court proposed summary affirmance, and defendant has filed a timely memorandum in opposition. Under the facts of this case, we affirm.

Defendant was convicted and sentenced on December 12, 1986, as an habitual offender. The trial court enhanced his sentence for a crime committed on or about

June 2, 1986, because of a prior conviction for crimes committed in December 1985. As to the crimes committed in 1985, defendant had entered a plea of guilty that the trial court accepted in a proceeding on May 15, 1986; however, judgment and sentence were not entered until June 17, 1986. Defendant contends that there was no prior conviction at the time he committed the June 2, 1986, offense within the meaning of the habitual offender statute. *See* NMSA 1978, § 31–18–17 (Cum.Supp.1986). We disagree.

The habitual offender statute provides that an individual who has incurred one or more felony convictions shall be deemed an habitual offender and, upon a subsequent conviction, the basic sentence shall be increased upon proof of the prior conviction. *State v. Marquez,* 105 N.M. 269, 731 P.2d 965 (Ct.App.1986). It is the conviction, or finding of guilt, which is relevant for enhancement purposes. *Id.* There must have been a prior conviction preceding the commission of the offenses for which the enhanced sentence is sought. *State v. Linam,* 93 N.M. 307, 600 P.2d 253, *cert. denied,* 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979).

In his memorandum in opposition, defendant argues that a guilty plea can be withdrawn at any time prior to entry of written judgment, and hence should not be used as a prior conviction for purposes of habitual offender enhancement. We note that we do not have a case before us involving the withdrawal of a guilty plea. Defendant, in fact, subsequently was sentenced for the offense to which he had pled guilty on May 15, 1986. For all practical purposes, this defendant was "convicted" of the prior crime at the time he entered, and the judge accepted, his plea. It is the fact of a prior conviction, not a prior sentence, that is dispositive. *See Padilla v. State,* 90 N.M. 664, 568 P.2d 190 (1977). Once defendant pled guilty, there was little for the court to do except sentence defendant in accordance with the law. *See State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973).

Defendant argues that *Padilla v. State* is distinguishable because that case involved a deferred sentence after formal entry of a judgment. On these facts, we are not persuaded that the distinction is material.

In this case, at the time the habitual offender sentence was imposed, written judgment had been entered on the May 15 plea. Thus, the principles of finality that have led some courts to construe the term "conviction" to require written judgment are not applicable. *See generally* Annot., 5 A.L.R.2d 1080 (1949); *see also* SCRA 1986, UJI Crim. 14–7001, –7002, –7007.

In any event, our supreme court has stated that the "conviction" to which the habitual criminal statute refers, "is simply a finding of guilt and does not include the imposition of a sentence." *State v. Larranaga,* 77 N.M. 528, 529, 424 P.2d 804, 805 (1967). A plea of guilty constitutes a legal conviction within the meaning of the habitual offender legislation. Nothing in these facts persuades us that the supreme court definition does not apply.

The habitual offender statute, Section 31–18–17, imposes an enhanced penalty which is intended to deter further crimes. *See State v. Linam.* We see no reason why a person who is given the opportunity to remain free pending sentencing but commits another crime prior to sentencing is not subject to a law designed to deter the subsequent crime. Since we view the result for which defendant contends as contrary to legislative intent, we do not adopt it. *See State v. Nance,* 77 N.M. 39, 419 P.2d 242 (1966), *cert. denied,* 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967).

For the foregoing reasons, we hold that the guilty plea proceeding that occurred on May 15, 1986, was a sufficient conviction upon which to enhance defendant's sentence in proceedings based on the June 2, 1986, offense. Consequently, defendant's sentence is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and FRUMAN, J., concur.

735 P.2d 1131

R. Charles BOMBACH, Plaintiff-Appellee,

v.

Jay BATTERSHELL and Cinema Corporation of America, Respondents-Appellants.

No. 16450.

Supreme Court of New Mexico.

April 9, 1987.

Lorenzo E. Tapia, Miguel P. Campos, Albuquerque, for respondents-appellants.

Dubois, Caffrey, Cooksey & Bischoff, P.A., John F. Caffrey, Lydia A. Mangold, Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Justice.

Appellee Bombach acquired ownership of a shopping center which included the

leased premises of appellants Battershell and Cinema Corporation of America (CCA). The terms of the lease agreement between Bombach and Battershell allowed either lessor Bombach or lessees Battershell and CCA to terminate the lease upon a ninety-day written notice of termination. On August 26, 1985, Bombach hand-delivered to Battershell's business premises a letter terminating the lease agreement, effective November 26, 1985. Battershell's employee received and signed for the notice.

Three days later Bombach and Battershell met to discuss the termination of the lease. Thereafter, on September 4, 1985, and October 17, 1985, Bombach wrote to Battershell confirming that he must vacate the premises within the ninety-day period as provided by the August letter.

On October 31, 1985, Battershell tendered a check in the amount of $1200 for rent for the entire month of November. Bombach, upon advice of counsel, returned the check and asked that November's rent be prorated through November 26th for a total amount due in November of $1040. When Bombach had not received a rent check in the correct amount, he again wrote Battershell on November 6th reminding Battershell that he must vacate the premises by the 26th of that month.

In the meantime, and on November 3, 1985, Bombach hand-delivered to his lessee a three-day notice to pay rent or vacate the premises. The rent was not paid; Bombach then filed a petition in municipal court against Battershell and CCA for forcible entry or detainer, alleging Battershell's failure to pay rent.

The metropolitan court entered judgment against Battershell and CCA and ordered that the premises be restored to Bombach, and that rent in the amount of $1520 be paid.

Battershell and CCA appealed the metropolitan court decision to district court, and it was affirmed. Battershell and CCA now appeal that decision, and we affirm.

I.

Battershell and CCA challenge the metropolitan court's subject matter jurisdiction to decide the case, arguing that there were no "proper pleadings before the court on the issue to compel defendants to vacate the premises based on the lease provision which permitted Bombach to cancel Battershell's lease upon proper notice." Defendants' reliance on *Zarges v. Zarges,* 79 N.M. 494, 445 P.2d 97 (1968), for that contention is misplaced.

SCRA 1986, 3–304 [formerly NMSA 1978, Metro.R. 22] in pertinent part provides that "[u]pon request of either party, the judge may permit him to file an amended pleading * * * at any stage of the proceeding. Permission to amend a pleading shall be freely granted * * *."

■ At the conclusion of Bombach's case, he moved the court to allow amendment of his pleadings to add a count based on termination pursuant to the ninety-day notice provision in the lease. The court granted the amendment; consequently, any claim of insufficient pleadings was rectified during trial, as permitted by the rule. *Cf. Zarges v. Zarges* (court may not reopen case after final judgment when jurisdiction has been exhausted).

II.

Defendants-appellants next raise abuse of discretion in the lower court's allowance of the amendment, but its denial of their request for a continuance. They urge that because of the amendment they were surprised and prejudiced at trial.

■ A continuance "shall be granted if necessary to avoid surprise or other prejudice to the opposing party." SCRA 1986, 3–304. Granting of a continuance, however, rests within the sound discretion of the trial court, and the denial of a continuance will be reversed only upon a showing of a clear abuse of discretion. *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates,* 99 N.M. 95, 654 P.2d 548 (1982).

■ Bombach's original suit for eviction was based on nonpayment of rent; and the second cause of action, allowed by the amendment, was for termination of tenancy as provided in the ninety-day notice pro-

vision of the lease. Eight days before trial on the eviction matter, the ninety-day period after notice to terminate had expired. The operative facts of both causes of action had ripened by the time of trial. Indeed, Exhibit A to Battershell's and CCA's answer was a copy of Bombach's October 31st letter which made reference to the August 26th letter in which the ninety-day termination notice had first been given.

Although Battershell and CCA make the claim that they were surprised by the amendment, the pleadings and the facts adduced at trial justifiably permitted the court to reject that claim. Defendants were on notice that the lease, under the ninety-day termination provisions of the lease, had terminated during the week preceding trial. Under either a judgment of eviction or termination by compliance with the notice requirements of the lease, defendants knew they were not entitled to possession of the premises. The denial of the continuance, therefore, was not a clear abuse of discretion. *See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates.*

III.

Defendants urge also that the summons form with which they were served, and the method of service, were insufficient to give them fair notice of the lawsuit against them.

Bombach used a preprinted metropolitan court summons form entitled "Summons and Notice of Trial and Petition for Writ of Restitution." Beneath the title appear, parenthetically, the words "Uniform Owner-Resident Relations Act." Defendants contend that because the summons which was issued contained the words "Uniform Owner-Resident Relations Act," they were deceived and misled regarding what they were supposed to defend against. According to the return of service, the summons was served "with a copy of the Petition attached."

The summons informed Battershell and CCA when and where to appear, and to show cause why a Writ of Restitution for the identified real property should not be granted. The petition attached not only informed Battershell and CCA that Bombach was seeking the return of the leased premises, but was apparently of sufficient clarity to allow the appellants to formulate and file an answer.

It is a long-standing policy in New Mexico that the rights of the litigants should be determined on the merits of the case rather than upon technicalities of procedure and form. *Transamerica Ins. Co. v. Sydow,* 97 N.M. 51, 636 P.2d 322 (Ct. App.1981). Accordingly, we are satisfied that the summons form which Bombach used, together with the petition served, were sufficient to notify Battershell and CCA of the time, place, date of hearing and the opportunity to answer, as well as of the claim made against them. *See Tremps v. Ascot Oils, Inc.,* 561 F.2d 41 (7th Cir.1977).

Defendants next argue that the manner in which Bombach delivered the initial notice of termination was insufficient, under the terms of the lease agreement, to effectuate satisfactory notice.

The portion of the lease relied on provides:

> Any and all notices required or permitted to be given hereunder shall be considered to have been given if in writing and delivered to the respective party designated below upon the date of such personal delivery * * * [Notice shall be] addressed to the respective party at the respective address set forth below, or at such other address as either party may furnish the other for this purpose by written notification.

The only address listed for Bombach's lessee was that of the leased premises. Bombach hand-delivered the notice to defendants' place of business and left if with an employee. If delivery by a mailman of a notice, "addressed to the respective party at the respective address," would have been sufficient compliance—and the lease terms do not provide otherwise—then the delivery accomplished by Bombach was sufficient. Moreover, there is evidence in the record to support the trial court's conclusion that Battershell and CCA actually

received the notice. The purpose of the notice provision in the lease agreement was fulfilled, and service thereof was sufficient. *See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates.*

The trial court's ruling is further buttressed by the fact that Battershell and CCA appeared, requested affirmative relief from the court by way of a counterclaim, and actively participated in the trial. *See Cline v. City of Boulder,* 168 Colo. 112, 450 P.2d 335 (1969). It is a somewhat ludricrous assertion to make, when one files an answer and counterclaim, and appears for hearing, that he has not been properly served. Any defect in service was waived. *See Garduno v. Pueblo De Nambe,* 57 N.M. 598, 261 P.2d 441 (1953).

IV.

Appellants' contention that if the notice of termination was valid, the lease converted to a month-to-month tenancy requiring additional notice of termination, is specious. While we feel compelled to address this issue because it was raised on appeal, a lengthy discussion is not warranted.

Paragraph XIV of the lease expressly provides that "after the *expiration* of the lease" any holding over by the lessee converts the lease into a month-to-month tenancy. Because the lease would not expire until June 30, 1987, it is impossible to contend seriously that there was any holding over or that the terms of the lease could create a tenancy from month-to-month prior to the date of expiration.

V.

Finally, we are asked to declare that there is not substantial evidence to support the trial court's judgment. Appellants premise their argument on conflicting testimony of the witnesses at trial—a shaky foundation, at best.

The trial court, as the trier of fact, is entitled to weigh the evidence, determine the credibility of witnesses, and reconcile contradictory testimony. *Lewis v. Bloom,* 96 N.M. 63, 628 P.2d 308 (1981). An appellate court, absent manifest error, will not disturb the trier of fact's resolution of conflicting evidence. *See Roybal v. Morris,* 100 N.M. 305, 311, 669 P.2d 1100, 1106 (Ct.App.1983). This record contains substantial evidence to support the district court's decision. Accordingly, the judgment is AFFIRMED.

SOSA, Senior J., and RANSOM, J., concur.

735 P.2d 1134

Ysidro MOLINAR, Jr., N. Dean Ricer, E. Navarrette, D.R. Greene, W.H. Baglemann, T.L. Potter, N. Rosacker and L. Yturralde, Plaintiffs-Appellees,

v.

CITY OF CARLSBAD, Defendant-Appellant.

No. 16281.

Supreme Court of New Mexico.

April 14, 1987.

Matkins & Davis, B.G. Davis, Carlsbad, for defendant-appellant.

W.T. Martin, Jr., Michael T. Murphy, Carlsbad, for plaintiffs-appellees.

OPINION

SOSA, Senior Justice.

Plaintiffs brought suit against their former employer, the City of Carlsbad (City), to recoup the value of retirement benefits allegedly lost as a result of the City's breach of a duty to advise Plaintiffs when their employer became the State of New Mexico. The trial court permitted the City to amend its answer to raise the defense that the statute of limitations had run on Plaintiffs' claim. After a hearing, the court ruled that the City was estopped, by the actions of its former attorney, from asserting the defense. The City appeals to this Court. We affirm.

The City raises two issues on appeal:

I. The trial court erred in applying estoppel under the facts of this case; and

II. The trial court incorrectly concluded that the City owed Plaintiffs a duty to disclose the effect of their employment transfer.

FACTS

Plaintiffs worked at the Living Desert State Park (Park). The City operated the Park from July 1, 1972 through July 1, 1978, when the State resumed manage-

ment. From about July 1, 1970 through July 1, 1980, the City provided for its employees a non-contributory pension plan known as the National Industrial Group Pension Plan (NIGPP). The terms of the NIGPP had been negotiated by the United Steelworkers of America (Steelworkers), which represented Plaintiffs' bargaining unit. The City funded the plan by paying into it a certain sum per hour for all hours worked by City employees. For an employee to be vested with any retirement benefits, the NIGPP required ten years of service.

None of the Plaintiffs had accumulated ten years of service at the time the State took over the Park. They were given the choice, in 1978, of seeking other jobs within the City or remaining at the Park and becoming State employees. All Park employees chose to terminate their employment with the City and sign on with the State. They then became eligible to participate in the Public Employees Retirement Association (PERA) Retirement Plan. PERA told Plaintiffs that they would have to pay cash to purchase into credits equivalent to their years of service with the City. No attempt was made by the City to protect or "roll-over" Plaintiffs' NIGPP contributions, nor to advise Plaintiffs or their union of the effects of termination upon their pension rights.

In 1980, the City did negotiate with the Steelworkers, one result of which was an agreement that City participation in the NIGPP would terminate on June 30, 1980 and henceforth City employees would be covered by PERA. Plaintiffs meanwhile had retained attorneys to negotiate with the City on their behalf. Messrs. Martin and Murphy met several times with counsel for the City, George L. Watkins, who assured them that the matter could be satisfactorily settled. Plaintiffs relied on Watkins' representations that their claim was meritorious and that litigation was unnecessary. Accordingly, they did not file suit until September 1983.

The parties stipulated to certain basic facts at trial on July 2, 1985. Then on July 8, 1985, the City moved to amend its answer to raise the defense of statute of limitations and to dismiss the complaint. The court heard the motion to amend on October 28, 1985 and subsequently granted the motion. Again the City moved to dismiss on October 29, 1985. The court heard the motion on November 6, 1985, then ruled that the City was estopped from asserting the defense of statute of limitations. Finally, on January 7, 1986, the court entered judgment in favor of Plaintiffs. The City appealed to this Court.

I. Statute of Limitations

Plaintiffs' complaint alleged that they were employed by the City on or about June 30, 1980. The stipulation at trial, however, correctly recited that Plaintiffs quit with the City in 1978. Accordingly, the City moved to amend its pleading to conform to the evidence. We agree with the City that the decision to allow or deny amendment of the pleadings to assert the defense of the statute of limitations rests within the sound discretion of the trial court. *See Apodaca v. Unknown Heirs of the Tome Land Grant,* 98 N.M. 620, 651 P.2d 1264 (1982). Here the trial court did not abuse its discretion in permitting the City to amend its answer to raise the defense.

We do not accept, however, the City's argument that the complaint should be dismissed because of the statute of limitations. The City asserts that Plaintiffs' failure to file suit sooner was solely owing to a misunderstanding that the appropriate period was six years, as prescribed in NMSA 1978, Section 37–1–3, or at least the four years provided by NMSA 1978, Section 37–1–4. In its defense, the City introduced the correct period of three years for actions against municipalities set forth in NMSA 1978, Section 37–1–24. Thus, even if the cause of action were found to have arisen on July 1, 1980, the suit would still be barred.

Furthermore, the City contends that Section 37–1–24 is *sui generis* and in derogation of the common law, meaning that it must be strictly construed and applied. We are unconvinced by the City's efforts to

analogize Section 37–1–24 to the limitations of the Wrongful Death Act (NMSA 1978, § 41–2–2 (Repl.Pamp.1986)), and the Workmen's Compensation Act (NMSA 1978, § 52–1–31 (Cum.Supp.1986)). Concerning those Acts we have refused to extend the period of limitations because the statutory scheme which created a new right also properly limited the time for the exercise of that right. *See Perry v. Staver,* 81 N.M. 766, 473 P.2d 380 (1970) (Wrongful Death Act); *Swallows v. City of Albuquerque,* 61 N.M. 265, 298 P.2d 945 (1956) (Workmen's Compensation Act).

Here we are concerned with a statute which creates no new right, but only reduces the period of exposure to liability of cities, towns, and villages in this state. That protection is not absolute, though. We have held that the doctrine of estoppel can be applied against a City. *See City of Carlsbad v. Neal,* 56 N.M. 465, 245 P.2d 384 (1952). Furthermore, the conduct of a party may estop it from raising the statute of limitations as a defense. *See Martinez v. Earth Resources Co.,* 90 N.M. 590, 566 P.2d 838 (Ct.App.1977). This principle has been codified in the Workmen's Compensation Act itself, which provides that failure to file "shall not deprive such person [otherwise entitled to compensation] of the right to compensation where the failure was caused in whole or in part by the conduct of the employer or insurer which reasonably led the person entitled to compensation to believe the compensation would be paid." NMSA 1978, § 52–1–36 (Cum.Supp.1986). It is clear that offers or promises of settlement, in connection with other conduct of defendants upon which plaintiffs have reasonably relied, may have the effect of tolling the statute of limitations. *See Owens v. Eddie Lu's Fine Apparel,* 95 N.M. 176, 619 P.2d 852 (Ct.App. 1980).

There was substantial evidence before the trial court to support the findings that the City's attorney had authority to act on behalf of the City; that he represented that settlement should be forthcoming and would be more expeditious in the absence of litigation; and that Plaintiffs postponed filing suit as he requested. Reasonable reliance upon the representations of the City's attorney led to the expiration of the limitation period prior to Plaintiffs' complaint being filed. We affirm the conclusion of the trial court that equitable considerations should estop the City from prevailing on its defense of the statute of limitations.

II. Duty to Disclose

The City challenges the trial court's conclusion that the City breached its duty under the collective bargaining agreement with the Steelworkers "to fully disclose, discuss and negotiate with the employees" concerning the effect upon pension rights of their transfer of employer while their job duties remained the same. This conclusion, contends the City, flies in the face of the stipulation entered into at trial that all the plaintiffs knew, in 1978, that they would lose their credits with the NIGPP if they accepted employment with the State. Moreover, the stipulation stated that the City had not yet made any agreement to purchase into PERA on behalf of any past or present employees. Nevertheless, the trial court ordered the City to reimburse Plaintiffs for the purchase of PERA credits in amounts equivalent to the City's contributions on their behalf to the NIGPP.

Plaintiffs' point, on the other hand, is that the City did negotiate with the Steelworkers in 1980 with respect to the transfer of pension benefits from the NIGPP to PERA. If the City had stayed with the NIGPP, then all employees, including Plaintiffs, who had less than ten years service would have no vested benefits. Conversely, it is conceivable that the City will agree to use the NIGPP funds to purchase PERA credits for past and present employees, thus preserving the NIGPP contributions of those City employees who had less than ten years of service at the time of transfer.

This is properly a matter for collective bargaining. But these Plaintiffs were deprived of the benefits of that bargain. In 1978 they knew that they did not have ten years vested credit with the NIGPP.

What they did not know is that the City would switch over in two years to a system which might have preserved their contributions.

We affirm the conclusion of the trial court that the City breached its duty to discuss and negotiate the pension consequences of the change of employer from City to State. Furthermore, the existence of such a duty and its acknowledgement by the City may be inferred from the representations of the late attorney for the City. Indeed, had he lived, this matter might never have gone to trial.[1]

For the foregoing reasons, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and STOWERS, J., concur.

735 P.2d 1138

Jimmy FUSON, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 16670.

Supreme Court of New Mexico.

April 16, 1987.

Jacquelyn Robins, Chief Public Defender, Kerry Kiernan, Asst. Appellate Defender, Santa Fe, for petitioner.

Paul Bardacke, Atty. Gen., Santa Fe, for respondent.

1. We observe that the amounts in question are not huge; the costs to the City of litigation may well exceed the value of the judgment.

OPINION

SCARBOROUGH, Chief Justice.

Petitioner was convicted of aggravated battery and as an habitual offender. He appealed, contending that the trial court abused its discretion in failing to excuse a particular prospective juror for cause, thereby compelling him to exercise a peremptory challenge, and thus violated his sixth amendment right to an impartial jury.[1] Petitioner did not allege that the jury which finally sat in the case was in any way biased. Nor did petitioner allege that he would have used the peremptory challenge to remove a juror who ultimately sat in the case if he had not been compelled to exercise it on the person in question. Considering itself bound by *State v. Martinez,* 95 N.M. 445, 623 P.2d 565 (1981), the Court of Appeals affirmed. We reverse the Court of Appeals and the trial court and overrule *Martinez* to the extent it is inconsistent with this opinion.

The issue in this case is whether the trial court abused its discretion in failing to excuse a particular prospective juror for cause, and if so, what consequences follow from the error.

During the trial court's voir dire of the jury panel, one of the prospective jurors indicated that he knew "about half" of the witnesses in the case. When asked by the court if it would embarrass him to sit as a juror, he responded: "Probably not." During defense counsel's voir dire, the person was asked to explain his answer "Probably not." He replied: "I think I'm probably too familiar with all the individuals involved in this case to say with certainty that I could be totally impartial." Defense counsel further inquired if the person's knowledge of these individuals would affect the way he decided the case. He responded: "I think that there is a possibility that that could occur."

In chambers, defense counsel requested the court to excuse the person for cause. The court denied the request. Defense counsel then exercised a peremptory challenge. Petitioner ultimately exercised all five of his peremptory challenges before the court completed the venire. The names of some jurors were called after petitioner exercised his final peremptory challenge.

The New Mexico Constitution guarantees the right to trial by an impartial jury. N.M.Const. art. II, § 14. An impartial jury is one in which each and every juror is "totally free from any impartiality whatsoever." *State v. McFall,* 67 N.M. 260, 263, 354 P.2d 547, 548–49 (1960). A prospective juror who cannot be impartial should be excused for cause. *See id.* Although we recognize that the trial court has discretion in dismissing a juror for cause, under the facts in this case, the trial court clearly abused its discretion. It is manifest from the person's responses to questions asked during voir dire that he could not be impartial. He should have been excused for cause.

In affirming the trial court, the Court of Appeals relied on *Martinez.* In *Martinez,* the Court held that even if the trial court abused its discretion in failing to excuse two persons for cause, the error was harmless since there was no allegation that the impartiality of the jury panel which finally heard the case was affected by the error. *Martinez* requires that the complaining party allege that the jury which finally heard the case was biased or unfair. *Martinez* also requires that the complaining party allege that he or she would have used peremptory challenges to remove jurors who ultimately sat in the case if he or she had not been compelled to use them on persons who should have been excused for cause. To put it another way, *Martinez* requires that the complaining party allege that he or she was *prejudiced* by the trial court's error.

Petitioner contends that *Martinez* is at odds with federal cases which dictate that the right of peremptory challenge is a derivative of the sixth amendment right to an impartial jury and that impairment of the right is reversible error without a showing of prejudice. In *Swain v. Alabama,* 380

1. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." U.S. Const. amend. VI.

U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled on other grounds, Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court of the United States characterized the right to peremptory challenge as " 'one of the most important of the rights secured to the accused' " (quoting *Pointer v. United States,* 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894)), and as " 'an arbitrary and capricious right [that] must be exercised with full freedom, or it fails of its full purpose' " (quoting *Lewis v. United States,* 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)). The Court stated that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain,* 380 U.S. at 219, 85 S.Ct. at 835.

A host of federal cases have followed *Swain.* In *United States v. Nell,* 526 F.2d 1223, 1229 (5th Cir.1976), the Fifth Circuit stated: "[I]t is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges." And in *United States v. Allsup,* 566 F.2d 68, 71 (9th Cir.1977), the Ninth Circuit stated: "Inhibition of the right to challenge peremptorily or for cause is usually deemed prejudicial error, without a showing of actual prejudice." *See also United States v. Hill,* 738 F.2d 152 (6th Cir.1984); *United States v. Gonzalez Vargas,* 585 F.2d 546 (1st Cir.1978).

■ The federal cases declare that prejudice is presumed when the right of peremptory challenge is denied or impaired. We overrule *Martinez* to the extent that case fails to recognize the presumption of prejudice announced in the federal cases.

■ In the present case, the names of some jurors were called after petitioner exercised his final peremptory challenge. Under these circumstances, petitioner's right of peremptory challenge was necessarily impaired by the trial court's failure to excuse the person for cause; therefore, prejudice is presumed. *See Swain v. Alabama; United States v. Allsup; United States v. Nell.* The presumption of prejudice was not rebutted. Petitioner is therefore entitled to a new trial.

We hold that prejudice is presumed where, as here, a party is compelled to use peremptory challenges on persons who should be excused for cause and that party exercises all of his or her peremptory challenges before the court completes the venire. We reverse the trial court and the Court of Appeals, and remand this case for a new trial.

IT IS SO ORDERED.

SOSA, Senior J., and WALTERS, J., concur.

RANSOM, J., dissents.

STOWERS, J., concurs in result only.

RANSOM, Justice, dissenting.

I DISSENT. If I had been the trial judge, I likely would have excused the juror. But, Judge Fort was the trial judge, not I. The trial court has "a great deal of discretion," *State v. Martinez,* 95 N.M. 445, 450, 623 P.2d 565, 570 (1981), in determining whether a prospective juror is "totally free from any partiality whatsoever." *State v. McFall,* 67 N.M. 260, 263, 354 P.2d 547, 548–49 (1960). Arbitrary and unreasonable action on the part of the court is the test for abuse of discretion. *Richins v. Mayfield,* 85 N.M. 578, 514 P.2d 854 (1973). For the court to have abused its discretion, there must have been *no reason to believe* that the prospective juror was totally free from any partiality whatsoever.

Therefore, the majority seems to hold that, when a juror states that he cannot say with certainty that he could be totally impartial, and that there is a possibility that his knowledge of "about half" of the witnesses would affect the way he decides the case, then there is no reason for the court to believe that the prospective juror is totally free from any partiality whatsoever. I do not want to dilute a "great deal of discretion" by holding that "lack of certainty" and "possibilities" skillfully elicited in voir dire shall require that the court dismiss prospective jurors on challenge for cause, or face the likely prospect of a new

trial after appeal. What honest man can be "certain"? Is not partiality always a "possibility"? Should not the trial judge take the measure of the man?

It is for the trial court to determine whether a prospective juror's statements regarding *lack of certainty* and *possibilities* are cause to excuse the juror. The manner and circumstances in which the words are expressed are as important as their literal meaning.

For the above reasons, I dissent.

735 P.2d 1141

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 8611, Plaintiff-Appellant and Cross-Appellee,

v.

Alvinita ARCHIBEQUE, et al., Defendants and Cross-Appellants,

and

Alice F. Hoppes, Defendant-Appellee.

Nos. 16030, 16031.

Supreme Court of New Mexico.

April 17, 1987.

Rehearing Denied May 11, 1987.

Kool, Kool, Bloomfield & Hollis, Gerald R. Bloomfield, Tara Selver, Albuquerque, Adair, Scanlon & McHugh, Patricia M. Shea, Patrick M. Scanlon, Washington, D.C., for Communications Workers of America, Local 8611.

Alan F. Zvolanek, Albuquerque, for Archibeque, et al.

Hanna B. Best, Albuquerque, for Hoppes.

OPINION

SCARBOROUGH, Chief Justice.

This action was commenced by Communications Workers of America, Local 8611 (appellant/cross-appellee) to collect fines imposed against union members for strikebreaking activity. Defendant Hoppes (appellee) counterclaimed for defamation and invasion of privacy. The jury returned a verdict for Hoppes in the amount of $15,000 actual damages and $50,000 punitive damages.[1] Local 8611 appealed that part of the judgment which awarded Hoppes affirmative relief. The jury returned verdicts in favor of Local 8611 on the local's claims against various of Hoppes' codefendants. Some of them appealed (cross-appellants). The appeals were consolidated. We affirm in part and reverse in part.

On August 6, 1983, Local 8611 (union) went on strike. Hoppes resigned from the union on August 12, 1983. On August 15, 1983, Hoppes crossed the union's picket line and returned to work. On August 24, 1983, James Tricoli, New Mexico Director of the international union with which Local 8611 is affiliated, wrote Alfred Rucks, New Mexico President of the National Association for the Advancement of Colored People (NAACP). Hoppes was an officer of the New Mexico NAACP. Tricoli's letter stated that Hoppes, "who concurrently is a member of Local 8611 * * * has and continues to cross authorized picket lines in connection with a membership-approved strike." The letter described Hoppes as "amoral," as "totally void of character," as "an embarrassment" to the NAACP, and likened her to Judas Iscariot. The letter concluded by urging Rucks to take action to remove Hoppes from her NAACP office. Later, Rucks received a telephone call from someone identifying himself as the president of Local 8611, who urged Rucks to take the action requested in the letter.

Hoppes' defamation counterclaim was based upon Tricoli's letter. Local 8611 contends that the jury was improperly instructed inasmuch as it was allowed to find the union liable to Hoppes for defamation upon proof of negligence rather than upon proof of actual malice.

Cross-appellants were both suspended from membership in the union and fined as a result of their strikebreaking activity. Cross-appellants contend the union cannot both suspend from union membership and impose fines for the same infraction of union rules. Cross-appellants also contend the union breached its fiduciary duty to deal fairly with them by failing to provide them with copies of the union constitution and bylaws prior to imposing sanctions.

The case, as consolidated, presents three issues for decision:

(1) Did the trial court err in instructing the jury that Local 8611 would be liable to Hoppes for defamation upon proof of negligence?

(2) Was the language of Tricoli's letter actionable?

(3) Did the trial court err in refusing to dismiss Local 8611's complaint against cross-appellants?

ISSUE (1):

Local 8611 contends that under *National Association of Letter Carriers v. Austin,*

1. It is not clear from the verdict whether the jury based its award on the defamation claim or the invasion of privacy claim. Two other defendants, however, raised identical invasion of privacy claims and the jury did not return verdicts in their favor. We therefore conclude that the jury's verdict in favor of Hoppes was based on the defamation claim. We note that appellant and Hoppes have devoted their entire argument to the defamation claim.

418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), and *Linn v. United Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), it could only be found liable to Hoppes upon clear and convincing proof of actual malice (knowledge of falsity or reckless disregard of the truth). *See New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). As already stated, the jury was instructed that it could find the union liable to Hoppes upon proof of negligence. We conclude that the jury was improperly instructed.

In *Linn,* defamatory statements about a company manager were published to union members and prospective union members during a union organizing campaign. The manager sued the union for defamation. The Supreme Court acknowledged the federal policy encouraging free debate on issues dividing labor and management and implied that this debate " 'should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' " 383 U.S. at 62, 86 S.Ct. at 663 (quoting *New York Times Co. v. Sullivan,* 376 U.S. at 270, 84 S.Ct. at 721). The Court concluded that "the most repulsive speech [in the context of a labor dispute] enjoys immunity provided it falls short of a deliberate or reckless untruth." *Id.* 383 U.S. at 63, 86 S.Ct. at 663. Thus, the Court adopted *New York Times Co. v. Sullivan*'s actual malice standard to determine whether libels published in the context of a labor dispute were actionable.

In *Letter Carriers,* the union regularly published in its newsletter a "List of Scabs," i.e., nonunion postal workers. The nonunion workers sued the union for defamation. The Supreme Court reiterated *Linn*'s holding that state libel laws may be applied to penalize statements made in the course of labor disputes only if the statements were known to be false or were made with reckless disregard of whether they were false or not. Holding that the dispute between nonunion workers and the union was a labor dispute, the Court applied the actual malice standard.

We must determine whether *Linn*'s partial preemption of state libel remedies is applicable in this case. In *Letter Carriers,* the Court stated:

> [W]hether *Linn*'s partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather, application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

418 U.S. at 279, 94 S.Ct. at 2778.

Linn's partial preemption of state libel laws is applicable in this case since Tricoli's letter was published in a context where the policies of the federal labor laws leading to protection for freedom of speech were significantly implicated. Tricoli's letter was written in the course of a strike; the letter was an expression of union contempt for strikebreakers. Since Tricoli's letter was published in a context where the policies of the federal labor laws leading to protection for freedom of speech were significantly implicated (i.e., a strike), the jury should have been instructed that the union would be liable to Hoppes for defamation only upon clear and convincing proof of actual malice.

We note that *Letter Carriers* expanded the scope of *Linn*'s partial preemption. *See* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches,* 75 Mich.L.Rev. 43, 51 n. 55 (1976). In *Letter Carriers,* the dispute was one between nonunion workers and a union; whereas in *Linn,* the dispute was one between management and a union. The facts in *Linn* more clearly implicate the federal policy of encouraging free debate on issues dividing labor and management. By defining a dispute between a union and nonunion workers as a "labor dispute," *Letter Carriers* implied that we must liberally construe *Linn*'s partial preemption. *Accord Tosti v. Ayik,* 386 Mass. 721, 437 N.E.2d 1062 (1982) ("labor dispute" should be broadly construed).

Hoppes contends that even if the actual malice standard applies, the jury's verdict should stand because the jury was instructed that it could award punitive damages upon proof of actual malice and the jury awarded Hoppes punitive damages. The problem with Hoppes' theory is that the jury was instructed that actual malice could be proven "by the greater weight of the evidence" rather than by "clear and convincing proof." *See New York Times Co. v. Sullivan.*

In sum, the jury was improperly instructed and its verdict in Hoppes' favor cannot stand.

ISSUE (2):

Our disposition of the first issue would warrant a new trial but for another problem with the counterclaim; the language used in Tricoli's letter is not actionable as a matter of law.

In *Letter Carriers,* the Court stated that "[t]he *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of falsehood." 418 U.S. at 283, 94 S.Ct. at 2781. Rhetorical hyperbole and lusty and imaginative expressions of contempt fail to satisfy the requirement of knowing or reckless falsehood. *See id.* at 282–87, 94 S.Ct. at 2780–82. Characterizations such as "amoral," "totally void of character," and "an embarrassment" are rhetorical hyperbole and will not support recovery for defamation in the context of a labor dispute.

Hoppes makes much of the misrepresentation contained in the letter that she, at the time the letter was written, was a union member. Hoppes' counterclaim, however, did not allege that she was damaged by this misrepresentation; rather, the counterclaim alleged damage by use of the characterization "amoral.' Furthermore, the misrepresentation is not defamatory, either on its face or in the context of the letter, and its presence does not convert rhetorical hyperbole contained in the letter into misstatements of fact.

Since the jury was improperly instructed and since the language of Tricoli's letter was not actionable, we reverse the jury verdict in favor of Hoppes. Our disposition of this issue renders moot appellant's claims that there was insufficient evidence to establish that Tricoli was Local 8611's agent and that the trial court erred in admitting Tricoli's letter into evidence.

ISSUE (3):

Cross-appellants moved to dismiss prior to trial on the ground that Local 8611 did not have authority to both suspend and fine its members for the same infraction of union rules and therefore failed to state a claim upon which relief could be granted. *See* SCRA 1986, 1–012(B)(6). The union constitution provides that "[m]embers may be fined, suspended or expelled by locals in the manner provided in the Constitution." The union bylaws similarly provide that "[m]embers of this Local may be fined, suspended or expelled in the manner provided in these Bylaws." Cross-appellants contend that these clauses can only be read to provide mutually exclusive remedies and that since cross-appellants were suspended from membership in the union they could not be fined for the same infraction. The constitution and bylaws, however, can be read to permit suspension, fines, *and* expulsion. The trial court, therefore, did not err in denying the initial motion to dismiss.

Nor did the trial court err in denying cross-appellants' motion to dismiss at trial which was based upon Local 8611's failure to provide cross-appellants with copies of the union constitution and bylaws prior to imposing sanctions. Cross-appellants have cited no authority for the proposition that Local 8611 was obligated to provide cross-appellants with copies of the union constitution and bylaws prior to imposing sanctions and we do not believe that such a requirement is called for by the circumstances of this case.

Finally, cross-appellants contend that the trial court erred in refusing to submit particular tendered instructions to the jury. In view of our disposition of the prior points raised by cross-appellants, this point is meritless.

The judgment of the trial court is affirmed in part and reversed in part; we

remand for entry of judgment in favor of Local 8611 on Hoppes' counterclaim.

IT IS SO ORDERED.

SOSA, Senior Justice, and RANSOM, J., concur.

735 P.2d 1145

In the Matter of Walter NAILS an Attorney Admitted to Practice before the Courts of the State of New Mexico.

No. 16610.

Supreme Court of New Mexico.

April 22, 1987.

Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, for Bd.

No appearance for respondent.

OPINION

PER CURIAM.

This matter is before the Court after disciplinary proceedings conducted pursuant to SCRA 1986, Rules Governing Discipline, wherein attorney Walter Nails (Nails) was found to have violated NMSA 1978, Code of Prof.Resp. (Repl.Pamp.1985), by engaging in various acts of dishonesty, by neglecting legal matters entrusted to him, and by failing to preserve his clients' funds. We adopt the Board's findings and conclusions and agree with its recommendation that Nails should be disbarred.

We note that Nails has not participated in these proceedings and that there is evidence to the effect that he left the State of New Mexico shortly before the instant charges were filed against him. He has, however, been served with copies of all notices and pleadings by certified mail at his address of record on file with the Clerk of this Court in accordance with the requirements of SCRA 1986, Rules Governing Discipline, Rules 17–301(C) and 17–309(D). All attorneys, whether licensed or under suspension, have an affirmative duty to advise the Clerk of any change in address. *See* SCRA 1986, Rules Governing Discipline, Rules 17–202(A) and 17–212(D). One cannot avoid disciplinary sanctions simply by concealing himself within or leaving the jurisdiction and failing to notify the Clerk of a change in address.

Most of the instant charges originated from a complaint filed by Darrell Allen (Allen), a New Mexico prison inmate incarcerated at the federal penitentiary in El Reno, Oklahoma, after the 1980 prison riot. Allen was under the impression that his sentence had been incorrectly imposed and asked a friend in Albuquerque to find an attorney to look into the matter. The friend spoke with Nails, who agreed to handle the matter for a retainer of $1400

(which included expenses for Nails to travel to Oklahoma to meet with Allen). Allen sent $1400 to Nails; this money constituted the bulk of Allen's net worth, which he had accumulated by working at prison industries for sixty cents per hour and saving nearly every cent.

Thereafter, Allen received two or three one paragraph letters from Nails, but he received no visit nor any answers to his many questions. Early in 1986, he was paroled and went to see Nails about getting a refund of part of his money. Nails finally agreed to refund $160, but provided no accounting to Allen of time spent on his behalf. Allen refused the refund, sued Nails, and was awarded judgment in the amount of $1209.00 on August 19, 1986. (Cause No. 1960–86 Metropolitan Court of Bernalillo County.) This judgment has not been paid.

When asked to respond to Allen's complaint, Nails contended that he had studied the court file and ascertained there was nothing irregular about Allen's sentence, and hence there was nothing he could do nor any need to visit Allen in Oklahoma. He maintained that he had, however, taken steps to insure that Allen would not be returned to the New Mexico penal system. Allen produced documentation to show that this was never a problem and that he had never requested Nails to take any action concerning the matter. Nails also claimed to have spent 10.5 hours doing "research." When disciplinary counsel inquired as to the nature and results of the research, Nails responded with a vituperative letter wherein he compared disciplinary counsel with "Attila the Hun" and announced that he would cooperate no further. We note that Nails has a habit of reacting to disciplinary investigations in this fashion. *See Matter of Nails,* 105 N.M. 89, 728 P.2d 840 (1986).

Since no refund was received by Allen and no showing was made by Nails that he earned the $1400 paid to him, records pertaining to Nails' trust account were subpoenaed pursuant to NMSA 1978, Disc.Brd. Proc.Rule 7(a)(2) (Repl.Pamp.1985). An examination of the bank records indicated not only that Nails no longer had Allen's money, but also that he had apparently utilized the account as a personal checking account. In addition, it appeared that monies belonging to many clients were either converted by Nails to his own use or otherwise unaccounted for. On numerous occasions the account was overdrawn. Although requested to address these apparent problems, Nails offered no explanation. It is not clear whether this was because he had no explanation or because of his position that he would not cooperate with the investigation by disciplinary counsel.

Nails' conduct with regard to his trust account violated NMSA 1978, Code of Prof. Resp.Rules 1–102(A)(4), 1–102(A)(6), 9–102(A), and 9–102(B)(3) (Repl.Pamp.1985). His failure to do any discernible work for Darrell Allen or to provide a satisfactory accounting of his time and a refund of the unearned portion of a fee paid in advance (as well as his apparent conversion of those funds to his own use when they had not in fact been earned) violated NMSA 1978, Code of Prof.Resp.Rules 1–102(A)(4), 1–102(A)(5), 1–102(A)(6), 2–106, 6–101(A)(3), and 9–102(B)(4) (Repl.Pamp.1985). In addition, Nails' refusal to cooperate in this investigation violated NMSA 1978, Code of Prof.Resp.Rules 1–101(C) and 1–102(A)(5) (Repl.Pamp.1985).

Nails was also found to have been paid money by a woman to handle a child custody dispute and thereafter to have taken no action in the matter. The unearned fee was never placed in his trust account. He did arrange to meet with his client one evening, ostensibly to take her to a restaurant in order to discuss her case over a soda. Nails met his client but was somewhat intoxicated; and rather than drive to a restaurant, Nails proceeded to drive her and her eleven-month-old son to Sandia Crest. He made physical advances to the woman and, when rebuffed, accused her of being a racist. When a sheriff's officer stopped Nails because of his erratic driving, the woman requested and received a ride home with the sheriff. Nails did not respond to requests for information concerning his neglect of this case, his fee, and his other behavior. His conduct in this

instance violated NMSA 1978, Code of Prof.Resp.Rules 1–102(A)(6), 6–101(A)(3), 7–101(A)(2), 7–101(A)(3), 9–102(A), and 9–102(B)(4) (Repl.Pamp.1985).

In addition to the violations noted, the hearing committee and the Board found numerous factors in aggravation of Nails' misconduct. Nails has a prior record of disciplinary offenses, his license to practice law having been suspended for six (6) months in November 1986. *See Matter of Nails,* 105 N.M. 89, 728 P.2d 840 (1986). His actions in taking money from clients and thereafter performing little or no work, as well as his conversion of trust monies to his own use, can only be described as dishonest. Nails has shown a pattern of misconduct and has committed multiple offenses. He has failed to comply in any way with the Rules Governing Discipline. He has not once acknowledged the wrongful nature of his conduct, nor has he shown the slightest hint of remorse; in fact, the few letters he did write to disciplinary counsel would indicate that he actually felt his actions were justified. Nails has also failed to make restitution to Darrell Allen, despite a judgment having been entered against him.

Under the circumstances, we see no alternative but to disbar Nails. Pursuant to SCRA 1986, Rules Governing Discipline, Rule 17–206(C), we also require that he make restitution to Darrell Allen in the amount of the judgment against him.

IT IS THEREFORE ORDERED that Walter Nails be and hereby is disbarred from the practice of law pursuant to SCRA 1986, Rules Governing Discipline, Rule 17–206(A)(1). Any motion for permission to apply for reinstatement filed pursuant to SCRA 1986, Rules Governing Discipline, Rule 17–214(A), must be accompanied by a showing that Nails has made appropriate restitution to Allen.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court strike the name of Walters Nails from the roll of those persons permitted to practice law in New Mexico and that this Opinion be published in the State Bar of New Mexico *News and Views* and in the *New Mexico Reports.*

Costs of these proceedings in the amount of $125.93 are hereby assessed against Nails. These, as well as any costs previously assessed, must be paid to the Disciplinary Board prior to any application for reinstatement.

IT IS SO ORDERED.

WALTERS, J., not participating.

735 P.2d 1147

In the Matter of Larry Rey HILL an Attorney Admitted to Practice before the Courts of the State of New Mexico.

No. 16713.

Supreme Court of New Mexico.

April 22, 1987.

Randall D. Van Vleck, Deputy Chief Disciplinary Counsel, Albuquerque, for Bd.

No appearance for respondent.

OPINION

PER CURIAM.

This matter is before this Court after disciplinary proceedings conducted pursuant to SCRA 1986, Rules Governing Discipline, wherein attorney Larry Rey Hill (Hill) was found to have violated the Code of Professional Responsibility by forging his client's name to a settlement check and absconding with her money, by charging a clearly excessive fee, and by failing to cooperate with the disciplinary board in its investigation. We adopt the Disciplinary Board's findings and conclusions and disbar Hill pursuant to SCRA 1986, Rules Governing Discipline, Rule 17–206(A).

In 1979, Hill was retained to represent Viola Warner in a suit involving the partition of real estate. A judgment was entered ordering sale of the land, and sale took place shortly thereafter.

In early May of 1981, Ms. Warner received a check for $32,026.20, representing her share of the proceeds from the sale of the land. Ms. Warner promptly returned the check to the attorney for the plaintiffs, thinking that if she did not negotiate the check she might be able to keep her land. The check was then sent to and received by Hill on behalf of Ms. Warner. Hill notified Ms. Warner of his receipt of the check and was subsequently advised by her not to cash it because she wanted to appeal the order of partition.

Without Ms. Warner's knowledge or consent, Hill forged her signature on and negotiated the check. Ms. Warner was later told by Hill that her check had been placed in the business account of the Sacramento Alternative School as an investment for which she would receive interest, but that the school had used $1,000 of the money for what Hill assured her was a "noble purpose." Ms. Warner was subsequently advised by Hill that $22,500 had been invested in a certificate of deposit in her name at Western Bank in Alamogordo and that Hill had the balance in his trust account. There was no certificate of deposit in Ms. Warner's name at Western Bank; by October of 1983, Hill had left the jurisdiction with the balance of Ms. Warner's money.

By forging Ms. Warner's signature to the check and absconding with her money, Hill violated NMSA 1978, Code of Prof. Resp.Rules 1–102(A)(3), 7–101(A)(3), 9–102(A), 9–102(B)(1), and 9–102(B)(4) (Repl. Pamp.1985).

While the appeal was pending, Hill distributed money to Ms. Warner which he represented was interest on the money he was supposedly holding for her. The money received by Ms. Warner was in fact a portion of the check that Hill fraudulently negotiated. This conduct violated NMSA 1978, Code of Prof.Resp.Rule 1–102(A)(4) (Repl.Pamp.1985).

On October 12, 1983, Hill sent Ms. Warner what purported to be an accounting. The "accounting" notified Ms. Warner (for the first time) that her check had been negotiated and that the "interest" she had been receiving had in fact been the principal of her own money. The accounting also noted that Hill had charged Ms. Warner an additional $2,000 in legal fees for prosecuting her appeal. Hill was employed and paid by Southern New Mexico Legal Services at the time, and Ms. Warner qualified for free legal services from that organization. This "accounting" was prepared two years after he forged Ms. Warner's name on the check and only after numerous requests for an accounting from Ms. Warner and her daughter, Alberta Silva. This conduct violated NMSA 1978, Code of Prof.Resp.Rules 2–106(A) and 9–102(B)(3) (Repl.Pamp.1985).

On April 16, 1986, an Otero County Grand Jury indicted Hill on criminal charges arising out of this conduct. Ms. Warner testified before the Grand Jury and was scheduled to testify at Hill's trial. Just prior to the Grand Jury proceedings, Hill appeared at Ms. Warner's home and offered to pay her between $1,000 and $10,000 if she would agree to "get the D.A. off my back" and not pursue criminal charges and/or testify against him. This conduct violated NMSA 1978, Code of Prof.Resp.

Rule 7–109(B) (Repl.Pamp.1985). Hill was subsequently acquitted by a jury of the criminal charges against him; however, this fact does not mandate an abatement of disciplinary proceedings. *See* NMSA 1978, Disc.Brd.P.R. 6 (Repl.Pamp.1985).

Hill was served copies of the Specification of Charges and Notice and Designation of Hearing Committee by certified mail to his address of record on file with the Clerk of the Supreme Court of the State of New Mexico on May 20, 1986. He failed to file an answer to the Specification of Charges against him and did not appear at the hearing before the Board's hearing committee or before this Court despite having received notice of both hearings. The allegations were, therefore, deemed to have been admitted. NMSA 1978, Disc.Brd.P.R. 11(c) (Repl.Pamp.1985, as amended). Additionally, this conduct violates NMSA 1978, Code of Prof.Resp.Rule 1–101(C) (Repl. Pamp.1985). Hill's cumulative conduct in this matter violated NMSA 1978, Code of Prof.Resp.Rules 1–102(A)(5) and 1–102(A)(6) (Repl.Pamp.1985).

Because of Hill's steadfast refusal to appear before the Board's hearing committee or before this Court, there is no evidence of any mitigating circumstances. On the contrary, Hill's conduct seems to be the product of dishonest and greedy motives. He not only failed to take reasonable steps to protect his client's interests, but in fact exploited his client's naivete. Such conduct by an officer of the court is despicable. This Court demands and the people of the State of New Mexico deserve a higher standard of conduct among persons granted the privilege of practicing law in this state.

IT IS THEREFORE ORDERED that Larry Rey Hill be and is disbarred from the practice of law pursuant to SCRA 1986, Rules Governing Discipline, Rule 17–206(A)(1).

IT IS FURTHER ORDERED that Hill file with this Court on or before May 2, 1987, evidence of his compliance with all the requirements of SCRA 1986, Rules Governing Discipline, Rule 17–212.

IT IS FURTHER ORDERED that full restitution be made to Viola Warner before any petition for reinstatement be considered by this Court.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court strike the name of Larry Rey Hill from the roll of those persons admitted to practice law in New Mexico and that this Opinion be published in the State Bar of New Mexico *News and Views* and in the *New Mexico Reports.* Costs of these proceedings in the amount of $190.42 are hereby assessed against Hill and must be paid to the Disciplinary Board prior to any application for reinstatement.

IT IS SO ORDERED.

SOSA, Senior Justice, not participating.

[redacted]

735 P.2d 1151

Isabel HERN, Individually and as Administrator of the Estate of Apolinar Paul Moraga, Plaintiff-Appellant,

v.

Roger CRIST, Chairman of the Board of Corrections, State of New Mexico, Jerry Griffin, Warden, New Mexico State Penitentiary, Felix Rodriguez, Secretary of Corrections, the New Mexico Department of Corrections, Defendants-Appellees.

No. 8251.

Court of Appeals of New Mexico.

Feb. 4, 1987.

Certiorari Denied April 21, 1987.

Jack L. Love, Love & McClelland, Albuquerque, for plaintiff-appellant.

Charles E. Stuckey, Douglas A. Baker, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Patrick M. Shay, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendants-appellees.

OPINION

DONNELLY, Chief Judge.

Plaintiff, individually and in her capacity as the administrator of the estate of Apolinar Paul Moraga, deceased, appeals from an order of the trial court dismissing her complaint on defendants' motion for failure to state a claim, or alternatively for summary judgment. The single issue presented on appeal is whether the trial court erred in dismissing plaintiff's causes of action for wrongful death and deprivation of civil rights. We affirm.

Plaintiff filed suit herein against defendants Roger Crist in his capacity as Chairman of the Board of Corrections; Jerry Griffin, Warden, New Mexico State Penitentiary; Felix Rodriguez, Deputy Secretary of Corrections (erroneously named as

Secretary of Corrections); and the New Mexico Department of Corrections. The complaint contained two counts: Count I alleged that defendants Crist, Griffin and Rodriguez in their capacity as public officials, and the Department of Corrections as a governmental entity, were each negligent in failing to adequately maintain security, supervise operation of the penitentiary, and protect decedent, thereby permitting an assault by other inmates and Moraga's death on October 24, 1980. Plaintiff also alleged failure to provide adequate medical care to decedent Moraga. Count II alleged that defendants acted to deprive decedent of his state and federal civil rights, including his rights under Title 42, U.S.C.A. Section 1983 (West 1981).

Defendants filed answers denying the allegations, and on August 20, 1984, filed a motion to dismiss plaintiff's complaint for failure to state a claim or, in the alternative, for summary judgment. In support of the motion, defendants submitted affidavits of Felix Rodriguez and Roger W. Crist and copies of court orders issued in other suits filed against the warden of the state penitentiary and other public officers.

Defendants challenge the accuracy of plaintiff's allegations contained in the complaint concerning the positions defendants allegedly held at the time of decedent's death. The affidavits of Rodriguez and Crist state that as of the date of the alleged incident on October 25, 1980, Rodriguez was Deputy Secretary of Corrections, not Secretary; that Crist did not become affiliated with the penitentiary or the Department of Corrections until after the incident; and that Griffin's affiliation terminated prior to the incident.

Plaintiff's complaint did not allege the basis for asserting individual claims against defendants. The record does not contain any depositions or affidavits in opposition to defendants' motion to dismiss or motion for summary judgment and, even though plaintiff's reply brief refers to other documents generally, they are not before us on appeal.

Following a hearing on defendants' alternative motion, the trial court entered an order of dismissal on November 15, 1984, finding that the motion to dismiss was well-taken and dismissing plaintiff's complaint.

PROPRIETY OF THE ORDER OF DISMISSAL

Plaintiff argues on appeal that the trial court erred in dismissing her complaint and cause of action for wrongful death and violation of civil rights. Plaintiff's reply brief concedes, however, that the case "should be dismissed as to the defendant Crist." We therefore consider the issue of Crist's liability under both counts as abandoned. *See State v. Fish,* 102 N.M. 775, 701 P.2d 374 (Ct.App.1985). We discuss jointly the propriety of dismissal of both counts of plaintiff's complaint as to Griffin, Rodriguez and the State Department of Corrections.

In considering a motion to dismiss under SCRA 1986, Rule 1–012(B)(6), the well-pleaded facts alleged in the complaint are taken as true. *State ex rel. Risk Management Division v. Gathman-Matotan Architects & Planners, Inc.,* 98 N.M. 790, 653 P.2d 166 (Ct.App.1982). In order to state a cause of action, plaintiff must allege facts which, if proven, would allow relief. *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613 (Ct.App.1983). A motion to dismiss should not be granted unless the court determines that the plaintiff cannot obtain relief under any state of facts provable under the alleged claims. *Eldridge v. Sandoval County,* 92 N.M. 152, 584 P.2d 199 (Ct.App.1978).

Plaintiff, attempting to circumvent sovereign immunity defenses, contends in her reply brief that Count I of her complaint states only a common law wrongful death action. The Tort Claims Act, NMSA 1978, Section 41–4–1 to –27 (Repl.1986), however, is the exclusive remedy against a governmental entity or public employee for torts where immunity is waived by provisions of the Act. § 41–4–17; *see also Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980).

Plaintiff's brief-in-chief concedes that Count I states a claim for relief only if the immunity provisions of the Tort Claims

Act are not present. Because the Act's waiver of immunity provisions contained in Sections 41–4–5 to –12 do not apply to defendants' conduct, plaintiff's Count I fails to state a claim for relief against all defendants acting in their official capacity and against the Department of Corrections. *See Anchondo v. Corrections Department,* 100 N.M. 108, 666 P.2d 1255 (1983); *Wittkowski v. State,* 103 N.M. 526, 710 P.2d 93 (Ct.App.1985).

Although the caption of plaintiff's complaint indicated that plaintiff brought suit as personal representative of decedent Moraga's estate and individually, the body of the complaint did not allege a basis for plaintiff's individual claim against defendants. Dismissal of plaintiff's individual claim was also proper.

Plaintiff's contention that defendants waived the defense of immunity because it was only raised at the motion hearing and not by motion or in their answers is without merit. While we deem it preferable practice for the immunity defense to be specifically raised as an affirmative defense or by way of a motion to dismiss, a failure to affirmatively plead this defense does not amount to a waiver. *See Maes v. Old Lincoln County Memorial Commission,* 64 N.M. 475, 330 P.2d 556 (1958); *Vigil v. State,* 56 N.M. 411, 244 P.2d 1110 (1952). The defense of sovereign immunity may properly be raised incident to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 1–012(B)(6). *Cf. Julius Rothschild & Co. v. State,* 66 Haw. 76, 655 P.2d 877 (1982) (where court held that when state does not raise the discretionary function exception defense in its responsive pleadings, it may raise that defense by motion). The claim of immunity may also be raised for the first time even upon appeal. *Maes v. Old Lincoln County Memorial Commission.*

Defendants submitted the affidavits of Rodriguez and Crist in support of their motion to dismiss. Where matters outside the pleadings are presented and not excluded by the court, the motion to dismiss will be treated as a motion for summary judgment. *Romero v. U.S. Life Insurance Co.,* 104 N.M. 241, 719 P.2d 819 (Ct.App.1986); *Knippel v. Northern Communications, Inc.,* 97 N.M. 401, 640 P.2d 507 (Ct.App.1982). Summary judgment provides a method to determine whether plaintiff has a genuine claim for relief prior to trial. *Pederson v. Lothman,* 63 N.M. 364, 320 P.2d 378 (1958). When a Rule 1–012(B) motion is converted into a summary judgment motion and the movant has satisfied its burden under SCRA 1986, Rule 1–056 establishing a prima facie case for summary judgment, the opposing party must come forward and show the existence of a genuine issue of material fact rendering summary judgment inappropriate. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

Plaintiff alleged that defendant Griffin acted negligently and that this negligence resulted in the death of Moraga. As shown by the affidavit of Rodriguez, Griffin was warden of the penitentiary from March 1979 through April 1980, but, thereafter, was not connected with the penitentiary. Plaintiff's complaint also alleged that defendant Rodriguez was Secretary of Corrections. Defendant Rodriguez asserts in his affidavit, however, that, at all times material hereto, he never served in that capacity but only as Deputy Secretary of Correction for Operations.

The affidavits of defendants Rodriguez and Crist established a prima facie case indicating that Griffin did not serve in a position controlling the operation of the penitentiary at the time of Moraga's death. Because plaintiff did not present facts or evidence to controvert this claim, the record before us fails to indicate the existence of any genuine issue of material facts as to Griffin to establish his responsibility for supervision or control of the operation of the penitentiary or its inmates, and which proximately caused Moraga's death on October 24, 1980.

Although dismissal of Count I against Rodriguez on the basis of immunity was proper as noted previously, summary judgment of both counts predicated alone

on the misallegation of Rodriguez's capacity would be improper. *See* SCRA 1986, Rule 1–009; *see also In re Ove's Estate,* 114 Colo. 286, 163 P.2d 651 (1945) (en banc); *Weiler v. Ross,* 80 Nev. 380, 395 P.2d 323 (1964); *see also* Annot., 8 A.L.R.2d 6 (1949).

Plaintiff contends that because the trial court's order of dismissal dealt only with defendants' motion to dismiss for failure to state a cause of action under Rule 1–012(B)(6), the trial court failed to grant summary judgment. Plaintiff argues that, in this posture, the summary judgment issue should not be reviewed herein and the case should be remanded for a hearing on defendants' motion for summary judgment. We do not read the trial court's order of dismissal so narrowly. Defendants' motion to dismiss was predicated upon two grounds: the failure to state a cause of action and, alternatively, a motion for summary judgment supported by accompanying affidavits. Plaintiff had a full and fair opportunity to submit pertinent materials and to argue the impropriety of the summary judgment. *Cf. Santistevan v. Centinel Bank of Taos,* 96 N.M. 734, 634 P.2d 1286 (Ct.App.1980). The affidavits before the trial court converted the motion to dismiss into one for summary judgment; the dismissal order was a summary judgment favoring defendants. *Emery v. University of New Mexico Medical Center,* 96 N.M. 144, 628 P.2d 1140 (Ct.App.1981). In any event, whether the basis for the dismissal is ascribed to a ruling under Rule 1–012(B)(6), or summary judgment, the trial court's order of dismissal as to Crist, Griffin, Rodriguez and the Department of Corrections was proper.

Insofar as plaintiff's complaint sought to state a claim against the Department of Corrections under Count II, this court has previously ruled that the Department of Corrections is not a "person" within the meaning of Section 1983. *DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 447, 640 P.2d 1327 (Ct.App.1981). Because Section 1983 applies only to persons, the dismissal as to this claim was proper. *Id.* While not conceding its correctness, plaintiff admits this is the law. In addition, summary judgment on Count II is appropriate as to defendant Griffin for the same reasons stated regarding Count I.

With respect to plaintiff's claim against Rodriguez, supervisory liability does not exist under a claim grounded upon a Section 1983 violation where the complaint fails to assert personal responsibility against defendants for deprivation of constitutional rights. *DeVargas v. State ex rel. New Mexico Department of Corrections.* Plaintiff alleges that defendants knew or should have known that the state prison was inadequately maintained and supervised and that it was highly foreseeable that a prisoner, such as plaintiff, would be a victim of attacks by other prisoners. Even if plaintiff's complaint can be said to state a claim against Rodriguez, nevertheless, it still fails for want of a genuine issue of material fact.

Other courts have found an alleged breach of duty of supervision actionable under Section 1983 when defendant was in a position of responsibility, knew or should have known of the misconduct, and failed to prevent future harm. *McClelland v. Facteau,* 610 F.2d 693 (10th Cir.1979); *see also Withers v. Levine,* 615 F.2d 158 (4th Cir.1980) (in order for prisoner to obtain relief for deprivation of constitutional right to be protected from threat of violence, he must show a pervasive risk of harm to an identifiable group of prisoners from other prisoners and that prison officials have failed to exercise reasonable care to prevent harm or risk of harm).

It is plaintiff's burden to show, in response to a motion for summary judgment, that defendant was adequately put on notice of prior misbehavior. *McClelland v. Facteau.* Generally, a single incident or isolated incidents is insufficient to establish notice or a pervasive risk of harm. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); *Withers v. Levine.*

Because plaintiff has failed to allege any prior acts or threats of physical violence towards the prison population or

decedent, an issue of material fact as to the requisite prior notice has not been established. Summary judgment of Count II as to Rodriguez is affirmed.

IT IS SO ORDERED.

BIVINS and APODACA, JJ., concur.

735 P.2d 1156

STATE of New Mexico, Plaintiff-Appellee,

v.

Steve APODACA, Defendant-Appellant.

No. 9692.

Court of Appeals of New Mexico.

Feb. 26, 1987.

Certiorari Denied April 9, 1987.

[redacted]

Hal Stratton, Atty. Gen., Santa Fe, for plaintiff-appellee.

Scott McCarty, Albuquerque, for defendant-appellant.

OPINION

MINZNER, Judge.

Defendant appeals from his convictions for first degree criminal sexual penetration, assault with intent to commit a felony, and aggravated assault with a deadly weapon. He raises the following issues: (1) failure to quash the indictment for grand jury improprieties; (2) violation of his right to a speedy trial; (3) failure to grant his motion for discovery; (4) failure to grant a mistrial because the jury was not sworn until the second day of trial; (5) prosecutorial misconduct during closing argument; and (6) violation of his right to a public trial. Our calendaring notice proposed summary affirmance, and defendant has filed a timely memorandum in opposition. We now affirm.

FACTS.

A man, armed with a knife and wearing a mask, seized a twelve-year-old girl as she walked to school and forced her to perform fellatio on him. Other children told several teachers about what had taken place. Two teachers went to the location where the victim had been seized. They eventually spotted her and the man, at which time he ran and the teachers chased him.

One teacher continued the chase to a tunnel under one road, where he lost sight of the man. The teacher ran through the tunnel and met a jogger at the other side, who had seen a man come out of the tunnel. Seeing a man climbing up an embankment, the teacher and the jogger chased and caught up with him. The suspect stopped and threatened his pursuers with a pocket knife and then a tree limb. The suspect ran again, and the teacher continued to chase him while the jogger went to a nearby fire station to get help. The suspect ran down an embankment to another road toward a step van.

The teacher's statements to the police were that the man he had chased had run in front of the van and entered the van from the left or driver's side. He testified at trial that the suspect had entered the van's right side and that in his statements to the police he had meant the left side as he faced the vehicle. The van had no left or driver's side door. Defendant worked as a route man, and the van was his assigned vehicle.

During defendant's preliminary hearing, the state requested that defendant be removed from the courtroom during the victim's testimony to avoid the trauma to her of looking at defendant. The magistrate, over defendant's objection, arranged the defense table so that defendant was positioned in the corridor outside the courtroom where he could not see or hear the victim.

A bind-over order was filed in magistrate court. A criminal information charging defendant with the crimes of which he was convicted in the present case, and a separate criminal information charging defendant with crimes unrelated to the present case, were filed.

While both cases were pending against defendant, he filed a discovery motion seeking investigative reports and witness statements pertaining to a case involving a widely-publicized serial rapist. Defendant contended that he was seeking these items for the purpose of showing that the suspect in that case might have been the perpetrator of the crimes with which defendant was charged. The state informed the trial court that the suspect in the serial-

rapist case had been in custody since September 9, 1985, and the trial court denied the motion.

Defendant moved to dismiss the criminal information in this case, contending that defendant's right of confrontation had been violated since defendant was excluded from the preliminary hearing during the victim's testimony. The trial court agreed and ordered a remand for a new preliminary hearing. The criminal information in the other case was not affected by this motion.

Electing to present the case to the grand jury, the state dismissed the criminal information in this case by filing a nolle prosequi. The charges originally set out in this case were presented to the grand jury and an indictment was returned. Seven months after defendant's arrest, an order was obtained from the New Mexico Supreme Court granting the state an extension of time for commencement of trial, and trial was commenced within this time.

Upon obtaining the tape recording of the grand jury proceedings, defendant learned that one of the regular grand jurors had been excused by the prosecutor and that an alternate had then been seated by the prosecutor. After the grand jurors had been qualified, sworn, and seated as jurors, the prosecutor asked whether any of the jurors knew of the proposed witnesses. One grand juror responded that she worked at the Los Alamos Mid School and had been at work on the day of the assault. She did not state what she knew about the case or the investigation; she indicated that whatever information she had or thought she had about the case would not interfere with her service as a grand juror on that case. The prosecutor then excused this grand juror, required her to leave the grand jury room until after the case was presented to the grand jury, and designated one of the alternates to replace the regular grand juror he had excused.

Defendant filed pretrial motions to quash the indictment for alleged grand jury improprieties and to dismiss the indictment alleging that his right to a speedy trial had been violated. The trial court denied these motions.

The prosecutor requested that the trial court be closed to the public during the testimony of the victim, and that her family members be permitted to be present. Defendant offered to agree if his family members could remain in the courtroom. Over defendant's objection, the trial court agreed to clear the courtroom of all spectators, including defendant's family, but allowed the victim's family to remain in the courtroom during her testimony.

The jury was selected. The prosecutor presented his opening statement and the state's first witness testified. It was then discovered that the jury had not been sworn after it was selected. Defendant moved for a mistrial at this time, but the trial court denied the motion. Instead, over defendant's objection, the trial court swore the jury between the state's first and second witnesses and ordered the jury to consider the first witness's testimony as if they had been sworn when they heard it.

During closing argument, defense counsel called attention to the discrepancy in the teacher's statements and testimony regarding from which side the man he had chased had entered the van. During his rebuttal summation, the prosecutor stated that the teacher had no reason to lie. Defendant objected on the grounds that this statement constituted improper argument because the prosecutor was vouching for the witness's credibility. The trial court ruled that the prosecutor's argument was proper. Thereafter the jury found defendant guilty on all counts.

GRAND JURY IMPROPRIETIES.

There is no statutory provision for prosecutors to discharge grand jurors or to select alternates. NMSA 1978, Section 31–6–1 (Repl.Pamp.1984) provides, in pertinent part:

> The *district judge shall summon and qualify* as a panel for grand jury service such number of jurors as he deems necessary. Each grand jury shall be composed of twelve regular jurors and a sufficient number of alternates to insure the continuity of the inquiry * * *. *All deliberations shall be conducted by any twelve jurors, comprised of regular ju-*

> *rors or substituted alternates.* * * * The *district judge may discharge or excuse members of a grand jury and substitute alternate grand jurors as necessary.* * * * [Emphasis added.]

In addition, NMSA 1978, Section 31–6–2 (Repl.Pamp.1984) provides, in pertinent part:

> The *jurors shall select one* of their number *as foreman* of the grand jury * * *. The *foreman, for good cause, may request the court to excuse or discharge individual grand jurors* and to replace them with alternate grand jurors as necessary * * *. [Emphasis added.]

Defendant contends that although all of the regular grand jurors and the one alternate who served on the grand jury that indicted him were qualified to serve, they were not all eligible to serve. He argues that because the regular juror was not excused by the court and the alternate was not seated to serve by the court, as required by the above statutes, the alternate was not eligible to serve on the grand jury. Therefore, the indictment against him should have been quashed by the trial court. We disagree. Section 31–6–1 provides that "[a]ll deliberations shall be conducted by *any* twelve jurors, comprised of regular jurors *or substituted alternates.*" (Emphasis added.)

We do agree that the procedure followed in the present case was not in compliance with the procedures set out in Sections 31–6–1 and –2. However, whether this is a sufficient basis to quash the indictment depends upon whether the applicable statutes are mandatory or merely directory. *See State v. Gunthorpe,* 81 N.M. 515, 469 P.2d 160 (Ct.App.1970), *cert. denied,* 401 U.S. 941, 91 S.Ct. 943, 28 L.Ed.2d 221 (1971).

Statutory provisions which relate to the number of and qualifications of jurors, or which are designed to secure impartiality or freedom from unfair influences, are ordinarily deemed to be mandatory, while those which prescribe details as to the manner of selection or drawing are usually regarded as directory. *State v. Gunthorpe.* Sections 31–6–1 and –2 merely provide details as to the procedure to be followed in selecting grand jurors. Accordingly, we conclude these provisions are directory. There has been no showing of actual prejudice suffered by defendant; therefore, the trial court was correct in refusing to dismiss the indictment for grand jury improprieties. *See generally State v. Leatherwood,* 26 N.M. 506, 194 P. 600 (1920) (statutory provisions for the election of petit jurors are usually construed as directory; in the absence of prejudice, failure to comply with such provisions does not support reversal of a conviction). We note that we do not condone the practice of prosecutors discharging grand jurors or selecting alternates. However, we are persuaded that the prosecutor in this case was attempting to be fair to defendant. There is no hint of malicious overreaching, subverting the grand jury proceedings, and there has been no showing of disadvantage to defendant. *See Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981); *State v. Ballinger,* 99 N.M. 707, 663 P.2d 366 (Ct.App.1983). On these facts, the trial court should be affirmed.

RIGHT TO A SPEEDY TRIAL.

Defendant argues that his right to a speedy trial was violated. On July 9, 1986, an order was obtained from the New Mexico Supreme Court granting the state an extension of time to October 15, 1986 for commencement of trial. Defendant contends that the granting of this order is irrelevant because the case was not ripe for a speedy trial motion when the order was granted. However, such orders are final and cannot be reviewed by this court. *See State v. Mazurek,* 88 N.M. 56, 537 P.2d 51 (Ct.App.1975).

DEFENDANT'S MOTION FOR DISCOVERY.

Defendant's motion for discovery was raised in hearings related to the criminal informations filed against defendant in this case before indictment and in the other case, which were both later dismissed. This motion was never refiled in the present case, nor did defendant ask the

trial court to incorporate into the present case all motions made in the prior cases. Defendant notes that the criminal information in the other case was not dismissed until the parties were before the court on the intended first day of trial, and since the discovery motion was raised with regard to the other case, the trial court was aware that the issues raised in the discovery motion pertained to the present case as well. We are not persuaded by this. Although the trial court may have been aware that the motion raised in the previous case might be relevant to the present case, defendant's failure to file renewed motions or to invoke a ruling on this motion constituted a waiver of the issue on appeal. *See State v. Lopez,* 84 N.M. 805, 508 P.2d 1292 (1973).

SWEARING OF THE JURY.

Defendant moved for a mistrial upon realizing that the jury had not been sworn. The state had already presented its opening statement and its first witness. The trial court refused to declare a mistrial and then proceeded to administer the oath to the jurors and ordered them to consider the first witness's testimony as if they had been sworn when they heard it.

There is no New Mexico case law on point. However, several out-of-state courts have addressed this issue. These courts have generally held that irregularities in the swearing of a jury may be waived and do not necessarily constitute reversible error; however, a complete failure to swear the jury cannot be waived and a conviction by an unsworn jury is generally held to be a nullity. *See State v. Godfrey,* 136 Ariz. 471, 666 P.2d 1080 (1983). Although a jury's oath is not a mere formality, *id.,* where the jury is sworn during trial, but prior to commencement or deliberations upon the verdict, the error does not warrant reversal in the absence of prejudice. *See United States v. Hopkins,* 458 F.2d 1353 (5th Cir.1972); *contra Steele v. State,* 446 N.E.2d 353 (Ind.App.1983).

In the present case, the jury was sworn on the second day of trial. SCRA 1986, UJI Crim. 14–123 sets out the oath administered, which was "[d]o you swear or affirm that you will arrive at a verdict according to the evidence and the law as contained in the instructions of the court?" Although the trial court should have administered the oath immediately after the jury was empaneled, the failure to do so did not constitute reversible error. *State v. Godfrey.* The oath given addresses how the jury will arrive at a verdict, and the oath was administered before the jury began to deliberate.

PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT.

The prosecutor, as well as defense counsel, is allowed wide latitude in closing argument, and the trial court has wide discretion in dealing with and controlling closing argument. *State v. Venegas,* 96 N.M. 61, 628 P.2d 306 (1981).

The prosecutor's comment that the teacher "had no reason to lie" was made after defense counsel had emphasized the teacher's inconsistent statements as to the side from which the suspect entered the van. We conclude the prosecutor was commenting on an inference the jury could reasonably draw from the teacher's testimony. Therefore, it was fair comment upon the evidence. *See State v. Venegas.*

RIGHT TO A PUBLIC TRIAL.

Whether the general public may be excluded from a trial is a matter resting within the discretion of the trial court. *State v. Velasquez,* 76 N.M. 49, 412 P.2d 4, *cert. denied,* 385 U.S. 867, 87 S.Ct. 131, 17 L.Ed.2d 95 (1966). The appellate issue is whether there was an abuse of discretion. *State v. Padilla,* 91 N.M. 800, 581 P.2d 1295 (Ct.App.1978). Once defendant offered to agree to the exclusion of the general public, with the exception of the victim's family and his family, it was not an abuse of discretion for the trial court to exclude everyone except the victim's family. The burden is on defendant to establish actual prejudice. *Id.*

Defendant claims that he was prejudiced by the exclusion of everyone except

the victim's family because "the jury is permitted to perceive the trial court as predetermining the truthfulness of the child witness and favoring the prosecution over the defendant." This is not a sufficient showing. We rejected a similar argument made by the defendant in *State v. Padilla* as being no more than speculation, noting that the absence of spectators might just as well have lessened the impact of the victim's testimony.

CONCLUSION.

For the foregoing reasons, we conclude that no reversible error occurred. The judgment and sentence are affirmed.

IT IS SO ORDERED.

BIVINS and GARCIA, JJ., concur.

735 P.2d 1161

CITY OF LAS CRUCES,
Plaintiff-Appellee,

v.

Elizabeth BETANCOURT, and Henry J. Baca, Defendants-Appellants.

No. 9585.

Court of Appeals of New Mexico.

March 5, 1987.

Certiorari Denied April 9, 1987.

Ben A. Longwill, Asst. City Atty., Las Cruces, for plaintiff-appellee.

Angel L. Saenz, Las Cruces, for defendants-appellants.

OPINION

GARCIA, Judge.

Defendants appeal the trial court's denial of their motions to suppress evidence. The two issues raised in this case are: 1) whether police roadblocks set up for the purpose of detecting and apprehending drunk drivers are constitutionally permissible in New Mexico; and, 2) if so, whether the particular roadblock operated by the Las Cruces police was constitutional as set up and operated. We affirm as to both defendants.

FACTS

In the late night hours of December 31, 1985 and the early morning hours of January 1, 1986, a roadblock was set up and operated on Amador Avenue by the Las Cruces police. The purpose of the roadblock was to detect and apprehend drunk drivers. A supervisor in the Las Cruces police department advised the field officers conducting the roadblock of the operation and briefed them on the procedures to be utilized. The field officers were provided with a written outline of what to say to motorists who were stopped at the roadblock.

Officer Childress, along with two or three other officers, manned the roadblock. The officers were wearing reflective vests and carrying flashlights to stop approaching vehicles. There were no signs warning the public that a roadblock was in progress, but the scene was well lit, and the officers placed flares and pylons on the street leading up to the roadblock so that approaching cars were funneled into one lane. A temporary stop sign was posted at the roadblock. A marked patrol car and a BATmobile were also present at the scene. There was no evidence as to the degree of delay to motorists, but the parties stipulated that the detentions were brief. Advance publicity concerning sobriety roadblocks had

been disseminated to a local radio station for release.

Defendant Baca approached the roadblock between two and three o'clock on the morning of January 1, 1986. He stopped as requested by Officer Barreras. The officer looked inside the automobile and noticed two open beer cans. He also noticed that Baca's eyes were bloodshot and detected an odor of alcohol on his breath. The officer directed Baca to pull over to a side street, where a field sobriety and breath alcohol test were administered. Both tests indicated that Baca was under the influence of alcohol. He was arrested for driving while intoxicated.

Defendant Betancourt approached the roadblock a few minutes later. Officer Childress first noticed Betancourt's automobile at the stoplight east of the scene because the headlights of her vehicle were not turned on. As the vehicle approached the roadblock, its headlights were turned on, but Betancourt failed to stop when directed to by Officer Childress. Betancourt proceeded through the roadblock at a high rate of speed, almost hitting Officer Childress and another officer. Officer Childress radioed for assistance and the Betancourt vehicle was stopped a short time later. Betancourt was returned to the scene of the roadblock and arrested for driving while intoxicated.

Following denial of their motions to suppress, each defendant stipulated to driving with a blood-alcohol content greater than .10%.

DISCUSSION

Both defendants admitted they were driving while intoxicated when they were arrested. Nevertheless, they challenge the initial stops at the roadblock, arguing that they violate the fourth amendment's prohibition against unreasonable seizures. There is no question that in Baca's case the police did not possess any articulable facts upon which to base a reasonable suspicion or probable cause that he was driving while intoxicated prior to the initial stop. Accordingly, affirmance or reversal of his conviction depends entirely upon the constitutionality of the initial stop at the roadblock.

This is not true of Betancourt's appeal. The facts recited above show that Officer Childress possessed sufficient articulable facts upon which to stop her and probable cause to believe that she was driving while intoxicated. *See Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Luna,* 93 N.M. 773, 606 P.2d 183 (1980). Accordingly, we affirm the denial of her motion to suppress evidence. *State v. Beachum,* 83 N.M. 526, 494 P.2d 188 (Ct.App.1972) (trial court will be affirmed on appeal if right for any reason).

ISSUE NO. 1

It is beyond question that stopping motorists for the purpose of detecting and apprehending drunk drivers constitutes a "seizure" under the fourth amendment. *E.g., Ingersoll v. Palmer,* 184 Cal.App.3d 1198, 221 Cal.Rptr. 659 (1985), *review granted,* 224 Cal.Rptr. 719, 715 P.2d 680 (1986); *State v. Deskins,* 234 Kan. 529, 673 P.2d 1174 (1983); *Webb v. State,* 695 S.W.2d 676 (Tex.Cr.App.1985). *See also Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). The essence of the fourth amendment prohibition against unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials by imposing a standard of reasonableness upon the exercise of those officials' discretion. *Deskins.* Thus, we hold that a roadblock is not per se violative of the fourth amendment when motorists are stopped without probable cause or a reasonable suspicion, but, rather, we believe the question of whether a particular roadblock violates the fourth amendment is basically one of reasonableness. *See People v. Bartley,* 109 Ill.2d 273, 93 Ill.Dec. 347, 486 N.E.2d 880 (1985); *People v. Scott,* 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.E.2d 1 (1984).

However, because "[n]o right is held more sacred * * * than the right of every individual to the possession and control of his own person, free from all restraint or interference," *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the reasonableness of any roadblock will be very closely scrutinized. In determining whether a roadblock is reasonable within the meaning of the fourth amendment, we must balance the gravity of the governmental interest or public concern served by the roadblock, the degree to which it advances these concerns and the severity of the interference with individual liberty, security, and privacy resulting from the roadblock. *Ingersoll; Bartley; Deskins; Webb.*

The need to deter, detect and remove drunk drivers from the public highways weighs heavily in favor of the state. *Ingersoll; Bartley; Deskins; Scott.* We need not recite the tragic figures involving the carnage caused by drunk drivers on our highways. *See Ingersoll; Bartley.* There can be no doubt that the threat posed by drunk drivers to public safety is so great that any reasonable efforts utilized by the state to deter, detect and remove them from the highways will be upheld by this court.

While no New Mexico cases have dealt with sobriety roadblocks, three cases have considered roadblock checks of driver's license and vehicle registration. *See State v. Bloom,* 90 N.M. 192, 561 P.2d 465 (1977); *State v. Bidegain,* 88 N.M. 466, 541 P.2d 971 (1975); *State v. Ruud,* 90 N.M. 647, 567 P.2d 496 (Ct.App.1977). In *State v. Bidegain,* no question of the validity of the stop was presented; therefore, the supreme court treated it as lawful. The supreme court in *State v. Bloom* simply held such stops are lawfully authorized pursuant to statutory authority. The supreme court was not called upon to consider the constitutional implications. In the same year that *State v. Bloom* was decided, this court did have occasion to examine the constitutionality of routine checks for license and vehicle registration. In *State v. Ruud,* we said that notwithstanding the statutory authority, such stops must comply with the constitutional requirements of the fourth amendment of the United States Constitution. While holding invalid stops based on random selection of motorists, we recognized the validity of "routine roadblocks set up in good faith to check registration certificates and driver's licenses." *Id.* 90 N.M. at 650, 567 P.2d at 499 (citation omitted).

All three of the cases just discussed were decided before *Delaware v. Prouse.* Because we discern no real difference between roadblocks to check for licenses and vehicle registration and roadblocks to check for sobriety, what we decide today simply adds to *State v. Rudd* the standard for determining the validity of roadblocks and guidelines useful in testing that standard. We take this opportunity to present eight guidelines that will be considered in determining the reasonableness of a roadblock. *See Ingersoll.* We would emphasize that we do not foreclose consideration of other relevant factors where appropriate and we hold that no one guideline is necessarily dispositive of the issue, so long as there is evidence to ensure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). *See Delaware v. Prouse; United States v. Martinez-Fuerte.*

1. Role of supervisory personnel.

We agree with the *Ingersoll* court that the decision to set up a sobriety roadblock, the selection of the site and procedures for conducting it must be made and established by supervisory law enforcement personnel rather than officers in the field. Ideally, roadblock decisions should be made by the chief of police or other high-ranking supervisory officials. *See Little v. State,* 300 Md. 485, 479 A.2d 903 (1984). This is essential to reduce the possibility of improper, unbridled discretion of the officers who meet and deal with the motoring public.

2. Restrictions on discretion of field officers.

For a valid roadblock, it is important that the discretion of field officers be restricted.

Ingersoll. Automobiles should not be stopped randomly. It would be proper to stop every automobile. Alternatively, the procedural plan may properly include a mathematical selection formula, stopping, for example, every third automobile. Unrestricted discretion in determining which vehicle to stop leads to the evil we seek to avoid. It is also wise to instruct officers orally or in writing on uniform procedures to be utilized when stopping motorists. As nearly as possible, each motorist should be dealt with in precisely the same manner.

3. Safety.

The safety of the motoring public and the field officer should also be given proper consideration. Here, we look to safety measures aimed at warning approaching traffic, the degree to which the roadblock causes traffic congestion and whether the roadblock is set up in such a way so as to put the motoring public and officers in unnecessary peril.

4. Reasonable location.

The location of the roadblock is significant in determining the degree of intrusiveness and safety of the public and police. *Ingersoll.* It will also impact on the deterrent effect of the sobriety roadblock and its detection value. Obviously, a location chosen with the actual intent of stopping and searching only a particular group of people, i.e., hispanics, blacks, etc., would not be tolerated.

5. Time and duration.

This factor also bears on the intrusiveness and effectiveness of the roadblock. *Ingersoll.* Reasonableness is the standard. For example, sobriety checkpoints established during the late evening hours on a weekend may be reasonable to detect drunk drivers, while continuing the roadblock through Monday morning during rush hour might not be reasonable.

6. Indicia of official nature of the roadblock.

The official nature of the roadblock should be immediately apparent. Officers in the field should be uniformed; police cars should be marked; and warning or stop signs, flares and pylons are advisable. The roadblock scene should strike an appropriate balance to provide for high visibility at the roadblock, yet minimize the potential fear and apprehension to the public. In addition to being important for safety reasons, these indicia will reassure motorists that the stop is duly authorized. *Ingersoll.*

7. Length and nature of detention.

The average length of time that a motorist is detained at the roadblock and the degree of intrusiveness should be minimized. This will avoid lengthy delays and traffic congestion. Initially, motorists should be detained only long enough to be informed of the purpose of the stop and to look into the vehicle for signs of intoxication. Where facts within the observation of the officer warrant further investigation, the suspected motorist should be asked to pull into a separate testing area so as not to unreasonably inhibit the flow of traffic.

8. Advance publicity.

The deterrence value of any roadblock and its reasonableness for sobriety checks will be enhanced if given widespread advance publicity. *Ingersoll; Commonwealth v. McGeoghegan,* 389 Mass. 137, 449 N.E.2d 349 (1983).

Considering and balancing the interests involved, we hold that sobriety roadblocks conducted in accordance with guidelines approximating those we have enumerated are permissible under the fourth amendment to the United States Constitution.

ISSUE NO. 2

The question now is whether the roadblock in question passes constitutional muster. Although an analysis of the constitutionality of the roadblock in this case is problematic because the city attorney was operating under the misapprehension that defendants had the burden of proving the illegality of the roadblock, a number of important facts were stipulated to at the

beginning of trial. The stipulated facts were that: 1) the roadblock was implemented by supervisory personnel of the Las Cruces Police Department; 2) there were flares in the vicinity, a stop sign was used and the area was well lighted; 3) a marked patrol car and a BATmobile were present; 4) flares and pylons were used so that cars were funneled into one lane; 5) officers wore reflective vests and carried flashlights to stop approaching motorists; 6) the roadblock was designed to make the detentions as brief as possible; 7) advance notice was given to a radio station for public release; and 8) a diagram of the location, showing the method by which the roadblock was carried out was entered into evidence. Additionally, on cross-examination, there was testimony that three officers were present at the roadblock, that a supervisor had briefed them about the operation and they were given instructions and a written outline of procedures to be followed. All westbound traffic was stopped at the scene. Thus, the roadblock substantially complied with the guidelines. The officers' discretion was curtailed; there was concern for the safety of the police and the motorists; and the location, duration and length of the individual stops was reasonable. For these reasons, defendant Baca's conviction is affirmed.

CONCLUSION

We hold that a roadblock set up and operated for the purpose of detecting and apprehending drunk drivers is constitutionally permissible so long as it is reasonable within the meaning of the fouth amendment as measured by its substantial compliance with the guidelines outlined previously. For the foregoing reasons, we further hold that the roadblock set up and operated by the Las Cruces police was reasonable. The trial court's denial of defendants' motions to suppress are affirmed.

IT IS SO ORDERED.

BIVINS and FRUMAN, JJ., concur.

[redacted]

735 P.2d 1166

Claude ELDRIDGE, Plaintiff-Appellant,

v.

AZTEC WELL SERVICING COMPANY, Employer, and Employers National Insurance Company, Insurer, Defendants-Appellees.

No. 9381.

Court of Appeals of New Mexico.

March 12, 1987.

Certiorari Denied April 21, 1987.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Jay L. Faurot, P.A., Farmington, Winston Roberts-Hohl, Santa Fe, for plaintiff-appellant.

Richard L. Gerding, Tansey, Rosebrough, Roberts & Gerding, P.C., Farmington, for defendants-appellees.

OPINION

DONNELLY, Chief Judge.

Plaintiff appeals from the trial court's refusal to award certain hospital and medical costs under the Workmen's Compensation Act, NMSA 1978, Section 52-1-49. The central issue is whether the employer provided timely medical services to the plaintiff in accordance with the Workmen's Compensation Act. Other issues raised in the docketing statement but not briefed are deemed abandoned. *State v. Dennis F.*, 104 N.M. 619, 725 P.2d 595 (Ct.App.1986). We affirm the trial court.

Plaintiff was employed as a floorhand on a drilling rig. On August 5, 1985, he was struck in the back while working on the rig floor. He reported the incident to his driller but continued to work the remainder of his shift. The next day he returned to work, performing his duties until he picked up a water cooler to carry to the rig. He said his pain then became too intense to walk or move. Plaintiff did not report the second incident or directly complain of his injury to anyone, but testified that it was readily apparent that he "couldn't * * * move around." Plaintiff was told to lie down and rest for the remainder of his shift.

Thereafter, plaintiff did not return to work. On August 6, 1985, he consulted a chiropractor, Dr. David Brimhall, D.C. Plaintiff testified that "within a week" of the accident, he went to his employer's office to report the work injury. The report, which was introduced as a defendant's exhibit, is dated August 7, 1985, the day after plaintiff's visit to Dr. Brimhall. The accident report was prepared by the employer's safety manager, and it noted that plaintiff's visit to Dr. Brimhall had been unauthorized. The safety manager

instructed plaintiff to see Dr. Joseph H. Sharpe, a company designated doctor. The employer's insurer paid Dr. Brimhall $500 for plaintiff's first two visits, but then gave the chiropractor written notice that it would not pay for any further treatment.

Plaintiff was treated for muscle pain by Dr. Sharpe and was then examined by Dr. George H. Peacock, a general surgeon. A CT scan ordered by Dr. Peacock showed no abnormalities, and Dr. Peacock diagnosed plaintiff's injury as a mechanical back strain. Dr. Peacock testified at trial that plaintiff's complaint of "almost total incapacitation" was inconsistent with muscle strain. Therefore, Dr. Peacock referred plaintiff to a neurologist, Dr. Pierre Herding, in order to confirm that there was no neurologic damage. The employer's insurance adjuster arranged an appointment with Dr. Herding, but plaintiff failed to keep the appointment, explaining at trial that he had run out of gas on his way to the examination. Plaintiff admitted, however, that he never attempted to reschedule the appointment. Despite the insurer's notification to both plaintiff and Dr. Brimhall that it would not pay for further treatment, plaintiff continued to see Dr. Brimhall. Dr. Brimhall referred plaintiff to Dr. Barry Hillmer, a physician in Durango, Colorado. Dr. Hillmer ordered plaintiff hospitalized for both a CT scan and a mylogram test, as well as physical therapy. The cost of this unauthorized medical treatment was $6,519.14.

The trial court denied plaintiff recovery for these additional medical costs, and found that the employer and its insurer "at all times material to this cause of action, furnished or arranged to furnish adequate medical treatment for Plaintiff." The court further found that plaintiff refused to continue medical treatment with the physicians furnished or recommended by the employers, and instead "chose to receive treatment from physicians and medical practitioners of his own choice after being told that medical services and treatment would be provided and that Defendant[s] would not pay for the treatment selected by Plaintiff."

RECORD ON APPEAL

We address initially the threshold problem of an incomplete record on appeal. Plaintiff's brief advises the court that one of the two tapes of the trial proceedings was destroyed accidentally by the clerk of the district court. Plaintiff further asserts that the parties were unable to agree upon a reconstructed record. Defendants, however, dispute the latter contention, claiming that "[a]t no time has attorney for Plaintiff attempted to reconstruct the record as inferred * * *."

Although the record is incomplete, both parties have briefed the case on its merits. Neither party contends that the lack of a complete record prevents a meaningful review of the issue on appeal. *See State v. Wildenstein,* 91 N.M. 550, 577 P.2d 448 (Ct.App.1978); *see also State v. Fish,* 101 N.M. 329, 681 P.2d 1106 (1984). The above recitation of facts is based on the tape transmitted to this court, and we believe that it provides a record of sufficient completeness to permit us to properly consider and resolve the issue. *State v. Herrera,* 84 N.M. 46, 499 P.2d 364 (Ct.App. 1972). It bears repeating, however, that it is the appellant's responsibility to provide this court with the record on appeal, and when a record is incomplete, this court assumes that the missing portions would support the trial court's determination. *State v. Padilla,* 95 N.M. 86, 619 P.2d 190 (Ct.App.1980).

EMPLOYER'S OBLIGATION TO FURNISH MEDICAL CARE

In New Mexico, an injured workman is precluded from seeking independent medical treatment at the employer's expense when the employer has indicated a willingness to furnish treatment and actively make such services available. *See* § 52–1–49; *Gregory v. Eastern New Mexico University,* 81 N.M. 236, 465 P.2d 515 (Ct.App.1970); *see also Montoya v. Anaconda Mining Co.,* 97 N.M. 1, 635 P.2d 1323 (Ct.App.1981). The "medical services rule," set forth in Section 52–1–49, is described by Larson in his treatise, 2 A. Lar-

son, *Workmen's Compensation Law,* Section 61.12(d) (1986), as follows:

> If the employer has sufficient knowledge of the injury to be aware that medical treatment is necessary, he has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense.

The dispute in this case centers on whether the employer acted with sufficient promptness to preserve its right of medical control. Plaintiff claims that Section 52–1–49 requires an employer to furnish medical treatment "as soon as the worker is injured." Plaintiff relies on the express wording of the statute, which provides in pertinent part:

> A. *After injury,* and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine unless the workman refuses to allow them to be so furnished.
>
> B. In case the employer has made provision for, and has at the service of the workman *at the time of the accident,* adequate * * * medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional * * * medical ... services or medicine than those so provided * * *. [Emphasis added.]

We disagree with plaintiff's contention that the emphasized wording of the statute, above, prevails over the remaining language in the statute and imposes an arbitrary duty on the employer to act in every instance "at the time of the accident." Instead, we construe the statute in its entirety and conclude that the legislative intent is that an employer is required, under Section 52–1–49, to provide appropriate "reasonable" and "adequate" medical treatment in a timely manner. *Beckwith v. Cactus Drilling Corp.,* 84 N.M. 565, 505 P.2d 1241 (Ct.App.1972). *Cf. State v. Slicker,* 79 N.M. 677, 682, 448 P.2d 478, 483 (Ct.App.1968) ("immediately" means "with reasonable promptness and dispatch").

Our case law reflects that work injuries span a broad spectrum, ranging from sudden fatal accidents to gradual, progressive injuries, not immediately discoverable. *See, e.g., Webb v. New Mexico Publishing Co.,* 47 N.M. 279, 141 P.2d 333 (1943). Clearly, the question of whether an employer knew or should have known that a worker required medical treatment, and whether the treatment provided by the employer was adequate, depends on the nature of the injury sustained and the circumstances of both the accident and the employer's knowledge of the accident. *See Beckwith v. Cactus Drilling Corp.*

Under Section 52–1–49, an employee injured in a compensable job-related accident may not ordinarily incur medical expenses and assign liability for such costs to an employer, without first giving the employer a reasonable opportunity to furnish the services. *See also Valdez v. McKee,* 76 N.M. 340, 414 P.2d 852 (1966); *Montoya v. Anaconda Mining Co.*

We hold there is substantial evidence to support the trial court's findings. Here, the evidence does not reflect a failure by the employer to provide emergency medical treatment to plaintiff. *Compare Garcia v. Genuine Parts Co.,* 90 N.M. 124, 560 P.2d 545 (Ct.App.1977). After being hit in the back, plaintiff continued to work the double shift and returned the next day to work another double shift. When he then strained his back lifting an ice cooler, he was told to lie down and rest, which he did. During this initial period plaintiff did not request or independently seek emergency medical treatment. Thus, the evidence suggests that neither plaintiff nor his driller perceived the extent of the injury, and neither considered the injury to be emergency in nature. *See Ingalls Shipbuilding Corp. v. Byrd,* 215 Miss. 234, 60 So.2d 645 (1952) (if worker failed to appreciate the seriousness of his injury, the employer cannot be expected to have done so).

Plaintiff did not consult Dr. Brimwall until August 6, 1985, and did not report the accident to his employer until the following day. The record contains no explanation for the delay in reporting the accident to the employer. However, it is undisputed that the employer's safety manager, when apprised of the incident, immediately referred plaintiff to a company doctor. It is further undisputed that the insurer thereafter gave notice to both plaintiff and Dr. Brimwall that it would not pay for further treatment by a chiropractor or physician other than the physicians furnished by defendants. Notwithstanding this admonition, plaintiff continued to see Dr. Brimwall, and Dr. Brimwall referred plaintiff for additional costly treatment in Durango.

Contrary to plaintiff's argument, this is not a case in which the employer belatedly attempted to assert its statutory right, or where the proffered services were inadequate. *See Montoya v. Anaconda Mining Co.* (exceptions to the rule include instances in which the worker is justified in initially seeking independent treatment). Instead, it is inferrable from the evidence that the employer made arrangements for medical treatment as soon as it became apparent that treatment was necessary. The trial court rejected the contention that plaintiff was justified in initially seeking independent medical treatment.

The facts of this case also distinguish it from cases in which the employer showed only a passive willingness to provide or arrange for medical treatment. *Compare Sedillo v. Levi-Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (Ct.App.1982); *Trujillo v. Beaty Electric Co.*, 91 N.M. 533, 577 P.2d 431 (Ct.App.1978). Here, the employer referred plaintiff to two doctors, and then, on the recommendation of one of those doctors, made arrangements for plaintiff to see a neurological specialist, whom plaintiff chose not to see. On appeal we view the evidence and its logical inferences in the light most favorable to the verdict. *Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982); *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct.App. 1985). The trial court's finding that the employer fulfilled its statutory duty to provide adequate and reasonable medical care under the circumstances is supported by substantial evidence.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

735 P.2d 1170

In the Matter of the Termination of Parental Rights with respect to I.N.M. and A.F.E., Children.

STATE of New Mexico, ex rel. DEPARTMENT OF HUMAN SERVICES, Petitioner-Appellee,

v.

TOMMY A.M., Laura M.W., a/k/a Marie M., a/k/a Laura M.M., and David E., Respondents-Appellants.

Nos. 9450, 9508.

Court of Appeals of New Mexico.

March 12, 1987.

Angela L. Adams, Acting Gen. Counsel, John Petoskey, Asst. Atty. Gen., Human Services Dept., Santa Fe, for petitioner-appellee.

Frederick B. Howden, Grants, Eileen Mallon, Albuquerque, for respondent-appellant Tommy A.M.

R. Max Best, James F. Hart, P.A., Clovis, for respondent-appellant Laura M.W.

S. Frank Stapleton, Portales, for respondent-appellant David E.

Donna U. Quinn, Clovis, Guardian ad Litem.

OPINION

GARCIA, Judge.

These cases involve three appeals from proceedings for termination of parental rights. The cases were consolidated for trial and, on this court's own motion, have been consolidated on appeal.

Two children and three parents are involved in these proceedings. Marie M. (Marie) is the natural mother of I.N.M., and A.F.E. Tommy A.M. (Tommy) is the natural father of I.N.M. and ex-husband of Marie. David E. (David) is the live-in boyfriend of Marie and natural father of A.F.E.

All three parents' rights were terminated by the Curry County District Court on July 17, 1986. We first give a general background and then discuss the rights of each parent separately.

BACKGROUND

I.N.M. was born to Marie and Tommy on September 25, 1979. Marie and Tommy were divorced May 10, 1982, at which time Marie was given custody of I.N.M., subject to reasonable visitation. Tommy was ordered to pay $50 per month child support plus half of the child's medical and dental bills.

Sometime in early 1983, Marie moved from Grants, where she had lived during her marriage, to Texico. Tommy remained in Grants. Marie met David in Texico in

May 1983, and began living with him three or four months later. A.F.E. was born to Marie and David on June 3, 1984.

On August 4, 1984, the Human Services Department (HSD) in Clovis received a report of child abuse. A social worker and deputy sheriff went to the address given, which was David's parents' home. Several family members were present, including David, Marie, I.N.M. and A.F.E. David had been drinking and was in a heated altercation with family members. David's brother had a black eye and I.N.M. had a bump on the back of her head and a bruise on her right thigh. I.N.M. said she did not want to go home. Explanations given by family members led the social worker to believe I.N.M. would be in danger, and she was taken into custody. Physical custody of I.N.M. was returned to Marie on August 15, 1984 and legal custody was retained by HSD.

On October 24, 1984, David's mother reported to HSD that I.N.M. had two black eyes. A social worker and deputy sheriff visited the home. Both of I.N.M.'s eyes were discolored and her jaw seemed to be dislocated. Marie told the social worker I.N.M. had fallen on a coffee table two days earlier. At the social worker's request, Marie took I.N.M. to the emergency room. The emergency room physician referred the case to HSD as a suspected child abuse.

I.N.M. was again taken into custody on October 25, 1984. X-rays were taken that evening, and she was examined the following day by Dr. Martin Goodwin, a diagnostic radiologist. Dr. Goodwin testified that the x-rays disclosed a linear fracture of the skull and fractures of the left first and second ribs. I.N.M. suffered facial paralysis dating from the approximate time of the injury. Surgery was performed in January 1986, at which time it was determined that the condition had been caused by a traumatic injury which could have resulted from any kind of severe blow to the ear. There has been some improvement since the surgery, but I.N.M. is considered a special needs child because of emotional problems from the paralysis.

On October 26, 1984, A.F.E. was also taken into custody because Marie and David were arrested for the abuse of I.N.M. I.N.M. and A.F.E. have been together in foster care since that time. On December 30, 1985, HSD filed petitions for termination of parental rights as follows: the rights of Marie to I.N.M. on grounds of abuse; the rights of Marie and David to A.F.E. on grounds of neglect; and the rights of Tommy to I.N.M. on grounds of abandonment. After trial the district court entered orders terminating the parental rights of all three parents and ordering that the children not be separated.

MARIE'S RIGHTS TO I.N.M.

Marie argues that HSD failed to prove by clear and convincing evidence that she abused and neglected I.N.M., and that HSD failed to take reasonable steps to assist the parents in adjusting the conditions which rendered the parents unable to care for the children. Further, she argues that the cause of I.N.M.'s injuries was not established.

A. Whether the trial court's finding that Marie abused and neglected I.N.M. is supported by sufficient evidence.

The trial court found that: I.N.M. was physically abused by David on numerous occasions; Marie failed to protect I.N.M. from David's abuse; and these abuses placed I.N.M. in situations that were dangerous to her life, health and wellbeing. The court also found that: I.N.M. was abused and neglected by Marie; Marie has never shown remorse or sorrow for what happened to I.N.M.; Marie has not made progress in learning to protect her children; and, Marie continues her relationship with David. The court concluded that HSD proved by clear and convincing evidence that Marie knowingly, intentionally, or negligently placed I.N.M. in a situation that was dangerous to her life or health, and that the termination or her rights to I.N.M. is in I.N.M.'s best interests.

In proceedings seeking the termination of parental rights, the grounds for termination must be proved by clear and convincing evidence. *State ex rel. Dep't of*

Human Services v. Peterson, 103 N.M. 617, 711 P.2d 894 (Ct.App.1985). It is for the trial court to determine whether this proof requirement has been met. *In re Estate of Fletcher,* 94 N.M. 572, 613 P.2d 714 (Ct.App.1980). The appellate court reviews the evidence in the light most favorable to the prevailing party to determine if it is sufficient to establish, clearly and convincingly, the claim that parental rights should be terminated. *See Terrel v. Duke City Lumber Co.,* 86 N.M. 405, 524 P.2d 1021 (Ct.App.1974). Here, the evidence is sufficient to support the trial court's findings.

NMSA 1978, Section 32–1–3(M) (Repl. 1986) states in part: " 'abused child' means a child: ... (3) whose parent, guardian or custodian has knowingly, intentionally or negligently placed a child in a situation that may endanger his life or health...." Marie argues that the testimony of the physicians fails to establish the cause of I.N.M.'s injuries. However, there is abundant evidence that David physically abused I.N.M.

The emergency room physician who examined I.N.M. on August 4 and October 24, 1984, testified that the first time he saw I.N.M. she told him that her mother's boyfriend, David, pushed her down and she hit the back of her head on the wall, and that David also struck her with a belt on her right thigh. After seeing I.N.M. on October 24, he was concerned about possible child abuse and referred the case to HSD. The doctor testified that there was suspicious bruising on I.N.M.'s face and the nature of the injury was inconsistent with Marie's statement that the child fell and struck her head on a coffee table, and was more likely the result of the child being struck. The neurosurgeon who performed I.N.M.'s surgery determined that her paralysis was caused by a traumatic injury.

Dr. W.C. Leiding, a clinical child psychologist, testified that I.N.M. told him David hit her with a board, knocking her down, and she hit the coffee table. She also said that David had thrown a plate at her and a plate at Marie because he was mad that Marie was not fixing dinner.

Chet Spear, a deputy sheriff, testified that he interviewed David on October 26, 1984, before David was taken into custody. He testified that David admitted several times that he struck and kicked I.N.M., and that on one occasion he kicked her twice in the ribs and kicked her off the bed. Deputy Spear was also present on October 25 when I.N.M. was taken to the sheriff's office. He testified that her face was bruised and pushed to one side, and when he asked how her face got hurt, I.N.M. said David did it. Fred Hamner, another deputy sheriff, testified that on the day I.N.M. was taken into custody, he remarked about her black eyes and she again said David did it. On October 30 he interviewed I.N.M. and she said "David has a board" and "David threw me down."

Joy Armstrong was the social worker who went to David's parents' home in August 1984, when I.N.M. was injured. She testified that statements were made to her by family members and by I.N.M. that David had caused I.N.M.'s injuries. She also testified that on that occasion Marie told her that David had been drinking heavily and was not responsible for his actions, and that when he hit I.N.M. with a belt she fell off the chair and hit her head. La Von Shelton was an HSD supervisor involved with the case at the time I.N.M. was taken into custody. She testified I.N.M. told her David hit her. Finally, Elizabeth Galvan testified that she visited in David and Marie's home at least once a week and that she had seen David hit I.N.M. "a few times."

The trial court's finding that David abused I.N.M. is supported by ample evidence; similarly, the finding that Marie failed to protect I.N.M. is supported by the same evidence. Elizabeth Galvan testified that she had seen Marie witness abuse by David but do nothing to protect I.N.M. Barbara Martinez, the HSD supervisor in charge of the case when the petitions were filed, testified that Marie will not admit that abuse has occurred. In her opinion, Marie would not protect any child in the future. Dr. Leiding also testified that Marie denies the abuse.

Dr. William Lowe is a clinical psychologist who tested Marie. In his opinion, Marie would not protect her children and did not exercise proper parental care. Dr. Richard Fink, a clinical psychologist, testified that he does not think Marie could provide a safe atmosphere for her children. Finally, Marie herself testified at the trial that "David hasn't done nothing," and that "he never laid a hand on her [the child]." There is sufficient evidence to support the trial court's finding that Marie denies I.N.M. was ever abused, and that Marie failed to protect I.N.M.

B. Whether HSD has taken reasonable steps to assist David and Marie.

The trial court also found that the conditions and causes of abuse are unlikely to change in the foreseeable future despite reasonable efforts of HSD, and that Marie continues her relationship with David. The HSD plan included visits with A.F.E. by Marie and David, visits with I.N.M. by Marie, Parents Anonymous and, when available, parenting classes for both, AA for David and Al-Anon for Marie, counseling with a psychologist, and weekly visits with a social worker. Barbara Martinez testified that Marie has continued to deny the abuse, and, at different times, has told three different stories about I.N.M.'s injuries. She believes that nothing has changed since HSD has been working with the family because they will not admit there is a problem. She has heard David tell Marie he is in this mess because of her and her daughter, and has heard Marie refer to I.N.M. as a "horrible child." In her opinion, Marie has not protected her children in the past and will not do so in the future.

Dr. Lowe does not see Marie as able to maintain a life on her own, and believes that, given the same circumstances (abuse by David), the same result would occur. He also testified that Marie has never shown remorse or sorrow for what happened to I.N.M.

Marie argues that the situation has changed because David is incarcerated and is no longer in the home. However, there was evidence that the relationship continues and that they will be reunited when David is released. Marie has visited David in prison and left money for him there.

There is sufficient evidence to support the trial court's findings that HSD has made reasonable efforts to assist the family in trying to become capable of caring for I.N.M. and that conditions are unlikely to change.

DAVID AND MARIE'S RIGHTS TO A.F.E.

David and Marie have both appealed the termination of their rights to A.F.E., based on insufficiency of the evidence. Although there is no evidence of physical abuse to A.F.E., two social workers testified that he did not hold his head properly and thought that might indicate some developmental delay. They also testified that the child had a red, swollen penis and diaper rash. There was also testimony that since David has been in prison he has never inquired about A.F.E.'s welfare or requested any visitation with the child. No support payments for A.F.E. have even been made to HSD.

The state's principal argument regarding A.F.E. is that the home situation is dangerous, as evidenced by the serious abuse of I.N.M. The state relies on out-of-state cases for the proposition that parental rights to a child may be terminated because another child in the household was abused. While abuse of a sibling may be insufficient to justify terminating parental rights, it is evidence that should be considered in determining whether a child has been placed in danger.

The Montana Supreme Court noted that "[t]he more enlightened majority rule appears to be that a parent does not have the privilege of inflicting brutal treatment upon each of his children in succession before they may individually obtain the protection of the state." *In re T.Y.K.*, 183 Mont. 91, 93, 598 P.2d 593, 595 (1979). Colorado holds that the trial court can reasonably infer a non-abused child lacked proper parental care from the evidence establishing mistreatment of the other. *In re C.R.V.E.L.*, 38 Colo.App. 252, 557 P.2d 1225 (1976). The South Dakota Supreme

Court holds that, where one child is abused, the trial court has discretion to determine the likelihood of abuse to other children in the family, *In re T.L.J.*, 303 N.W.2d 800 (S.D.1981), and that it could not allow the health, safety, or life of a young child to be placed back into an environment proved, by abusive treatment of a sibling, to be wholly unfit and improper. *In re K.D.E.*, 87 S.D. 501, 210 N.W.2d 907 (1973).

We agree with the Illinois court that while a court may not speculate as to the future care of a child, the primary consideration is the best interests and welfare of the child and the court should not be forced to refrain from taking action until each child suffers an injury. *In re Brooks*, 63 Ill.App.3d 328, 20 Ill.Dec. 39, 379 N.E.2d 872 (1978). Under our statutes, it is not necessary to wait until a child has been injured, since knowingly, intentionally, or negligently placing a child in danger constitutes abuse under Section 32–1–3(M)(3), and is a ground for terminating parental rights. NMSA 1978, § 32–1–54(B)(3) (Repl. 1986). The seriousness of I.N.M.'s injuries, combined with testimony about David and Marie, supports the trial court's finding that the parents have placed A.F.E. in situations that could have endangered his life or health, and that the home environment is dangerous to A.F.E. and unlikely to change in the future.

Dr. Leiding testified that, in his opinion, Marie does not have the capability to parent, and that David's anger could be transferred from I.N.M. to A.F.E. Dr. Lowe testified that he believes that if David began abusing A.F.E., Marie would not act to protect him. Dr. Fink testified that if David felt taxed or pushed he might snap or explode in an emotional outburst, and that his outburst might not be directed toward the person that set him off, but rather toward the closest thing at hand. Dr. Lowe believes that if A.F.E. were to misbehave, David's punishment could be excessive and not in keeping with reasonable discipline. He also does not believe Marie could provide a safe atmosphere for the child.

Finally, there was testimony of very strong bonding between I.N.M. and A.F.E. and of a lack of attachment behavior between the parents and children. Since the primary consideration is the welfare and needs of the child, Section 32–1–54(A), we believe that there is evidence to support the finding that it is in A.F.E.'s best interests to have the parental rights terminated and to keep the children together.

TOMMY'S RIGHTS TO I.N.M.

Tommy argues that the evidence against Marie and David was so prejudicial that failure to sever his hearing deprived him of his fundamental right to a fair and impartial trial. While this argument might have merit if the matter had been tried by a jury, this was a bench trial. In a nonjury case, the trial court is presumed to have disregarded incompetent evidence, absent a showing that the court was influenced thereby. *Gray v. Grayson*, 76 N.M. 255, 414 P.2d 228 (1966). *See also In re Adoption of Doe*, 89 N.M. 700, 556 P.2d 1176 (Ct.App.1976) (erroneous admission of evidence is not reversible error in a nonjury proceeding unless it appears that the court must have relied upon such evidence in reaching its decision). Tommy has not established that he was deprived of a fair and impartial trial.

In the absence of fundamental error, the request for a separate trial must have been preserved. NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 308 (Repl.Pamp. 1983). The record does not reflect that any such request was made. Therefore, the issue may not be raised on appeal. *Id.*

Tommy also argues that the trial court's finding that he abandoned I.N.M. is not supported by substantial evidence and therefore, the statutory requirements for terminating his parental rights were not met.

" '[A]bandonment consists of conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship.' " *In re Adoption of Doe*, 100 N.M. 764, 767, 676 P.2d 1329, 1332 (1984) (quoting *In re Adoption of Doe*, 89 N.M. 606, 618–19, 555 P.2d 906 (Ct.App.1976)). The requisite disregard may be inferred from

purposeful parental conduct. No specific intent is involved. *State ex rel. Dep't of Human Services v. Peterson.* Relevant factors in determining whether a parent has abandoned a child include parental neglect, lack of affection shown toward the child, failure to contact the child, failure to support the child if able to do so and disregard for the child's general welfare. *Id.* Obligations owed by a parent to a child include the obligation to personally care for, support, educate, give moral and spiritual guidance and provide a home and the love and security that a home provides. *In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329.

Abandonment is to be determined objectively, taking into account not only verbal expressions of natural parents, but their conduct as parents as well. *In re Adoption of Doe,* 89 N.M. 606, 555 P.2d 906. Abandonment focuses on parental conduct and not on the child's welfare. *Id.*

Tommy suggests a different standard should be used in determining abandonment for a non-custodial, as opposed to a custodial parent. However, whether or not a parent has custody of the child is factored in when determining whether the parent has met his parental obligations. Further, a father may not delegate parental obligations to the mother and be held harmless when she neglects these obligations. *State ex rel. Dep't of Human Services v. Peterson.*

Marie testified that after she moved to Texico in 1983, I.N.M. received one birthday card from Tommy with five dollars in it, and one package of clothes which she sent back because they were too small. She also testified that Tommy visited I.N.M. once between the time she moved to Texico and October 1984, when I.N.M. was taken into custody.

Barbara Martinez testified that Tommy has visited I.N.M. twice since January 1985, once when he was in town for a Citizens' Review Board hearing and once when he went to Texico for David's criminal hearing. She also testified that he wrote only two or three times after I.N.M. was taken into custody, but has been writing more often since the petition was filed. She also stated that Tommy called her once, after I.N.M.'s surgery, and that he never paid child support to HSD. Tommy admitted that he never paid child support on a regular monthly basis.

While there is evidence sympathetic to Tommy, weighing the evidence and judging the credibility of the witnesses is the province of the trial court. Measured by an objective standard, there is evidence to support the trial court's determination that Tommy abandoned I.N.M. Further, there is evidence from which the trial court could have inferred that most of the contacts attempted by Tommy were instigated by his mother.

The trial court's finding that there is no parent-child relationship between Tommy and I.N.M. is supported by the evidence as a whole; and particularly by the testimony of La Von Shelton that she did not see a relationship between Tommy and I.N.M. when they visited, and that I.N.M.'s attention was directed more toward her grandmother.

Evidence supports the trial court's finding that Tommy abandoned I.N.M.

CONCLUSION

The trial court is affirmed on all issues.

IT IS SO ORDERED.

ALARID and FRUMAN, JJ., concur.

735 P.2d 1176

William MICHALUK, Petitioner-Appellant and Cross-Appellee,

v.

Victor BURKE, Donna Burke-Taylor and Jeffery Burke, Surviving Children of Josephine E. Michaluk, Deceased, Respondent-Appellee and Cross-Appellant.

No. 8954.

Court of Appeals of New Mexico.

March 19, 1987.

Martha A. Daly, Rothstein, Bailey, Bennett, Daly & Donatelli, Santa Fe, Stevan Douglas Looney, Albuquerque, for petitioner-appellant and cross-appellee.

Jeffery Burke, pro se.

Donna Burke-Taylor, pro se.

Victor Burke, pro se.

OPINION

BIVINS, Judge.

In this divorce action, husband-petitioner (husband) appealed and wife-respondent (wife) cross-appealed. After entry of the divorce decree and final judgment, but before resolution by this court, wife died. We granted leave for the parties to file supplemental briefs regarding what effect wife's death had on the issues before us.

Husband raises two issues on appeal: (1) whether the trial court abused its discretion in awarding lump sum alimony of $35,000; and (2) whether the trial court abused its discretion in awarding wife attorney fees. In his supplemental brief, husband contends that wife's right to collect lump sum alimony abated upon her death. Husband also challenges the substitution of wife's children as parties to this appeal.

Wife's cross-appeal raises two issues: (1) whether the trial court erred in awarding property to husband as his sole and separate property, based on husband's oral testimony of its character; and (2) whether the trial court erred when it failed to make an ultimate finding of fact regarding when title to the property was acquired. Wife's children filed no supplemental brief. We affirm the trial court on all issues raised before wife's death. As to the issues raised in husband's supplemental brief, we hold that wife's death has no effect on the judgment entered below and that wife's children are proper parties to this appeal.

The parties married in 1968. At the time of divorce, the parties owned community property worth approximately $21,000, which they divided equally by agreement. When the final decree of divorce was en-

tered, wife was sixty-seven[1] years old, in poor health and unemployable. She had minimum assets and income. Based on these factors, the trial court found that wife was entitled to alimony and awarded $35,000 in lump sum alimony. The trial court found lump sum alimony appropriate because of wife's intent to leave the state to be near her children, and because the incompatibility between the parties made it unlikely that husband would continue to make periodic payments without further court proceedings, which neither could afford. The trial court awarded wife $2,000 in attorney fees and court costs.

Also in dispute was the status of a four-plex apartment building in Albuquerque, valued at $100,000. Husband claimed that he purchased the building as his separate property prior to their marriage; wife claimed that she was involved in the purchase of the property and helped manage it. The trial court found the four-plex to be husband's sole and separate property. A final decree of dissolution of marriage and judgment in the amount of $38,227.15, with interest at 15% per annum, were entered on November 6, 1985.

LUMP SUM ALIMONY AWARD

Husband concedes that wife is entitled to alimony, but disputes the award of lump sum alimony in the amount of $35,000. In reviewing the trial court's award of alimony, we consider only whether the award was contrary to all reason. *Hodges v. Hodges,* 101 N.M. 67, 678 P.2d 695 (1984). We do not substitute our judgment for that of the trial court.

Factors to consider in determining whether to award alimony and, if awarded, the adequacy of the amount, include the spouse's needs, age, health, means available for support, the payor spouse's earning capacity, the duration of the marriage, and the amount of property owned by each party. *Blake v. Blake,* 102 N.M. 354, 695 P.2d 838 (Ct.App.1985). The trial court found that wife was aged, in ill health, unemployable and had minimal assets. Also, the marriage lasted seventeen years and husband was leaving the marriage with over $110,000 in assets. We agree with the parties that alimony was appropriate.

The evidence indicated that husband had failed to pay monthly obligations to his first wife, that his current wife wanted to leave New Mexico, that husband had spent over $1,000 in food and entertainment expenses over a six-week period, that wife had long-term medical and living expenses, that husband would leave the marriage with over $110,000 of assets while wife had about $10,000 of assets, and that husband and wife were unable to communicate with each other to any degree. Given these factors and the inferences drawn from them, we cannot say that the trial court abused its discretion in awarding lump sum alimony to wife.

Husband urges this court to adopt a rule that trial courts should routinely award periodic alimony and reserve the award of lump sum alimony only for compelling circumstances. Our statutes do not so provide and we decline to adopt such a rule. NMSA 1978, Section 40–4–7(B)(1) (Repl.1986) provides the trial court the option of awarding "a reasonable sum of money * * * either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper[.]" Section 40–4–7 states no preference for one form of alimony over the other, and we will not interfere with the trial court's statutorily authorized discretion. Statutes should be given effect as written, and where free from ambiguity, there is no room for construction. *State v. Lujan,* 103 N.M. 667, 712 P.2d 13 (Ct.App. 1985).

Husband also argues that the amount of alimony was excessive and that he should not be forced to pay the lump sum from his separate property. We disagree. The trial court's discretion to award alimony is limited only to the grant

1. The trial court inadvertently found that wife was sixty-five years old, but her death certificate and deposition indicate wife was sixty-seven.

of a reasonable sum, given the facts of the particular case. *Redman v. Redman,* 64 N.M. 339, 328 P.2d 595 (1958). Given wife's needs and her lack of assets, we find the trial court's award reasonable. *See Redman v. Redman; Golden v. Golden,* 41 N.M. 356, 68 P.2d 928 (1937).

In so holding, we have considered husband's argument that the trial court's finding reflects little regard for his earning capacity and future earnings as required. *Michelson v. Michelson,* 86 N.M. 107, 520 P.2d 263 (1974); *Blake v. Blake.* Husband points out that the trial court found that he is sixty-eight years old, unemployed and receives $392 monthly from social security. Since he depends upon his social security and net rentals for his livelihood, and it was an accepted fact at trial that he could not borrow the money to pay the lump sum alimony award, his only recourse is to sell the four-plex. Relying on *Ellsworth v. Ellsworth,* 97 N.M. 133, 637 P.2d 564 (1981), husband asserts he should not be required to sell his only asset, upon which this livelihood depends, to satisfy the alimony award.

Additionally, husband contends there is no evidence as to the amount necessary to meet wife's needs. We disagree. Wife projected $1,000 a month for living expenses, including medical bills. We note that the trial court awarded wife, pending the appeal and before her death, $250 a month plus rent-free occupancy at the four-plex if she returned to Albuquerque, and $425 a month if she did not return. Given the circumstances of wife's age, condition of health, and her needs, the sum of $425 a month does not appear unreasonable. Using that figure and applicable annuity tables, the resultant value of future alimony payments computed at five percent discount, compounded annually, comes to $34,989.57.[2] Of course, a lower monthly sum or a higher discount rate would lower the present value. Nevertheless, the rough calculation, taking judicial notice of the tables discussed, demonstrates that the $35,000 figure can be supported when a modest monthly sum is projected.

The dilemma faced by the trial court prompted its comment that the award was not enough for wife and too much for husband. Nevertheless, the trial court fashioned, as best it could, a fair resolution. The fact that husband will have to sell the four-plex, while burdensome, should not leave him destitute. Assuming a sales price of $100,000, husband will still have approximately $65,000, less cost of sale, plus $10,000 in additional community property to invest. In addition, husband has his social security of $392 a month. Further, lump sum alimony, as opposed to monthly payments, would not likely have been awarded but for husband's poor track record with his first spouse, the acrimonious relationship with wife here, and his own equivocations about paying her alimony. That husband may have to sell his four-plex is due in part to his own actions. *Ellsworth* does not require a different result. That case concerns the liquidation of property by the recipient of alimony. Here, we are dealing with the sale of separate property by the payor to satisfy his obligation for alimony, which Section 40–4–7 authorizes.

As to husband's argument that his separate property should not be used to pay alimony, we point out that this assertion directly contradicts Section 40–4–7(B)(1), which allows the trial court to award "either party such a reasonable portion of the spouse's separate property" as alimony. *See also* NMSA 1978, § 40–4–12 (Repl.1986). New Mexico cases have stated that the trial court can award alimony from either the community property or separate property of a spouse. *Ridgway v. Ridgway,* 94 N.M. 345, 610 P.2d 749 (1980); *Harper v. Harper,* 54 N.M. 194, 217 P.2d 857 (1950); *Golden v. Golden.*

Even if the alimony award was higher than we might have awarded, *Bilbao v.*

2. In making this calculation, we used 5% discount based on NMSA 1978, Section 52–1–30(B) that was in effect for worker's compensation cases at the time of the final decree, but since repealed, the American Experience Mortality Table, NMSA Parallel Tables, Vol. 13 at 19, age 67 at 5%, and the Explanation of Use, Annuity Tables, Parallel Tables, Vol. 13 at 17.

Bilbao, 102 N.M. 406, 696 P.2d 494 (Ct. App.1985), or lower than we might have awarded, *Mattox v. Mattox,* 105 N.M. 479, 734 P.2d 259 (Ct.App.1987), we cannot say that the trial court abused its discretion by awarding $35,000 in lump sum alimony. Such an award was not contrary to all reason and is supported by the evidence.

STATUS OF ALIMONY AWARD AFTER WIFE'S DEATH

Husband raises an issue of first impression in New Mexico: whether the right to receive lump sum alimony terminates at the recipient's death. For a general discussion of this subject, *see* Annotation, *Effect of Death of Party to Divorce Proceeding Pending Appeal or Time Allowed for Appeal,* 33 A.L.R.4th 47 (1984). Husband urges us to abate the award of lump sum alimony because wife has died. He argues that the judgment for the lump sum award was stayed pending appeal and that this stay acted to prevent the vesting of the right to payment. Husband cites *Corliss v. Corliss,* 89 N.M. 235, 549 P.2d 1070 (1976), for the principle that the right to future installments of alimony becomes absolute and vested only upon becoming due.

In our case, unlike *Corliss,* wife has no right to *future* installments of alimony. She was awarded a lump sum, which we have upheld. This is different than a right to receive *future* payments of alimony. The trial court gave husband ninety days within which to pay the sum, and a judgment was issued on the date of the divorce decree. The fact that husband stayed the judgment does not affect its validity. A stay stops any future executions on the specific judgment appealed from, but it does not suspend the operation of the judgment as an estoppel or preclude the bringing of other actions. 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 62.06 (2d ed.1985); *see also Higgins v. Higgins,* 204 Iowa 1312, 216 N.W. 693 (1927) (where a husband stayed execution on a judgment for alimony by filing a supersedeas bond, this did not have the effect of vacating the judgment, but only prevented its enforcement during the pendency of the appeal). We agree with this analysis. If we were to follow husband's reasoning, the judgment in effect would not be final. If the judgment were not final, neither party could appeal. *Thornton v. Gamble,* 101 N.M. 764, 688 P.2d 1268 (Ct.App.1984).

Both parties state that lump sum alimony is modifiable based on Section 40–4–7(B)(2). We disagree. At first glance, it appears that Section 40–4–7(B)(2) permits modification of any alimony award. We must, however, construe sections of the statute together so that all parts are given effect. *Methola v. County of Eddy,* 95 N.M. 329, 622 P.2d 234 (1980). If we were to construe Section 40–4–7(B)(2) as allowing modification of lump sum alimony, the efficacy of lump sum alimony would be greatly diminished, if not eradicated. *Cummings v. Lockwood,* 84 Ariz. 335, 338–39, 327 P.2d 1012, 1015 (1958) summarizes our reasoning:

> The provisions of our statute, § 25–319, supra [modification of alimony], and § 25–321, supra [authorization to award alimony], should be construed together. We hold that § 25–321, relating to the power of the court from the time after entry of final judgment to alter, amend or revise the decree, relating to alimony, should be construed as impliedly excepting from its operation in this respect the right of the court to alter, amend or revise a decree of divorce where an award has been made of gross alimony or alimony in one sum payable in installments. If § 25–321 is not so construed then § 25–319 does not mean anything when it provides that alimony may be in one sum.

We view lump sum alimony as akin to accrued periodic alimony. As such, the authority to modify an alimony decree does not include the authority to make a retroactive modification of accrued and vested payments. *Hazelwood v. Hazelwood,* 89 N.M. 659, 556 P.2d 345 (1976); *Corliss v. Corliss.* Once installments become due, the right to those accrued installments of alimony becomes a fixed property right. *Cain v. Cain,* 91 N.M. 423, 575 P.2d 607 (1978). The judgment for accrued alimony becomes a nonmodifiable judgment, enti-

tled to full faith and credit in all states. *Id.*

We note that if neither party appealed and wife collected the $35,000, then died the next day, husband would have had no recourse. Whether we affirm an award of lump sum alimony before or after the recipient's death, the award must still be paid. Such is the nature of lump sum alimony; once awarded it cannot be modified. *Dooley v. Dooley,* 147 Ariz. 132, 708 P.2d 1323 (App.1985) (lump sum alimony payable in installments nonmodifiable); *Lyons v. Lyons,* 244 Ga. 619, 261 S.E.2d 395 (1979) (lump sum alimony nonmodifiable pursuant to statute); *Phillips v. Webster,* 611 S.W.2d 591 (Tenn.App.1980) (lump sum alimony, whether payable in one sum or in installments, nonmodifiable); *see also Hagerty v. Hagerty,* 222 Mich. 166, 192 N.W. 553 (1923) (alimony in gross awarded in lieu of property rights is not affected by death of either party). *Contra Sinn v. Sinn,* 696 P.2d 333 (Colo.1985) (en banc) (both periodic and lump sum alimony held modifiable). In the rare case such as this, where wife dies before actual receipt of the lump sum alimony award, her estate is entitled to collect it.

ATTORNEY FEES

We have often stated that the award of attorney fees lies within the sound discretion of the trial court. *Berry v. Meadows,* 103 N.M. 761, 713 P.2d 1017 (Ct.App.1986). We will set aside an award of attorney fees only if the trial court abused its discretion. *Id.* In this case, wife had minimal assets and income. She incurred over $3,000 of attorney fees. Husband had more income and considerably more property. Considering the relative financial status of the parties and their ability to employ counsel, we find support for the trial court's award of $2,000 in attorney fees to wife. While we might have decided differently, we cannot deem the trial court's decision an abuse of discretion.

Wife also seeks attorney fees and costs for this appeal. Because of the disposition of this case upholding the lump sum alimony award, we decide that each party should pay his or her own attorney fees and costs for this appeal.

APARTMENT BUILDING

Wife contends that a four-plex apartment building in Albuquerque should have been characterized as community property rather than husband's separate property. The standard of review is whether substantial evidence supported the trial court's decision. *Hodges v. Hodges.* We consider evidence in the light most favorable to the trial court's decision, drawing all reasonable inferences in favor of the judgment. *Id.* Applying this standard to the decision of the trial court in this case, we find no error.

Both parties agree that the property in question was purchased in March 1968, prior to the marriage in August 1968. Wife testified that husband's mother gave him the money for the property, that she, wife, put "not one penny" down towards the purchase of the property, that husband took care of the rental income and maintained the rental property. Wife also testified that she sometimes collected the rents, cleaned vacant apartments and put up vacancy signs when necessary. Husband testified that he put $1,000 of his separate money down on the property; borrowed $19,000 from his mother; had the deed made out in his mother's and sister's names; repaid the loan from proceeds from the rental units; and received a quitclaim deed from his sister for her share and later a deed from his mother for the whole property as his sole and separate property. Husband received these deeds during his marriage to wife. All arrangements to repay the loan were oral.

We are hindered somewhat in our review of the evidence because of the lack of documents in this case. We note that wife's docketing statement listed certain exhibits required for appeal, including a warranty deed, a bill of sale, quitclaim deeds, a promissory note and two lists of mortgage payments. These documents, however, were never transferred to this court. In fact, neither party requested them. *See* SCRA 1986, R. 12–212. Where the record on appeal is incomplete, the rul-

ing of the trial court is presumed to be supported by the evidence. *State ex rel. Alleman v. Shoats,* 101 N.M. 512, 684 P.2d 1177 (Ct.App.1984). We assume the trial court considered these omitted documents before characterizing the property.

It is well-settled that property takes its status as community or separate property at the time it is acquired, and is fixed by the manner of its acquisition. *Lucas v. Lucas,* 95 N.M. 283, 621 P.2d 500 (1980); NMSA 1978, § 40–3–8 (Repl.1986). Wife contends that husband did not "acquire" the property until he received legal title during the marriage. We disagree. Although decided under former law, we believe the rule in *Hollingsworth v. Hicks,* 57 N.M. 336, 258 P.2d 724 (1953), is still good law and applies here. In that case, husband contracted to purchase property prior to his marriage, but acquired legal title during the marriage. The court ruled that husband acquired an equitable right to the property when he signed the contract and the property was his separate property. Here, it appears that husband's mother received the original deed from the seller, and entered into an oral contract where husband would receive legal title upon repayment of the loan. Both parties were aware of the repayment schedule. Although we do not have the promissory note before us, the taped record indicates that one existed. Minimal community funds were used to repay this loan. From this evidence it appears that husband had equitable title to the property prior to his marriage and that the property was his separate property.

Wife contends that oral evidence should not be sufficient to support husband's claim. " 'The statute of frauds applies only to executory, as distinguished from executed, contracts, and if a contract otherwise within the statute is completely performed, it is thereby taken out of its operation.' " *Pattison Trust v. Bostian,* 90 N.M. 54, 56, 559 P.2d 842, 844 (Ct.App. 1976) (quoting *Mapel v. Starriett,* 28 N.M. 1, 5, 205 P. 726, 728 (1922)); *see also Prude v. Lewis,* 78 N.M. 256, 430 P.2d 753 (1967). Applying this standard to our case, and assuming the statute of frauds would otherwise apply, we hold that husband's testimony and other evidence of the oral contract were properly before the trial court. The trial court weighs the evidence; we will not reweigh it. *Sanchez v. Homestake Mining Co.,* 102 N.M. 473, 697 P.2d 156 (Ct.App.1985). It also appears that the trial court had more than husband's oral testimony on which to base its decision. In any event, if the trial court disregarded all of husband's testimony regarding the oral contract, as husband's brief points out, the only basis for the transfer of property would appear to be that of a gift from his mother and sister to him. Pursuant to our statutes, this gift would be the separate property of husband. § 40–3–8(A)(4).

Wife contends that the trial court made no ultimate finding regarding when title to the property was acquired. Since we have already stated that the acquisition of legal title does not affect the nature of the property in this case, this argument is without merit. Substantial evidence supports the trial court's decision that the four-plex is husband's separate property.

SUBSTITUTION OF CHILDREN AS PROPER PARTIES

Husband contends that the real parties in interest would be wife's devisees. At the time husband filed his supplemental brief, the children had not yet filed a copy of their mother's will naming them as devisees. The children's ex parte withdrawal of counsel and substitution of party pro se attaches a copy of the will. The will is sufficient to allow the children as substitutes in this proceeding. *See* NMSA 1978, § 39–3–20. *See also* SCRA 1986, Rule 12–301(B) for the current rule.

We affirm the judgment of the trial court and direct that the lump sum alimony award be paid to wife's estate. The parties shall pay their own costs and attorney fees on appeal.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

735 P.2d 1184

In the Matter of MELISSA H., a Child.

STATE of New Mexico, ex rel. HUMAN SERVICES DEPARTMENT, Petitioner-Appellant,

v.

JUDY H., Respondent-Appellee.

No. 9563.

Court of Appeals of New Mexico.

March 19, 1987.

Certiorari Denied April 21, 1987.

Angela L. Adams, Acting Gen. Counsel, Susan K. Rehr and John Petoskey, Assts. Gen. Counsel, Human Services Dept., Santa Fe, for petitioner-appellant.

Ralph E. Ellinwood, John F. Schaber, P.A., Deming, for respondent-appellee.

M. Lea Brownfield, Jeffreys, Cooper & Associates, Deming, guardian ad litem.

OPINION

BIVINS, Judge.

The New Mexico Human Services Department (HSD) appeals from a children's court order assessing costs against it in a child abuse and neglect proceeding. The sole issue on appeal is whether the children's court can assess costs against HSD in an abuse and neglect proceeding brought by HSD under the Children's Code, NMSA 1978, Sections 32–1–1 to –45 (Repl.1986). We hold it cannot and reverse.

Following the entry of a consent decree, legal custody of the child was placed with HSD and physical custody with the child's maternal grandmother. HSD later moved to revoke the consent decree, alleging, among other things, that respondent had maintained only minimal visitation with the child and that her home environment was unstable. Respondent resisted this motion and sought permission to depose the social workers and foster parents assigned to the case. *See* SCRA 1986, R. 10–306. The children's court entered an order authorizing the depositions. Following a hearing, the children's court denied HSD's motion to revoke the consent decree and ordered that the child be returned to respondent at the expiration of the consent decree. Respondent filed a cost bill seeking $660.86 for the costs of the depositions and moved the children's court, pursuant to NMSA 1978,

Civ.P. Rule 54 (Cum.Supp.1985) (now SCRA 1986, Rule 1–054), for a judgment awarding her those costs. Over HSD's objection, the children's court entered an order taxing costs against HSD. From that order HSD appeals. Although it is not clear from the record, we assume the cost bill was for a court reporter's appearance and transcription of the depositions.

It is well established that the right to recover costs exists only by virtue of statutory authority or court rule. *New Mexico Bureau of Revenue v. Western Elec. Co.*, 89 N.M. 468, 553 P.2d 1275 (1976); *Gurule v. Ault*, 103 N.M. 17, 702 P.2d 7 (Ct.App. 1985). Rule 1–054(E) provides, in pertinent part:

> Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law.

As argued by HSD, Rule 1–054(E) contains two critical limitations under the facts of this case: the rule has no application where an express provision for costs is made elsewhere, and costs against the state can be imposed only if permitted by law.

With regard to these limitations, HSD argues that the Children's Code contains its own statutory provision for costs, and that this provision does not permit taxation of costs against HSD. Section 32–1–41, entitled "Court costs and expenses," provides, in pertinent part:

> A. The following expenses shall be a charge *upon the funds of the court* upon their certification by the court:
>
> (1) the costs of medical and other examinations and treatment of a child ordered by the court;
>
> (2) reasonable compensation for services and related expenses for counsel appointed by the court for a party;
>
> (3) the expenses of service of summons, notices, subpoenas, traveling expenses of witnesses *and other like expenses incurred in any proceeding under the Children's Code;* and
>
> (4) reasonable compensation of a guardian ad litem appointed by the court. [Emphasis added.]

Respondent's only argument against the application of Section 32–1–41 is that Subsection A(3) does not specifically include the expense of depositions. Consequently, respondent contends that authority for deposition costs is found under a general statute. She relies on *Kirby v. New Mexico State Highway Department*, 97 N.M. 692, 643 P.2d 256 (Ct.App.1982), a case in which this court ruled that costs could be assessed against the state under NMSA 1978, Section 39–3–30 in damage actions under the New Mexico Tort Claims Act. Respondent's reliance on *Kirby v. New Mexico State Highway Department* is misplaced.

Our resolution against the application of Section 39–3–30 is required by the rule that specific statutes control over general statutes. *In re Rehabilitation of Western Investors Life Ins. Co.*, 100 N.M. 370, 671 P.2d 31 (1983). The Children's Code contains its own statutory provision for costs. *See* § 32–1–41.

We now examine that statute to determine if deposition costs are included. The parties agree that if deposition costs are allowed, it must be found under Section 32–1–41(A)(3), which provides: "the expenses of service of summons, notices, subpoenas, traveling expenses of witnesses *and other like expenses* incurred in any proceeding under the Children's Code[.]" (Emphasis added.) We do not believe the phrase "other like expenses" includes depositions. Under the rule *ejusdem generis*,

> general words in a statute, which follow a designation or enumeration of particular subjects, objects, things, or classes of persons, will ordinarily be presumed to be restricted so as to embrace only subjects, objects, things, or classes of the same general character, sort or kind, to the exclusion of all others.

Grafe v. Delgado, 30 N.M. 150, 153, 228 P. 601, 602 (1924). Deposition costs do not appear to be of the same character, sort or kind as expenses for service of process and traveling expenses of witnesses.

This result is consistent with the supreme court rule governing depositions in children's court cases. SCRA 1986, Rule 22-301(A) provides, in part: "Depositions in criminal, children's court and termination of parental rights cases shall be taken on an audio recording device approved by the administrative office of the courts. The tape recording shall serve as the record on appeal and shall not be typed."

From an examination of Section 32-1-41, as relates to this case, two things are clear. One, either the court fund or the parents or other persons legally obligated for the care and support of the child, not HSD, is responsible for court costs and expenses. Two, reading Section 32-1-41 in conjunction with Rule 22-301(A), the costs of depositions are not allowable costs. Therefore, the court fund is not responsible for the costs of the depositions taken in this proceeding. Consequently, respondent must bear those costs.

We reverse the order assessing costs against HSD.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

736 P.2d 135

Leo SCHMIDT, Plaintiff-Appellant and Cross-Appellee,

v.

ST. JOSEPH'S HOSPITAL, Dr. Ian Knight, and Dr. Thomas E. Broderick, Defendants-Appellees and Cross-Appellants.

No. 8250.

Court of Appeals of New Mexico.

March 19, 1987.

John Duhigg, Catherine Gordon, Duhigg & Cronin, Albuquerque, for plaintiff-appellant and cross-appellee.

Carl J. Butkus, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendant-appellee and cross-appellant St. Joseph's Hosp.

Bruce D. Black, Campbell & Black, P.A., Santa Fe, for defendant-appellee and cross-appellant Ian Knight, M.D.

James O. Browning, Bruce Hall, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee and cross-appellant Thomas Broderick, M.D.

OPINION

GARCIA, Judge.

Plaintiff appeals from an order granting summary judgment in his medical malpractice action against Dr. Ian Knight, Dr. Thomas Broderick and St. Joseph's Hospital. Subsequent to the court's dismissal of plaintiff's complaint, the trial court allowed plaintiff to supplement the record by filing an expert's affidavit. The matter is before this court on cross-appeals. Plaintiff challenges the trial court's summary dismissal of his complaint; St. Joseph's Hospital appeals the order of the trial court permitting plaintiff to supplement the record with an expert's affidavit after summary judgment had been granted. Drs. Knight and Broderick also filed notices of appeal on the issue of supplementation of the record. They, however, failed to file briefs-in-chief and their appeals are deemed abandoned. *See Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct.App.1970).

FACTS

Plaintiff underwent surgery for the removal of a hydrocele, a painful condition caused by the accumulation of fluid in a testicle. The surgery was performed at St. Joseph's Hospital by Dr. Knight. The anesthesiologist was Dr. Broderick. Two nurses assisted in the operating room, and other St. Joseph's personnel attended plaintiff before and after surgery.

Plaintiff alleged that when he awoke following surgery, he had pain in his left hand and arm. The condition was subsequently diagnosed as ulnar neuropathy, a nerve damage in his left elbow.

SUMMARY JUDGMENT

The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party has competent evidence to support his pleadings. *See Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). The proceeding allows the court to penetrate the allegations of the pleadings to ascertain whether there is a genuine issue of fact in dispute. *See Pederson v. Lothman*, 63 N.M. 364, 320 P.2d 378 (1958). "The procedures provided by Rule 56 * * * serve a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims." *Goodman v. Brock*, 83 N.M. at 793, 498 P.2d at 680.

In summary judgment proceedings, the burden rests on the moving party to dem-

onstrate that there is no triable issue of fact. *See Tapia v. McKenzie,* 83 N.M. 116, 489 P.2d 181 (Ct.App.1971). Once the moving party makes a prima facie showing, it is incumbent on the party opposing the motion to demonstrate the existence of a triable issue. *See Goodman v. Brock.* The opposing party's duty in the face of a meritorious showing by the moving party is succinctly discussed by Professor Jerrold L. Walden in his treatise on Civil Procedure in New Mexico. Walden writes:

> [W]here movant has sustained the burden of proof in motion for summary judgment, the opposing party's mere reliance on the allegations contained in the pleadings to raise a triable issue of fact will be insufficient to resist the motion * * *. Nor will a mere argument or contention that a triable issue exists suffice or a general allegation without an attempt to show the existence of those factual elements comprising the claim or defense. In sum, there must be some concrete showing through the production of evidence indicating the existence of a genuine dispute between the parties.

J. Walden, *Civil Procedure in New Mexico* 258–259 (1973).

In support of their motions, defendants submitted affidavits of Dr. Broderick, Dr. William Brooks Gauret and Dr. Knight. In addition, various hospital and surgical records were appended to the affidavits. Defendants further referred to plaintiff's responses to interrogatories and to his deposition testimony. Finally, plaintiff was served with requests for admissions, but failed to respond to the requests. Those matters are deemed admitted. SCRA 1986, R. 1–036. Briefs in support of the summary judgment motions were filed by defendants. Plaintiff failed to file any response to the motions or to submit any affidavits, deposition testimony, answers to interrogatories or other supporting information to establish a factual dispute.

At the time of the summary judgment hearing, the trial court had before it plaintiff's complaint and deposition as well as the evidence submitted by defendant doctors and their experts. Plaintiff's complaint and deposition establish only that: plaintiff underwent surgery while under general anesthesia; following surgery, plaintiff suffered pain in his left arm and elbow; and plaintiff's condition was diagnosed as an ulnar neuropathy. In plaintiff's deposition and answers to interrogatories, he affirmatively states that he was unconscious throughout the surgical procedure and is unaware of any occurrence which might have caused the neuropathy. Defendants' evidence and affidavits in support of the motion established that they adhered to the recognized standards of medical practice and that their actions were not the proximate cause of plaintiff's injury. Defendants thus made a prima facie case that they were entitled to judgment as a matter of law.

MALPRACTICE AND RES IPSA LOQUITUR

In any medical malpractice action, the plaintiff has the burden of proving that: 1) the defendant owed him a duty recognized by law; 2) the defendant failed to conform to the recognized standard of medical practice in the community; and, 3) the actions complained of were the proximate cause of plaintiff's injuries. *See Cervantes v. Forbis,* 73 N.M. 445, 389 P.2d 210 (1964). Here, plaintiff's responses to interrogatories indicate that he seeks to rely on the doctrine of res ipsa loquitur. Where there is such reliance, a plaintiff must establish that the injury was of a kind which does not ordinarily occur in the absence of someone's negligence and that the agent or instrumentality causing the injury was within the exclusive control of defendants. *See Tapia v. McKenzie.*

Although res ipsa loquitur may apply to medical malpractice actions as one form of circumstantial evidence, the doctrine does not relieve plaintiff from making a prima facie case. *See Buchanan v. Downing,* 74 N.M. 423, 394 P.2d 269 (1964); *Tapia v. McKenzie; Holmes v. Gamble,* 655 P.2d 405 (Colo.1982); *Hoover v. Gaston Memorial Hospital, Inc.,* 11 N.C.App. 119, 180 S.E.2d 479 (1971) (summary judgment upheld where plaintiff who suffered injury to ulnar nerve in left arm after surgery for

broken bone in right arm failed to obtain evidence as to when and how the injury occurred); *Talbot v. Dr. W.H. Groves' Latter-Day Saints Hospital, Inc.*, 21 Utah 2d 73, 440 P.2d 872 (1968). *Cf. Parks v. Perry*, 68 N.C.App. 202, 314 S.E.2d 287 (1984) (plaintiff offered expert testimony which tended to show that injury occurred due to improper positioning of arm); *Holloway v. Southern Baptist Hospital*, 367 So.2d 871 (La.App.1978).

The application of res ipsa loquitur to the facts of this case does not negate plaintiff's obligation to establish the existence of some genuine issue of material fact. *See Tapia v. McKenzie; Hoover v. Gaston Memorial Hospital, Inc.* It is insufficient that plaintiff states he does not know how the injury occurred when there is a showing that the actions of defendants were not the cause of the injury. Under these circumstances, plaintiff has failed to rebut the prima facie showing by the moving parties that they are entitled to summary judgment. *See Carrillo v. Hoyl*, 85 N.M. 751, 517 P.2d 73 (Ct.App.1973). Moreover, by his failure to deny certain requests for admissions filed by Dr. Broderick, plaintiff admitted that no act of negligence on the part of Dr. Broderick caused or contributed to his injury. Moreover, he admitted that the injury which he suffered "is of a kind which can occur in the absence of negligence on the part of any person." This admission is fatal to plaintiff's res ipsa loquitur claim because it eliminates a requisite element of the doctrine that the injury would not have occurred absent negligence.

As an alternative to his argument that res ipsa loquitur applies in the present case, plaintiff contends that common knowledge may be used to infer a question of fact as to defendants' negligence. We are not persuaded that this is the kind of injury or type of situation which can be resolved by reliance on a lay person's common knowledge. *See Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977); *Mascarenas v. Gonzales*, 83 N.M. 749, 497 P.2d 751 (Ct.App.1972). Under the circumstances of this case, expert testimony was required to rebut the prima facie showing that defendants adhered to recognized medical standards of the community and that their actions were not the proximate cause of plaintiff's injury. In a malpractice action, expert testimony is generally required to support a claim of negligence. *See Sewell v. Wilson*, 97 N.M. 523, 641 P.2d 1070 (Ct.App.1982); *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (Ct.App. 1972).

CROSS-APPEAL OF ST. JOSEPH'S HOSPITAL

Defendants were entitled to judgment unless plaintiff was successful in demonstrating the existence of a material issue of fact. Plaintiff relies on the affidavit submitted by Dr. Thomas. Initially, we determine that the affidavit may not be considered in reviewing the summary judgment. In a summary judgment hearing, the trial court may properly consider only those pleadings, depositions, answers to interrogatories, admissions and affidavits which are before it. NMSA 1978, Civ.P.R. 56 (Repl.Pamp.1980); *Roberts v. Piper Aircraft Corp.*, 100 N.M. 363, 670 P.2d 974 (Ct.App.1983). *See also Martin v. Board of Educ. of Albuquerque*, 79 N.M. 636, 447 P.2d 516 (1968). Although plaintiff filed his motion to supplement the record prior to the entry of summary judgment, the order allowing the record to be supplemented was entered almost two months after the summary judgment became final. We affirm the cross-appeal of St. Joseph's Hospital.

Plaintiff argues that the affidavit was timely because the trial court retained jurisdiction to vacate its judgment and allow the record to be supplemented by extending the time for plaintiff to file a notice of appeal. Even if the trial court had jurisdiction to supplement the record and vacate its judgment, the fact remains that the affidavit was not before the trial court at the summary judgment hearing.

Although the affidavit is now a matter of record, it was not before the trial court at the summary judgment hearing; thus, the affidavit cannot be considered by this court

in reviewing the trial court's determination that summary judgment was appropriate. *Cf. Hunick v. Orona,* 99 N.M. 306, 657 P.2d 633 (1983). Since the order permitting plaintiff to supplement the record does not affect the relevance of the affidavit for the purpose of appeal, it was not necessary for defendant doctors to appeal the order.

FOOTNOTES

There is a final matter on which we are compelled to comment. The answer brief filed on behalf of Dr. Broderick, while excellent in terms of issue analysis, makes excessive use of footnotes such that much of the argument and most of the case citations are contained in footnotes rather than in the body of the brief. The footnotes, extensively used and excessive in number, are all single-spaced, and some cover one-half to two-thirds of the page. We criticize this practice for two reasons: 1) the brief is difficult to read; and, 2) the practice skirts the page limit requirement of 35 double-spaced typewritten pages. SCRA 1986, R. 12–213(F). Extensive use of footnotes is a practice frowned upon by most legal writers. Professor Henry Weihofen, noted authority on legal writing style, states: "Footnotes are not normally used in brief-writing. If the thought is important enough to deserve a place in the brief, it can usually be fitted into the text." H. Weihofen, *Legal Writing Style,* 290 (2d ed. 1980).

The reader of a "footnote-bedecked" brief or opinion is continually interrupted and required to shift attention between the physically separated pieces of the page. Gordon, *A Note on Footnotes,* 60 A.B.A.J. 952 (1974).

Finally, while this practice may technically comply with the letter of our appellate rules, we believe it violates the spirit of the rules' page limitation requirement, and, therefore, we do not encourage it.

SUMMARY

We determine that plaintiff failed to rebut defendants' prima facie showing by raising a genuine issue of material fact. Based on the evidence before the trial court at the summary judgment hearing, defendants were entitled to summary dismissal of plaintiff's complaint.

We further determine that plaintiff's reliance on res ispa loquitur, under the facts of this case, was misplaced. It is not necessary to reach the parties' arguments concerning the statute of limitations and plaintiff's compliance with NMSA 1978, Section 41–5–15 (Repl.1986).

The order of the trial court granting summary judgment is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and FRUMAN, J., concur.

736 P.2d 491

STATE of New Mexico,
Plaintiff-Appellee,

v.

Herman Jerry SENA,
Defendant-Appellant.

No. 16072.

Supreme Court of New Mexico.

April 23, 1987.

Jacquelyn Robins, Chief Public Defender, Susan Gibbs, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Winston Roberts-Hohl, Santa Fe, trial counsel.

Hal Stratton, Atty. Gen., Charles H. Rennick, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SCARBOROUGH, Chief Justice.

Defendant was convicted of first degree murder, aggravated burglary, and tampering with evidence. He moved for a new trial based on newly discovered evidence—a key prosecution witness recanted subsequent to trial. The trial court denied the motion; defendant appealed. We affirm.

The State relied on the testimony of Elva Martinez (Martinez) and Chris Sena to link defendant to the murder of Ignacita Escudero. Other circumstantial evidence linked defendant to the murder, but there was no direct evidence implicating defendant. Martinez and Chris Sena testified that defendant confessed to them that he mur-

dered Escudero. The State theorized that details of the crime given by Martinez and Chris Sena could only have been known to the killer. The descriptions of the crime given by Martinez and Chris Sena were very similar. After trial, Martinez recanted and testified that she committed perjury in her trial testimony and that defendant never confessed to her. Martinez said she fabricated the confession story in order to get revenge against defendant.

Defendant contends that the trial court erred in denying the motion for new trial. Defendant also contends that the trial court erred in failing to inquire into alleged juror misconduct. A third contention, concerning prosecutorial misconduct, was not preserved for review.

This case presents two issues:

(1) Did the trial court err in denying defendant's motion for new trial based on newly discovered evidence?

(2) Did the trial court err in refusing to inquire into alleged juror misconduct?

ISSUE (1):

In order to warrant a new trial, newly discovered evidence must satisfy the following conditions: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since trial; (3) it could not have been discovered before trial by exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Volpato,* 102 N.M. 383, 384–85, 696 P.2d 471, 472–473 (1985). In this case, only the existence of the first condition is at issue.

Motions for new trial based on newly discovered evidence rest in the sound discretion of the trial court. Id. at 385, 696 P.2d at 473. When newly discovered evidence concerns the recantation of a prosecution witness, the following factors indicate that a new trial should be granted: (1) the original verdict was based upon uncorroborated testimony; (2) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (3) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (4) the witness admitted her perjury on the witness stand and thereby subjected herself to prosecution. *State v. Fuentes,* 67 N.M. 31, 33, 351 P.2d 209, 210 (1960).

In this case, not only was Martinez's testimony corroborated by Chris Sena's testimony and circumstantial evidence, but Martinez's recantation did not occur under circumstances free from suspicion of undue influence. There was considerable evidence that defendant's family intimidated Martinez with threats and acts of physical violence and thereby coerced her recantation. Under these circumstances, we hold that the trial court did not abuse its discretion in denying the motion for a new trial.

ISSUE (2):

Defendant complained of two instances of alleged juror misconduct and introduced affidavits in support of his complaints. According to the affidavit of another juror, juror Stone stated during deliberations that "he knew the defendant was guilty, but that he could not base his conviction on anything he heard in the courtroom." According to the affidavit of defendant's sister, she observed a female juror sleeping during trial. Relying upon SCRA 1986, 11–606(B), the trial judge refused to hear evidence of juror misconduct.

Rule 606(B) states in part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

In *State v. Doe,* 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct.App.1983), *cert. denied,* 101 N.M. 276, 681 P.2d 61 (1984), the Court of Appeals stated:

> The party seeking a new trial on the basis that extraneous evidence reached the jury must make a preliminary showing that movant has competent evidence that material extraneous to the trial actually reached the jury. If the party makes such a showing, and if there is a reasonable possibility the material prejudiced the defendant, the trial court should grant a new trial. The trial court has a duty to inquire into the possibility of prejudice. In an appropriate case, the trial court should conduct an evidentiary hearing.

(Citations omitted.) Defendant failed to show that he had competent evidence that extraneous material reached the jury. Defendant produced nothing more than the statement of juror Stone quoted above. That statement alone does not indicate that extraneous material reached the jury. Therefore, the trial court did not err in refusing to inquire further into juror Stone's remark. Likewise, the trial court did not err in refusing to inquire further into the alleged inattentiveness of a juror. The allegation of inattentiveness is vague and uncorroborated.

We affirm defendant's conviction.

IT IS SO ORDERED.

STOWERS and RANSOM, JJ., concur.

736 P.2d 495

STATE of New Mexico,
Plaintiff-Appellee,

v.

Henry VALENCIA OLAYA,
Defendant-Appellant.

No. 9263.

Court of Appeals of New Mexico.

March 5, 1987.

Certiorari Denied May 7, 1987.

Dean E. Border, Mitchell & Border, Tucumcari, for defendant-appellant.

Hal Stratton, Atty. Gen., Gail MacQuesten, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

MINZNER, Judge.

Defendant appeals his conviction for possession of cocaine, contending that the trial court erred in denying his motion to suppress evidence seized prior to arrest. Defendant raises three issues: (1) whether the police roadblock violated the fourth amendment of the United States Constitution and article II, Section 10 of the New Mexico Constitution; (2) whether the state established that defendant consented to the search of his automobile; and (3) whether the search followed an unlawful detention that tainted defendant's consent. We affirm.

BACKGROUND.

Defendant, a Panamanian citizen, and his companion, also Latin American, were driving east from Tucumcari on Interstate 40 in a 1982 car bearing Texas license tags, approximately 20 miles from the Texas border. On October 5, 1985, at approximately 9:30 a.m., they were stopped by State Police Officers Toler and Wallace at a routine roadblock.

The officers were given permission by their immediate supervisor to establish the roadblock at a place of their choice. They were required to use reflectors, marked units, and a stop sign. They stopped all privately-owned, east-bound vehicles in order to check driver's licenses and car registrations and, for New Mexico drivers, to check proof of insurance. Commercial vehicles were waved through, as a border checkpoint for them lay several miles ahead.

When defendant drove up alongside the stop sign, Officer Toler requested his license and car registration. Defendant gave him a valid Texas driver's license; a current registration in the name of Juan Cantu; an application for Texas title transfer dated November 1, 1982, and signed by defendant and Cantu; and a retail installment contract between Cantu and GMAC dated July 26, 1982. In addition, defendant's companion gave Officer Toler his valid temporary Texas driver's license.

Officer Toler requested that defendant pull his car to the right shoulder. He testified that he did this because he smelled deodorizer in the car and because of the title irregularity. He returned to his patrol car and ran an NCIC check on defendant, his companion, and the automobile. The NCIC response was negative. He returned to defendant, handed him all his documents, and then asked defendant from where he was traveling and where he was going. Defendant said he was traveling from Albuquerque to Houston. At this point, the officer asked for consent, but here the officer's testimony and that of defendant diverges.

Officer Toler testified on direct examination that he asked defendant if he could look inside the vehicle, and that after defendant agreed, he asked if he could look in the trunk first. Defendant responded by opening the trunk with the latch inside the car. On cross-examination, the officer said that he did not specifically ask to look in the trunk. Rather, he asked defendant what he had in the car. Defendant replied he had luggage and the officer said "well, I'd like to look in your vehicle," at which point defendant said "yes, sir," and opened the trunk.

Defendant testified the officer asked what he had in the car and he replied "just luggage." The officer then said "I need to see your luggage, can you open the trunk?" Defendant said "yes, sir," and opened the trunk.

The officer and defendant agree that defendant stood near the back of the car while Officer Toler searched the trunk and opened and searched the luggage in the trunk. They also agree that the officer did not ask permission to open the luggage but that defendant did not object.

Officer Toler testified that after searching the trunk he asked if he could look inside the vehicle itself. When defendant said yes, he asked defendant to have his friend get out of the car.

Defendant, on the other hand, testified that after Officer Toler looked in the luggage he "was talking about the ownership of the car," so defendant gave him additional papers regarding the car. The additional papers apparently included a power of attorney from Cantu. Defendant testified that Officer Toler then entered the back seat. Defendant also testified that the officer never asked him if he could look in the car, but only if defendant could open the trunk.

Upon checking the passenger compartment, the officer discovered a bottle of Pine Sol. Noticing that a vent cover in the door was loose, he removed it with a screwdriver from his patrol car and discovered six small packages of tin foil containing cocaine.

Officer Toler testified that he decided he wanted to search the car thoroughly after receiving the NCIC response and before returning to defendant's car. He was suspicious because the occupants of the car were Latin American and were traveling east to a large city, and because of the irregularity in the title. According to Officer Toler's testimony, these are characteristics he believed to be common in drug cases. He also testified that he made a conscious decision not to ask for a written consent to search, even though he had consent forms in his patrol car. He estimated that about ten minutes elapsed from the time defendant entered the roadblock until the cocaine was found.

After a hearing, the trial court entered an order that contained findings of fact. With respect to the roadblock, the trial court found: "[t]he roadblock was conducted in daylight with due regard for proper location, equipment, officers and traffic conditions. The Court finds no evidence of the delegation of unbridled discretion to the officers nor did they act to assume same."

The trial court also specifically found "that Officer Toler did ask to look into the vehicle" and that "defendant was not afraid or frightened." The trial court found that "the consent to search the vehicle was not confusing nor misleading," and that, although defendant was present throughout the search, he did not "give the officer any indication of any lack of consent to search the automobile." Finally, the trial court found that "the brief detention was reasonable."

Based on these findings, the trial court ruled the roadblock was valid. The court sustained the search on the basis of a valid consent and denied defendant's motion to suppress.

THE VALIDITY OF THE ROADBLOCK.

New Mexico recognizes the validity of routine roadblock stops for the purpose of checking driver's licenses, registrations, and proof of insurance. *State v. Bloom,* 90 N.M. 192, 561 P.2d 465 (1977); *State v. Bidegain,* 88 N.M. 466, 541 P.2d 971 (1975); *State v. Ruud,* 90 N.M. 647, 567 P.2d 496 (Ct.App.1977). The Tenth Circuit has, on several occasions, approved the application of roadblocks set up to make routine checks of licenses and registrations. *United States v. Diaz-Albertini,* 772 F.2d 654 (10th Cir.1985).

Defendant concedes the validity of systematic non-random roadblocks, but he argues that the lack of written guidelines setting explicit and neutral limitations on the conduct of individual officers violates the standards articulated in *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). In *Delaware v. Prouse,* the Court held that:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the * * * States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that

> persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Id. at 663, 99 S.Ct. at 1401 (footnote omitted). *See also Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

Delaware v. Prouse and the cases that have applied it prohibit unbridled discretion on the part of police officers in conducting their stops, but the facts in this case are distinguishable. Officers Toler and Wallace conducted a permissible-type roadblock designed to stop every vehicle on the highway, except commercial carriers. Moreover, the officers' conduct had explicit and neutral limitations. The record discloses that they stopped all private vehicles for the purpose of checking license, registrations, and proof of insurance.

Defendant relies heavily on cases addressing the unconstitutionality of drunk driving stops where officers in the field acted without specific guidelines set by high-ranking superior officers. *State ex rel. Ekstrom v. Justice Court of Arizona,* 136 Ariz. 1, 663 P.2d 992 (1983) (en banc); *Commonwealth v. McGeoghegan,* 389 Mass. 137, 449 N.E.2d 349 (1983). In each of these cases, a state supreme court affirmed a trial court's decision that a roadblock violated fourth amendment protection. In the first case, the record discussed a "not insubstantial amount of discretionary law enforcement activity," *State ex rel. Ekstrom v. Justice Court of Arizona,* 136 Ariz. at 5, 663 P.2d at 996, and in the second, the record failed "to establish sufficient police presence, and adequate lighting and warning to approaching motorists" and did not otherwise "establish lack of arbitrariness and undue delay." *See Commonwealth v. McGeoghegan,* 389 Mass. at 144–145, 449 N.E.2d at 353. In this case, however, the trial court ruled against defendant on this issue, and the record supports its conclusion. The roadblock in our case was valid.

Defendant asks us to adopt guidelines for evaluating a roadblock. *See State v. Deskins,* 234 Kan. 529, 673 P.2d 1174 (1983). We understand the argument to be that such guidelines are necessary to deter pretextual stops. We note that the Kansas Supreme Court has developed a three-factor analysis, stated in *Brown v. Texas,* in addition to identifying a number of factors to be considered in applying the factors. *Id.,* 673 P.2d at 1184–85. *See also State v. Superior Court in and for the County of Pima,* 143 Ariz. 45, 691 P.2d 1073 (1984) (in banc). We agree with the Kansas Supreme Court that, in addition, or as an alternative, minimum uniform standards for the operation of vehicular roadblocks might be advisable.

While this opinion was circulating, another panel of this court considered the validity of a sobriety roadblock. *See City of Las Cruces v. Betancourt,* 105 N.M. 655, 735 P.2d 1161 (Ct.App.1987). In that case, this court affirmed the trial court's denial of defendant's motion to suppress, after identifying eight guidelines that should be considered in determining the reasonableness of a roadblock. This court stated: "[b]ecause we discern no real difference between roadblocks to check for licenses and vehicle registration and roadblocks to check for sobriety, what we decide today simply adds to *State v. Ruud* the standard for determining the validity of roadblocks and guidelines useful in testing that standard." *Id.,* at page 658, 735 P.2d at page 1164.

We have reviewed the facts of the roadblock at issue in this appeal in light of the new guidelines. With the exception of advance publicity, the roadblock in this case satisfied the intent of each guideline. Because no one guideline is dispositive, and because there was substantial evidence to support the trial court's conclusion that the officers in this case did not have or exercise unbridled discretion, we conclude that the roadblock was valid.

WHETHER DEFENDANT'S CONSENT WAS VOLUNTARY.

a. Standard of Review.

Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances. *Schneckloth*

v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Cohen,* 103 N.M. 558, 711 P.2d 3 (1985), *cert. denied,* — U.S. —, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). It is for the trial court to weigh the evidence, determine its credibility, including the credibility of the witnesses, and decide whether the evidence is sufficient to clearly and convincingly establish that consent was given voluntarily. *State v. Bidegain.* Although we must view the evidence and inferences in the light most favorable to the prosecution, the presumption of the trial court's correctness does not replace the requirements of proof. *State v. Malouff,* 81 N.M. 619, 471 P.2d 189 (Ct. App.1970).

The government has a heavy burden when it seeks to justify warrantless arrests and searches. *United States v. Coker,* 599 F.2d 950 (10th Cir.1979). In the absence of a warrant, but when defendant has given permission to search, the burden is on the state to show by clear and positive evidence that consent was given without duress, coercion, or other factors which would vitiate the voluntary nature of the consent. *See State v. Aull,* 78 N.M. 607, 435 P.2d 437 (1967), *cert. denied,* 391 U.S. 927, 88 S.Ct. 1829, 20 L.Ed.2d 668 (1968); *State v. Mann,* 103 N.M. 660, 712 P.2d 6 (Ct.App. 1985).

Waiver of a basic constitutional right will not be presumed. *State v. Herring,* 77 N.M. 232, 421 P.2d 767 (1966), *cert. denied,* 388 U.S. 923, 87 S.Ct. 2126, 18 L.Ed.2d 1372 (1967). Although proof of knowledge of the right to refuse is not required in order to have effective consent, such knowledge is highly relevant to a determination that there has been consent. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Since voluntary consent is a substitute for probable cause, *see State v. Herring,* it must be clear that actual consent was voluntarily given to overcome the presumption against waiver of a constitutional right.

When the defendant to be searched is illiterate or a foreigner who does not readily speak and understand English, the government's burden to show voluntary consent is heavier. *Kovach v. United States,* 53 F.2d 639 (6th Cir.1931); *United States v. Wai Lau,* 215 F.Supp. 684 (S.D.N.Y.1963), *cert. denied,* 379 U.S. 856, 85 S.Ct. 108, 13 L.Ed.2d 59 (1964); *Restrepo v. State,* 438 So.2d 76 (Fla.App.1983). *See United States v. Rodriguez,* 525 F.2d 1313 (10th Cir.1975). *Cf. United States v. Sanchez-Jaramillo,* 637 F.2d 1094 (7th Cir.), *cert. denied,* 449 U.S. 862, 101 S.Ct. 166, 66 L.Ed.2d 79 (1980) (defendant's difficulty with English not a factor where agents informed him of his rights and otherwise conversed with him in Spanish).

In summary, the state must establish by clear and convincing evidence that under the totality of the circumstances, some of which are listed above, the defendant's consent was given freely and was sufficient to encompass the search that followed. The trial court's analysis of the relevant factors and its conclusion, however, are not subject to de novo review. We must review the evidence in the light most favorable to the trial court's decision. The appellate court then determines only whether the evidence, viewed in the light most favorable to the finding and considering the degree of proof required, substantially supports the finding. *State v. Bidegain.*

In *State v. Cohen* the New Mexico Supreme Court adopted the three-tiered analysis set out in *United States v. Recalde,* 761 F.2d 1448 (10th Cir.1985), for determining whether a consent is voluntary. First, there must be clear and positive testimony that the consent was unequivocal and specific. Second, the government must establish that the consent was given without duress or coercion. Finally, we view the first two elements with a presumption against waiver of constitutional rights.

The scope of a consent search is limited by the actual consent. *United States v. Dichiarinte,* 445 F.2d 126 (7th Cir.1971); *Honig v. United States,* 208 F.2d 916 (8th Cir.1953); *State v. Alderete,* 88 N.M. 619, 544 P.2d 1184 (Ct.App.1976). If a search exceeds the scope of the consent that is given, the search must fail under the first tier of the *United States v. Recalde* test,

since there would not have been unequivocal and specific consent to the search that was performed. A search beyond the scope of consent is, therefore, not pursuant to a voluntary consent.

b. Applying Standard to Facts.

In the light most favorable to the state, the evidence is that Officer Toler twice asked if he might look inside the car. The second time Officer Toler asked, he had searched the trunk and searched the luggage in the trunk.

We cannot say as a matter of law that acquiescence in a request to look into a vehicle is an affirmative consent to a thorough search. *Cf. United States v. Covello,* 657 F.2d 151 (7th Cir.1981) (defendant signed form authorizing a "complete" search of his vehicle); *United States v. Torres,* 663 F.2d 1019 (10th Cir.1981), *cert. denied,* 456 U.S. 973, 102 S.Ct. 2237, 72 L.Ed.2d 847 (1982) (defendant signed consent to a complete search; it logically follows permission to search contemplates a thorough search). That, however, is not the question on appeal. Rather, the question is whether the evidence will support an inference that defendant voluntarily consented to a search of the car.[1] *See State v. Austin,* 91 N.M. 793, 581 P.2d 1288 (Ct. App.1978). If the evidence permits an inference that defendant consented to a search of the car, the trial court's ruling must be sustained on the ground that the consent given was unlimited. *Id.* In this event, there is no issue as to the scope of the consent. *Id.*[2]

The state cites *United States v. Espinosa,* 782 F.2d 888 (10th Cir.1986), for the proposition that a failure to object to the continuation of a search may be considered an indication that the search was within the scope of the consent. However, in *United States v. Espinosa* the defendant and his companion were both specifically asked whether agents could search the car, and defendant stated, "no problem, go ahead." *United States v. Espinosa* cites generally to *United States v. Sierra-Hernandez,* 581 F.2d 760 (9th Cir.), *cert. denied,* 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978), which upheld a similar search where defendant watched the search and made no attempt to retract or narrow his consent. As authority for holding the search was within the scope of consent, the *United States v. Sierra-Hernandez* court cited *United States v. Miller,* 491 F.2d 638 (5th Cir.), *cert. denied,* 419 U.S. 970, 95 S.Ct. 236, 42 L.Ed.2d 186 (1974). In *United States v. Miller,* defendant permitted the IRS to remove documents for inspection and apparently acquiesced in their removal. The court held that in so doing the defendant waived any restrictions against removal that may have been contained in a letter agreeing to permit government inspection.

Because Officer Toler had searched the luggage in the trunk prior to asking a second time for permission to look in the car, the trial court might have concluded that there was evidence of an unlimited consent. Under these circumstances, when Officer Toler used a screwdriver to remove the loose door panel, the evidence supports a finding that he was acting with defendant's consent. Given the standard of review on appeal, we conclude the state carried its burden of proof.

WHETHER DEFENDANT'S CONSENT WAS TAINTED.

Defendant has argued that defendant's consent was tainted by an unlawful detention. The state contends that defendant has waived the argument by failing to iden-

1. *Cf. State v. Cuzick,* 21 Wash.App. 501, 585 P.2d 485 (1978) (consent to "look in the car" did not extend permission to rummage through suitcases); *People v. Sanders,* 44 Ill.App.3d 510, 3 Ill. Dec. 208, 358 N.E.2d 375 (1976) (by acquiescing in request to look into trunk, defendant did not consent to a probing exploration into a closed container in the trunk); *People v. Thiret,* 685 P.2d 193 (Colo.1984) (en banc) (defendant's oral consent to "look around" his house was not a consent to search; a "look around" connotes a casual observation of the premises).

2. *Compare State v. Price,* 363 So.2d 1102 (Fla. App.1978) (search upheld where defendant consented to search of vehicle and evidence found under jacket on car seat) *with State v. Martinez,* 102 Idaho 875, 643 P.2d 555 (App.1982) (where owner consented to search of truck, no reasonable expectation of privacy in gun case on seat).

tify the period of time on which he relies. It seems clear that defendant relies on the period of time between Officer Toler's receiving a negative NCIC report and the time defendant consented. We understand his argument, however, to be based on a claim that defendant's testimony, rather than the officer's, was the more credible.

The trial court found that the brief detention was reasonable. The record supports a conclusion that there was a very brief interval between the time the officer received a negative response and the time he asked for consent, during which he asked defendant's point of origin and destination. We assume, but need not decide, that this period of time was not an unreasonable detention.

Defendant's argument on appeal has been that *State v. Cohen* is distinguishable, because in that case defendants had been advised of their rights and had signed a written consent form. We understand *State v. Cohen,* however, to have ruled, alternatively, that where the detention was not unreasonable, it was not sufficient to taint defendant's consent. In view of the trial court's finding concerning the detention, we conclude that *State v. Cohen* controls. *See also Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

CONCLUSION.

Having reviewed the record in light of the requisite standard, we conclude that the roadblock was valid and that the state carried its burden of proof as to defendant's consent. Under these circumstances, the trial court's decision to deny defendant's motion to suppress must be affirmed.

IT IS SO ORDERED.

BIVINS and FRUMAN, JJ., concur.

736 P.2d 501

STATE of New Mexico, Plaintiff-Appellee,

v.

Anthony SANDOVAL, Defendant-Appellant.

No. 9444.

Court of Appeals of New Mexico.

March 10, 1987.

Hal Stratton, Atty. Gen., Bill Primm, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jacquelyn Robins, Chief Public Defender, Bruce Rogoff, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

DONNELLY, Chief Judge.

Defendant appeals multiple convictions for armed robbery and false imprisonment with firearm sentencing enhancement. Defendant initially raised seven issues on appeal including an assertion that the state improperly utilized its peremptory challenges to remove jurors of Hispanic heritage from the jury panel on the basis of their race. We reverse and remand for a new trial.

USE OF STATE'S PEREMPTORY CHALLENGES

The prosecutor, by use of peremptory challenge, excluded the only two Hispanic jurors who could have served on the jury. Defendant moved for a mistrial based on the prosecutor's attempt to eliminate all members of defendant's race from the jury. Defendant in this case is of Hispanic background. The jury was selected from a panel of thirty-three prospective jurors. Of the thirty-three panel members, three were Hispanic: Solomon Hernandez, drawn

as number one; Jose Lopez, drawn as number fifteen; and Mercy Castillo, drawn as number twenty-nine. The record indicates that the prosecutor, without explanation, struck from the jury venire Mr. Hernandez and Mr. Lopez, the only two Hispanic jurors with a chance of serving on the jury. Ms. Castillo was not directly involved because the numerical order in which she was drawn was high enough so that a jury was chosen before her number was reached.

On appeal, defendant argues that the recent United States Supreme Court decision, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), altered the law applicable to the prosecutor's use of peremptory challenges, thus requiring reversal of defendant's convictions on equal protection grounds.

In *Batson*, the Supreme Court significantly modified the rules applicable to a prosecutor's use of peremptory challenges in criminal cases and overruled in part its earlier holding in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), concerning the evidentiary burden defendant must meet to establish purposeful discriminatory use of peremptory challenges that exclude members of an accused's racial group from the jury. Under *Swain*, a defendant was required to show systematic exclusion of jurors based upon race beyond the facts of his own case in order to rebut a presumption that the prosecutor utilized the state's peremptory challenges to obtain a fair and impartial jury.

The Supreme Court in *Batson*, however, recognized that the Equal Protection Clause of the federal Constitution limits the state's use of peremptory challenges. The Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of the state's peremptory challenges. *Batson* states in applicable part:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra*, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia, supra*, 345 U.S., [559] at 562, 73 S.Ct., [891] at 892 [97 L.Ed.2d 1244]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Id. 476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 87–88.

The Court in *Batson* further stated that in deciding whether a defendant has made the requisite showing, the trial court should consider all relevant circumstances, including questions asked and statements made by the prosecutor during voir dire and in exercising the challenges.

Batson specifically cites *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), to explain the basis of the prima facie case: "Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." *Id.* at 495, 97 S.Ct. at 1280. In addition, *Batson* recognizes that a "pattern" of strikes against certain jurors may give rise to the inference of discrimination. 476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 88.

The strict requirement in *Swain* was also rejected by this court before *Batson* in *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct.App.1980). In *Crespin*, we noted that post-*Swain* United States Supreme Court cases infer that the challenge allowed in *Swain* may be too limited, and "that certain fact situations may arise where the defendant can overcome the pre-

sumption based entirely upon the facts of his own case." *Id.* at 487, 612 P.2d at 717. We held that improper, systematic exclusion by use of peremptory challenges can be shown (1) "by presenting facts beyond the instant case;" or (2) "where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor." *Id.* at 488, 612 P.2d at 718. This court accordingly held that, where the prosecutor challenged only one black member of the jury venire, defendant did not meet his burden of overcoming the presumption of proper purpose. We note that *Crespin* has been modified by *Batson* in that a prima facie case may be established by substantial underrepresentation or any other relevant circumstances in addition to the absolute number of challenges in one case.

The state relies on *State v. Davis,* 99 N.M. 522, 660 P.2d 612 (Ct.App.1983). *Davis* is not controlling herein, however, because it was grounded in part on a portion of *Crespin* that has subsequently been modified by *Batson.* We now follow *Batson. See also United States v. Chalan,* 812 F.2d 1302 (10th Cir.1987) (interpreting *Batson,* court of appeals vacated convictions of defendant who was Indian and remanded to trial court for hearing on government's reasons for exercising a peremptory challenge against member of defendant's race).

Defendant complied with the requirements of *Batson* in order to establish a prima facie case of discriminatory purpose. Defendant made a requisite showing and alerted the trial court to the fact that the prosecutor used his peremptory challenges to remove the only two Hispanic jurors with a chance of serving on the jury. *Batson* does not require defendant to present evidence of additional circumstances in order to make a prima facie showing of discriminatory purpose. *Cf. State v. Davis.*

Defendant moved for a mistrial based upon the state's use of peremptory challenges. The following colloquy occurred:

DEFENSE COUNSEL: I have a motion at this time. It's a motion for a mistrial because the state has used two of the peremptory challenges to strike the only two Spanish-surnamed jurors that were on the panel. My client is obviously a Spanish-surnamed person and I believe, as far as authority is concerned, there's a recent Supreme Court case that says it was improper to preempt Black jurors simply because they are Black, where the defendant is also Black. The two jurors Your Honor, were Mr. Solomon Hernandez and Jose Lopez, juror no. 5 and juror no. 24.

JUDGE BACA: State reply?

PROSECUTOR: I wasn't aware of it, Your Honor. It wasn't done because they were Spanish-surnamed.

* * * * * *

JUDGE BACA: I'm going to deny the motion. I'm aware there is a new Supreme Court of the United States case that dealt with racial strikes. In that instance, Black jurors, I'm not sure, very frankly I haven't read the case, I don't know what it says except what the press coverage would indicate. Other cases involving race and exclusion of jurors for race have been couched in some sort of language of a systematic exclusion of people because of race, in that there has to be some sort of showing. And I think what I have, if nothing more, without knowing the very specifics of that case, that I would deny the motion for a mistrial.

The prosecutor offered nothing to overcome defendant's prima facie case.

Batson recognized that, although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason as long as that reason is related to his view concerning the outcome of the case to be tried, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that [jurors of the same race] as a group will be unable impartially to consider the State's case against [the] defendant." *Id.* 476 U.S. at ___, 106 S.Ct. at 1719, 90 L.Ed.2d at 83.

The state argues that in a case such as this where the number of Hispanic jurors challenged was very small, it was reasonable that the trial court would find no prima facie proof of purposeful, systematic discrimination. The state emphasizes that the various cases cited by defendant have involved greater numbers of challenges than in the present case. The actual number of challenges is not at issue. *Cf. State v. Davis.* Although the prosecutor only needed to challenge two Hispanics to create a Hispanic-free jury panel, all members of defendant's racial group were excluded from the jury. Defendant has established a pattern of excluding all members of his group based on the facts in his case alone; this is sufficient under *Batson. See also United States v. Chalan.*

Once defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging the jurors. *Batson v. Kentucky.* Here, the prosecutor failed to offer any explanation for his two challenges of Hispanic jurors. The prosecutor may not rebut the defendant's prima facie case of discrimination merely by denying that he challenged jurors of defendant's race because of their shared race. The Court in *Batson* further noted that in order to satisfy constitutional due process requirements, once the burden is shifted to the prosecution, it must then come forward with a neutral explanation for challenging jurors of defendant's racial background, and:

> Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. * * * But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. * * * *Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive*
>
> * * * * * *

Id. at ——, 106 S.Ct. at 1723, 90 L.Ed.2d at 88 (citations omitted & emphasis added).

Following the prosecutor's articulation of a neutral explanation of peremptory challenging members of the venire in the case to be tried, the trial court must then determine if the defendant has established "purposeful discrimination." *Id.*

On the record before us, the prosecutor failed to comply with the Constitutional requirements articulated in *Batson* to rebut defendant's prima facie showing of discrimination in the use of its peremptory challenges or to offer a neutral basis for the exercise of peremptory challenges against the two jurors of Hispanic background. *Cf. United States v. Chalan.*

Defendant's conviction is reversed and the cause is remanded with instructions to award defendant a new trial.

IT IS SO ORDERED.

BIVINS and FRUMAN, JJ., concur.

736 P.2d 979

THOMPSON DRILLING, INC., a New Mexico corporation, Plaintiff-Appellee,

v.

Sally M. Kandarian ROMIG, Defendant-Appellant.

No. 16127.

Supreme Court of New Mexico.

May 4, 1987.

William H. Burden, Jr., Santa Fe, for defendant-appellant.

F. Stephen Boone, Los Alamos, for plaintiff-appellee.

OPINION

SOSA, Senior Justice.

Plaintiff Thompson Drilling, Inc. (Thompson), a New Mexico corporation, brought an action against defendant Sally Kandarian Romig (Romig) to recover money due under a contract and enforcement of a mechanic's lien. Romig counterclaimed, alleging negligent misrepresentations, fraudulent misrepresentations, and breach of contract. The case was tried before a jury, which returned a verdict in the following form: "We find for the Plaintiff on the complaint in the sum of $_____." The Foreperson signed the verdict which stated:

[$]8,309.64

+ Gross Receipt Tax

+ Interest Rate Specified in Defendant's Exhibit # 43

+ Attorney Fees

After the proceedings were adjourned, Romig filed a motion to quash the verdict. But the trial court, pursuant to the jury verdict, entered a final judgment in favor of Thompson in the total amount of $26,941.55. Romig then filed a motion for a new trial, challenging the jury's award of damages and the court's award of attorney fees and interest. This motion was denied. Romig appeals from the resulting final judgment. We affirm in part and reverse in part with respect to the award of attorney's fees.

The relevant facts can be briefly summarized as follows: On June 22, 1983, the parties entered into a "work order agreement" in which Thompson agreed to drill a water well and furnish labor and materials for $8,511.21. The agreement provided for payment upon installation of the pump. Thompson drilled a well 550 feet deep and installed the proper equipment. On July 8, 1983, Thompson billed Romig for all services and parts.

Romig, not satisfied with the quantity or quality of the water, refused to pay Thompson. In August 1983, Romig hired Pioneer Drilling to drill another well. Thompson made a final written demand for payment on Romig's counsel. Again, payment was refused. This suit followed. On appeal Romig raises six issues of alleged trial court error: (1) failure to quash the jury verdict; (2) the increased jury verdict; (3) failure to submit certain jury verdict forms; (4) refusal to allow Romig's witness to testify; (5) failure to include Romig's jury instructions; and (6) the award of attorney's fees.

JURY VERDICT

Issues one, two, and three are dealt with respectively. Romig asserts that the jury verdict is invalid because it is ambiguous and indefinite as to the amount of damages. Thompson maintains that the verdict is unequivocal and accurately reflects the jury's intention. Thompson also contends that Romig waived any objection to the final judgment on the jury verdict because Romig's counsel failed to object or except at the time the jury returned the verdict and before the jury was discharged.

A valid judgment cannot be entered on a jury verdict which is neither specific nor definite regarding the amount of damages. *Sanchez v. Martinez,* 99

N.M. 66, 71, 653 P.2d 897, 902 (Ct.App. 1982). Although a verdict must state the amount due with sufficient definiteness, "strict technical accuracy is not required in the statement of the amount; and it is sufficient if the amount can be ascertained by mere mathematical calculation." 89 C.J.S. *Trial* § 497, at 161 (1955). The jury's verdict reasonably followed the court's Instruction No. 26, which states in part:

> If you should decide in favor of Plaintiff on its claim, then you must fix the amount of money damages which will restore to Plaintiff what was lost by Defendant's breach and what Plaintiff reasonably could have expected to gain. The Plaintiff's claim for damage is payment for its services and materials pursuant to the bill submitted by Plaintiff to Defendant, less the sum of $108.89 listed for the pump shelter and maintenance contract and water system.

Under this instruction, the jury was authorized to find the verdict returned. The instruction allowed the jury to award damages pursuant to the bill submitted. Thompson's bill for service and parts was in the total amount of $8,414.59, plus $315.55 in tax. The sum listed on the bill for the pump shelter, maintenance contract, and water system was for $104.95, not $108.89. It is evident, therefore, that the jury's verdict of damages for $8,309.64 was arrived at by simply subtracting $104.95 from $8,414.59. There is no ambiguity here.

The jury awarded damages for gross receipt tax, interest, and attorney fees without specifying the exact amounts.[1] Romig's second point is that the court erred in calculating the gross receipt tax, thus increasing the jury verdict to the amount of $8,612.25. She maintains that it was the exclusive province of the jury to decide the applicable gross receipt tax rate, and because this amount was indefinite, the jury's verdict should have been quashed.

We agree that the jury should determine the proper amount of damages. *See Sanchez v. Martinez,* 99 N.M. at 72, 653 P.2d at 903. A verdict, however, is generally held to be sufficient if it can be made definite and certain by reference to other matter in the case, such as reference to evidence and instructions of record. 89 C.J.S. *Trial* § 496, at 158. In the instant case, the applicable gross receipt tax rate of 3.75% is apparent from the bill, which was introduced into evidence. Because the amount of damages can be determined by a mere calculation and reference to the record, the jury verdict is sufficiently certain. *See generally Sandell v. Norment,* 19 N.M. 549, 562, 145 P. 259, 263 (1914) (amount of recovery was undisputed and could be ascertained from the pleadings). The trial court did not err in computing the gross receipt tax from the jury's verdict, where the amount intended to be stated was clear.

Romig also argues that she was prejudiced by the court's failure to submit complete jury verdict forms under NMSA 1978, UJI Civ. 13–828 (Recomp.1986). The directions for use of 13–828 provide in pertinent part: "UJI 13–828A through 13–828E will each be given to the jury in any contract case involving a counterclaim or recoupment." The court submitted to the jury verdict forms 13–828A, 13–828C, and 13–828E. Although the court failed to offer all the verdict forms required by this instruction, there is no evidence that Romig was thus prejudiced. In fact, the court submitted forms which included a finding for Romig on her counterclaim. *See* UJI Civ. 13–828C.

Moreover, we agree with Thompson that the right to object to an improper verdict is waived when not made at the time of the return of the verdict and cannot be reclaimed and revived by resorting to a motion for a new trial or on appeal. *See Fischer v. Howard,* 201 Or. 426, 463, 271 P.2d 1059, 1075 (1954). *See also Holloway*

1. Before trial, both parties stipulated that the damage issues of pre-judgment interest and reasonable attorney fees would be reserved for the court's consideration and determination. Consequently, after the jury returned its verdict, Thompson's counsel filed a Remittit Damna on those damages awarded.

v. Evans, 55 N.M. 601, 605–06, 238 P.2d 457, 459 (1951) (failure to object to possible error waives challenge on appeal). In response to this argument, Romig maintains that Thompson's assertion of alleged waiver cannot be considered because no reference to the transcript is made. The record shows that Thompson was unable to make reference to a timely objection, or the lack thereof, because those proceedings were not transcribed pursuant to Romig's designation of the record on appeal.

It is the duty of the appellant, Romig, to see that the record is properly prepared and completed for review of any question by an appellate court. *State ex rel. State Highway Comm'n v. Sherman,* 82 N.M. 316, 317, 481 P.2d 104, 105 (1971); *Westland Dev. Co. v. Saavedra,* 80 N.M. 615, 618, 459 P.2d 141, 144 (1969). We conclude that the record does not reflect a timely objection to the verdict.

PROFFERED TESTIMONY AND JURY INSTRUCTIONS

Romig contends that the court erred in refusing proffered testimony that she was subject to an injunction and fine because her well was drilled without a proper permit. She also asserts that the court erred in refusing to allow the following language in Instruction No. 35: "Defendant was unable to withdraw water from the well because Plaintiff violated statutes and regulations relating to the drilling of water wells," and in refusing Romig's requested Instruction No. 13, which states: "A contract, the performance of which violates statutes or regulations prohibiting the drilling of a well without a proper permit, is illegal and unenforceable."

The parties' agreement required Romig to furnish Thompson with the well permit. Even though Romig obtained a permit only authorizing the deepening of an existing well, Thompson drilled a new or replacement well. Romig's counsel at trial, outside of the presence of the jury, made an offer of proof that David Stone, an employee of the State Engineer's Office, would testify that Romig was subject to an injunction and fine under NMSA 1978, Sections 72–12–15 and 16 (Repl.Pamp.–1985). Romig argued that the evidence was relevant because it showed the illegality of the contract and went to the issue of proper performance.

The court, finding the contract legal on its face, refused the proffered testimony to show that Romig was harmed, since no injunction or fine had been imposed, thus making the testimony purely speculative in nature. The court allowed the testimony for the limited purpose of showing less than substantial performance by Thompson. Romig argues that the proffered testimony would have shown that Thompson was in violation of the Statute because he drilled a well without a proper permit and therefore she was subject to an injunction and fine, citing Sections 72–12–15 and 72–12–16.[2] The penalties imposed under these provisions, however, relate to violations under the Act's requirement that a license be issued for drilling from an "underground source." For example, Section 72–12–15 provides in part: "No person owning or controlling lands shall permit the drilling of a well thereon for water from an underground source .. by any person other than a driller licensed under the provisions of this Act [72–12–12 to 72–12–17 NMSA 1978]." This section is a legitimate exercise of police power of the state. *State v. Myers,* 64 N.M. 186, 194, 326 P.2d 1075, 1081 (1958). The legislative intent is to regulate the use of, and drilling of, wells for underground water by requiring the issuance of a license. It is undisputed that Thompson was a licensed driller under Section 72–12–12. Therefore, based on the above reasoning, and because Romig suffered no actual harm, we agree with the trial court's ruling on this issue. Moreover, the trial court acts in its prerogative in refusing evidence which would confuse jurors more than it would aid them. *Sego*

2. NMSA 1978, Section 72–12–12 provides in part: "It shall be unlawful for any person, firm or corporation to begin the drilling of a well for water from an [underground source] ..., without a valid, existing license for the drilling of such well. * * *"

v. Mains, 41 Colo.App. 1, 578 P.2d 1069, 1072 (1978).

Nor do we find that the court abused its discretion in denying Romig's requested instructions. As a general rule, a party is entitled to an instruction on its theory of the case when it is supported by the evidence. *Adams v. United Steelworkers of Am.,* 97 N.M. 369, 374, 640 P.2d 475, 480 (1982). The above quoted language in Instruction No. 35 is not supported by any evidence, nor is the instruction restricted to its proper limited purpose. *Cf. Gonzales v. Sansoy,* 103 N.M. 127, 131, 703 P.2d 904, 908 (Ct.App.1984) (evidence may be admitted for limited purpose and limiting instruction may be included in the instructions given).

Finally, Instruction No. 13 was not proper since it went to the validity and enforceability of the contract. The court had previously stated that the contract's validity was an issue for its own determination, and that the evidence here showed that the contract was legal and not void, even if it was performed in an unlawful manner. *See Measday v. Sweazea,* 78 N.M. 781, 438 P.2d 525 (Ct.App.1968).

ATTORNEY FEES

On July 31, 1985, the trial court held a hearing to determine the award of attorney's fees. The court, relying on the parties' work order agreement and Thompson's evidence concerning reasonable attorney's fees, awarded fees in the total amount of $15,945.49. The issue before this Court is whether the trial court abused its discretion in awarding attorney's fees for that amount.

The work order agreement provides in part:

> (5) If the collection of any amount past due hereunder is referred to any attorney or if a claim of lien is filed on account of any work performed hereunder, Purchaser agrees to pay *reasonable attorney's fees* in an amount not less than 15% of the amount due. [Emphasis added.]

Romig argues that the trial court erred in making the fee award because Thompson held a superior bargaining position and was negligent in the performance of his duty and because the fee was oppressive. Alternatively, Romig maintains that, even if the court could award attorney's fees, this fee was excessive and not supported by substantial evidence. Finally, Romig asserts that the court erred by including the court's costs, expenses, and taxes in the award of attorney's fees.

This Court has long held that contract provisions between parties, such as clause five here, are valid and enforceable. *See Exchange Bank of Dallas v. Tuttle,* 5 N.M. 427, 23 P. 241 (1890). This contract allows for reasonable attorney's fees. In *Budagher v. Sunnyland Enter. Inc.,* 93 N.M. 640, 603 P.2d 1097 (1970), a case similar to the one at issue and involving a contract suit that claimed damages for attorney's fees, this Court considered a number of factors in determining the reasonableness of attorney's fees. These factors include: (1) the time and labor required—the novelty and difficulty of the questions involved and skill required; (2) the fee customarily charged in the locality for similar services; (3) the amount involved and the results obtained; (4) the time limitations imposed by the client or by the circumstances; and (5) the experience, reputation and ability of the lawyer or lawyers performing the services. *Id.* at 641, 603 P.2d at 1098. Applying these factors to the instant case, we find the fee award excessive.

The record shows that there was no evidence introduced concerning the fee customarily charged in the locality for similar services, nor was there evidence of any time limitations imposed by Thompson. And, although Thompson's counsel is an experienced, undoubtedly reputable and able lawyer, this factor alone does not support an attorney's fee award that is nearly twice the amount of the jury's verdict, particularly in light of the fact that this was not a complex case requiring the expenditure of extraordinary time and labor. The amount awarded for services performed cannot be extended beyond what was reasonably required. In fact, at the hearing Thompson's counsel conceded that if this

case had been tried solely as a breach of contract, it would have required only one-third of the time actually expended. Thompson's counsel argues that because of the counterclaims raised, fraudulent misrepresentation and negligent misrepresentation, more extensive research was necessary.

This Court has recognized that, in asserting a claim for attorney's fees under an action in contract, it is appropriate to distinguish between the amount of the attorney's fees incurred for prosecution of the complaint and counsel's fees for defense of a counterclaim. *State ex rel. Nichols v. Safeco Ins. Co. of Am.,* 100 N.M. 440, 447, 671 P.2d 1151, 1158, (Ct.App.) *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983), *cited with approval in State Sav. and Loan Ass'n. v. Rendon,* 103 N.M. 698, 702, 712 P.2d 1360, 1364 (1986). Had the trial court made such a distinction, along with considering the other factors stated, it is dubious that it would have awarded such an exorbitant fee.

The allowance of a particular fee may be reduced if it is determined to be unreasonable or excessive. 7A C.J.S. *Attorney & Client* § 330, at 645 (1980). Accordingly, we reverse the trial court's attorney's fee award. After careful consideration of the matter, it is our opinion that an attorney's fee award for $4500 is reasonable. Furthermore, we hold that, under these circumstances, the court costs and expenses in the amount of $711.15 may be added to the award. *See Chalmers v. Hughes,* 83 N.M. 314, 491 P.2d 531 (1971).

Based on the foregoing, we affirm the trial court's judgment but reverse that portion of the judgment regarding attorney's fees. That portion of the judgment shall be reduced to $5211.15.

Each party is to bear their own costs on appeal.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and RANSOM, J., concur.

736 P.2d 986

TENNECO OIL COMPANY,
Appellant-Petitioner,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,
Appellee-Respondent.

NAVAJO REFINING COMPANY,
Appellant-Movant,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,
Appellee-Respondent.

Nos. 9103, 9106.

Court of Appeals of New Mexico.

March 25, 1986.

Paul G. Bardacke, Atty. Gen., Andrea L. Smith, Ass't Atty. Gen., Duff Westbrook, Special Ass't Atty. Gen., Santa Fe, for appellee-respondent.

Karen Aubrey, Kellahin & Kellahin, Santa Fe, for applicant Tenneco.

Bruce S. Garber, Santa Fe, for applicant Navajo Refining Co.

OPINION

DONNELLY, Judge.

The issue before us involves the applications of Navajo Refining Company and Tenneco Oil Company, seeking to stay the enforcement of amendments to the Water Quality Control Commission regulations during the pendency of their appeal from the administrative order adopting such amendments. With the consent of the parties, the applications for stay have been consolidated for hearing.

In their applications for stay, applicants assert that the proposed amendments promulgated under the Water Quality Act, NMSA 1978, Section 74-6-1 (Repl.Pamp. 1983), et seq., "will set more stringent numerical standards for discharge of substances which are controlled by the Water Quality Control Commission than presently exist" and that if such standards are permitted to become effective, applicants "will be irreparably harmed by enforcement of these regualtions [sic] while this matter is pending on appeal."

Applicants have included in their petitions for stay, copies of the amended regulations which are the subject of their appeals, but have not alleged specifically in what manner the proposed amendments to the regulations, if allowed to take effect, will result in "irreparable harm."

Section 74-6-4 empowers the Commission to adopt regulations and amendments applicable to water quality standards, after notice and hearing to interested persons. NMSA 1978, § 74-6-6 (Repl.Pamp.1983). The Act is silent, however, concerning any provision for the grant of a stay from regulations or amendments enacted by the Commission.

During the pendency of an appeal, an appellate court may grant supersedeas or stay to review any action of, or any failure or refusal to act by, the district court. NMSA 1978, Civ.App.R. 5 (Repl.Pamp. 1984). The appellate rule, however, does not specifically refer to the granting of supersedeas or stay from orders of a state administrative agency. *Compare* NMSA 1978, Civ.P.R. 62 (Repl.Pamp.1980).

Under the Water Quality Act, provision is made for a direct appeal to the Court of Appeals from any regulation or amendment adopted by the Commission. NMSA 1978, § 74-6-7 (Repl.Pamp.1983). Implicit in the statute is the power to grant a stay from the operation of an administrative order or regulation, after due notice and opportunity for hearing. *See* N.M. Const. art. VI, § 29. During the pendency of an appeal, a stay can be granted as an incident to this court's power to review final administrative orders or regulations. *Compare* NMSA 1978, § 12-8-18 (specifying under Administrative Procedures Act, that the filing of an appeal does not stay enforcement of an agency decision, but the

agency may grant, or Court of Appeals may order a stay upon appropriate terms).

Grant of an application for stay is not a matter of right, it is an exercise of judicial discretion, and the propriety of its issuance is dependent upon the circumstances of each individual case. *See State v. Doe,* 103 N.M. 30, 702 P.2d 350 (Ct.App. 1984).

In cases where a stay is sought of agency action during the pendency of an administrative appeal, in accord with the general rule requiring a party to exhaust his administrative remedies, the party seeking the relief should first apply for a stay from the agency involved. *See Von Weidlein International Inc. v. Young,* 16 Or. App. 81, 514 P.2d 560 (1973) (en banc). *Cf. Angel Fire Corp. v. C.S. Cattle Co.,* 96 N.M. 651, 634 P.2d 202 (1981); *State Racing Commission v. McManus,* 82 N.M. 108, 476 P.2d 767 (1970).

In the absence of a specific statute or rule governing the granting of a stay of agency action pending appeal, what standard is applicable herein? Courts in other jurisdictions have applied varying standards. *See Tomasi v. Thompson,* 635 P.2d 538 (Colo.1981) (en banc); *Connecticut Life & Health Insurance Guaranty Ass'n v. Daly,* 35 Conn.Sup. 13, 391 A.2d 735 (1977); *Coordinating Committee of Mechanical Specialty Contractors Ass'n v. O'Connor,* 92 Ill.App.3d 318, 48 Ill.Dec. 147, 416 N.E.2d 42 (1980); *Teleconnect Co. v. Iowa State Commerce Commission,* 366 N.W.2d 511 (Iowa 1985). The standards recognized in some of these decisions are influenced in part by statutory provision or court rule.

The test articulated in *Associated Securities Corp. v. Securities & Exchange Commission,* 283 F.2d 773 (10th Cir.1960) and *Teleconnect,* we conclude, should be adopted herein. In both *Associated Securities Corp.,* and *Teleconnect,* the appellate courts recognized four conditions which they determined should guide an appellate court in determining whether its discretion should be exercised in the granting of a stay from an order or regulation adopted by an administrative agency. These conditions involve consideration of whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

The mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay. *Union Fidelity Life Insurance Co. v. Whaland,* 114 N.H. 549, 323 A.2d 585 (1974). An administrative order or regulation will not be stayed pending appeal where the applicant has not made the showing of each of the factors required to grant the stay. *Id.*

Applicants herein have alleged that irreparable harm will result unless a stay from the Commission's amended regulations is granted. Mere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay. However, in addition to a showing of irreparable harm, to obtain a stay of administrative action pending appellate review, an applicant must make a showing as to the other three conditions. In evaluating a request for a stay, the court must consider the applicant's presentation as to each of the enumerated factors.

Applying the above standards to the matters presented by applicants herein, we find that applicants have not established good cause for the granting of a stay under the factors recognized above. Denial of the requested stay does not constitute any determination of the validity of applicants' appeal on the merits.

The applications for stay are denied.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

736 P.2d 989

Dan SALTER, D.D.S. and Larry Cook, D.D.S., Plaintiffs-Appellees,

v.

Keith D. JAMESON, D.D.S., Defendant-Appellant.

No. 8576.

Court of Appeals of New Mexico.

March 19, 1987.

Certiorari Denied April 24, 1987.

Robert Suzenski, P.C., Susan Weckesser, Patrick A. Casey, P.A., Santa Fe, for defendant-appellant.

Saul Cohen, Sutin, Thayer & Browne, P.C., Santa Fe, for plaintiffs-appellees.

OPINION

BIVINS, Judge.

Plaintiffs sought damages against defendant based on claimed breach of duty of loyalty and tortious interference with prospective contractual relations. From a judgment awarding plaintiffs $30,000 compensatory damages and $10,000 punitive damages, defendant appeals. He raises four issues: (1) whether defendant had a duty of loyalty and, if he did, whether he breached it; (2) whether defendant's actions interfered with plaintiffs' prospective relations with their patients and with a prospective sale of the Questa practice; (3) whether the compensatory damage award is supported by substantial evidence; and (4) whether an award of punitive damages was proper in this case.

We affirm on the first issue and that portion of the second issue dealing with tortious interference with prospective relations with patients, but reverse and remand as to the claim of tortious interference with a prospective sale. As a result, we do not reach the remaining two issues.

After experiencing a substantial following from the Questa area, plaintiffs, two established dentists with their primary office in Taos, decided to open a branch in Questa. They purchased a building, had it remodeled, bought equipment and supplies and proceeded to staff the office. Defendant, a young dentist, who at the time was unemployed, was engaged to run this office. He was paid $150 a day for the days he worked at the Questa office and was provided with a staff of three persons. Plaintiffs paid all salaries and overhead, set the fee schedule and consulted with defendant on a regular basis. Before commencing, defendant spent two weeks at plaintiffs' Taos office so plaintiffs could review his work and show him how they wanted him to operate the Questa office.

Defendant opened the Questa office on March 1, 1982, and ran it until March 10, 1983, when he left to open his own office "down the street." Before leaving, defendant either copied the recall records or took them with him; wound down plaintiffs' practice by delaying or postponing dental work for patients until he opened his own office; failed to make appointments for patients; solicited patients away from plaintiffs; and took two of the three employees with him when he left.

Plaintiffs hired Dr. Jacobs, an experienced Albuquerque dentist, to run the Questa office after defendant left. Because there was insufficient practice to make it feasible to continue, plaintiffs closed the office after six months.

There was no written agreement between plaintiffs and defendant. The parties agree that either side could have termi-

nated the arrangement at will, and that there was no covenant against competing after defendant left.

The above highlights facts favorable to the prevailing parties. There were other facts that, if believed, might have supported a different result, but we disregard those facts. It is the function of the fact finder, not the reviewing court, to weigh the evidence, resolve conflicts and decide where the truth lies. As long as we can find substantial evidence to support the trial court's findings, our job is complete and we look no further. This, then, is the scope of review and it is exceedingly narrow. *Toltec Int'l, Inc. v. Village of Ruidoso,* 95 N.M. 82, 619 P.2d 186 (1980).

1. **Violation of Duty of Loyalty**

Defendant challenges the trial court's findings that he worked as an employee of plaintiffs, by attempting to demonstrate his status was that of an independent contractor. Defendant does not explain why an independent contractor, as opposed to an employee, owes no duty of loyalty and cites no authority that there is any difference. Nevertheless, assuming defendant is correct, that an independent contractor owes a lesser duty or no duty at all, it would not matter here.

Substantial evidence supports the finding of defendant's status as an employee. While certain indicia are helpful in determining a master-servant relationship, as distinguished from that of an independent contractor, it is generally agreed that the determinative factor is the right to control. *Jaramillo v. Thomas,* 75 N.M. 612, 409 P.2d 131 (1965); *Dibble v. Garcia,* 98 N.M. 21, 644 P.2d 535 (Ct.App.1982). Here, there was substantial evidence not only of the right to control but of the exercise of that right. In addition to reviewing defendant's work before opening the Questa branch and instructing defendant as to fee schedules and office procedures, plaintiffs, as well as their office manager, supervised the branch operation on a regular basis.

Having concluded that substantial evidence supports the finding of an employer-employee relationship between plaintiffs and defendant, what duty did defendant owe?

> It is well settled that the employment relationship is one of trust and confidence and places upon the employee a duty to use his best efforts on behalf of his employer. The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of the one relying upon his integrity. * * *
>
> * * * Although an employee may lawfully plan to compete with his employer, it is also well established that an employee has a duty not to do disloyal acts in anticipation of future competition.

Las Luminarias of N.M. Council of the Blind v. Isengard, 92 N.M. 297, 302, 587 P.2d 444, 449 (Ct.App.1978) (citations omitted). Although one member of the panel in *Las Luminarias* concurred in the result only and a second specially concurred, *see Casias v. Zia Co.,* 94 N.M. 723, 616 P.2d 436 (Ct.App.1980), we believe the above principles announced by Judge Lopez correctly state the law and we adopt them here.

Defendant does not dispute the existence of a duty; he argues that the evidence will not support a finding of breach of duty. We disagree. The trial court found that defendant decided in November or December 1982 to terminate his employment with plaintiffs. Without telling plaintiffs of his plans, defendant "wound down" his services and did not give his best efforts to the practice. The trial court further found that defendant copied the names and addresses of all of plaintiffs' patients, copied other vital information, deferred dental work until after he had terminated, and induced patients to defer needed dental work until he opened his own office. It found defendant failed to make appointments for plaintiffs' patients for the new dentist, and that defendant opened his office taking two of the three staff employees with him. Defendant never gave notice to plaintiffs of his intention to leave and, when confronted, he said he intended to leave at the end of the week.

Defendant had a right to compete with plaintiffs after he left their employ, and he had a right to make reasonable plans in advance of leaving. What defendant could not do was undermine plaintiffs' practice by engaging in disloyal acts designed to promote his own self-interest to the detriment and damage of his employers. The above findings are supported by substantial evidence. Thus, the trial court's findings of breach of duty of loyalty are affirmed.

2. Interference with Prospective Relations

New Mexico recognizes a cause of action for tortious interference with prospective contractual relations. *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 612 P.2d 241 (Ct.App.1980). The trial court found improper interference in two areas: interference with patients and with the sale of plaintiffs' practice to a prospective buyer. We have already detailed the findings as to defendant's activities in inducing patients away from plaintiffs. Substantial evidence supports those findings and they will not be disturbed on appeal. A different result is required, however, with respect to the finding of interference with a prospective sale.

A review of the testimony of Dr. Higgins, the dentist with whom plaintiffs discussed a possible sale, does not persuade us that defendant's conversation with that dentist had any significant effect on Dr. Higgins' decision not to purchase. Dr. Higgins testified that defendant called him and cautioned against " 'getting into my kind of deal with [Doctors] Cook and Salter.' " First, defendant's "kind of deal" did not involve a sale. Second, Dr. Higgins said he had already made up his mind not to buy when this conversation took place. This evidence would not support a finding of tortious interference. Plaintiffs do not address this aspect of the findings in their brief. We found only one reference, outside of Dr. Higgins' own testimony, as to why he decided against buying plaintiffs' practice. That reference came through the testimony of Dr. Salter who said Dr. Higgins told him at a dental conference that defendant did not buy because he said there would be no practice, " 'nothing left.' " This evidence, however, was not admitted for the truth of the matter asserted, only as evidence of plaintiffs' efforts to mitigate their damages.

The trial court's award of compensatory damages is based in part on intentional interference with a sale to a prospective purchaser. Because of the lack of evidence, this theory should not have been considered. We do not know what effect this theory may have had on the award. Under these circumstances, we must vacate the judgment and remand for entry of revised findings that exclude the tortious interference based on a prospective sale. *See Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct.App.1983).

Where the trial judge who heard the case dies, resigns or retires pending appeal, a new trial is required. *See Smith v. Trailways, Inc.*, 103 N.M. 741, 713 P.2d 557 (Ct.App.1986). In this case, the trial judge was elected to the supreme court and has consequently resigned his position as trial judge. Thus, a new trial on the issues of compensatory and punitive damages must be conducted by another judge, unless the chief justice should appoint the trial judge who heard this case to preside. N.M. Const. art. VI, § 15 (Cum. Supp.1986). In that case, all that would be required would be to delete from the decision any consideration of tortious interference based on the claimed prospective sale, and to make new findings as to damages, should the deletion of that one item affect damages.

The trial court's judgment is vacated and the case is remanded for further proceedings consistent with this opinion. Defendant is assessed the cost of appeal.

IT IS SO ORDERED.

FRUMAN and APODACA, JJ., concur.

737 P.2d 74

Aurelia MADRID, Plaintiff-Petitioner,

v.

UNIVERSITY OF CALIFORNIA, d/b/a Los Alamos National Laboratory, Employer, and Wausau Insurance Company and Royal Globe Insurance Company, Insurers, Defendants-Respondents.

No. 16172.

Supreme Court of New Mexico.

March 18, 1987.

Rehearing Denied May 29, 1987.

George M. Scarborough, Santa Fe, Benny R. Naranjo, Albuquerque, for plaintiff-petitioner.

Montgomery & Andrews, Sarah M. Singleton, Walter J. Melendres, Santa Fe, Modrall, Sperling, Roehl, Harris & Sisk, Benjamin Silva, Jr., Albuquerque, for defendants-respondents.

Frank L. Spring, Catherine Gordon, Albuquerque, for amicus curiae New Mexico Psychological Ass'n.

ON REHEARING

WALTERS, Justice.

We granted petitioner's request for rehearing in this matter. The opinion filed on November 24, 1986 is withdrawn and the following substituted therefor.

OPINION

Petitioner, plaintiff in a workman's compensation case, appealed the trial court's dismissal of her claim for failure of proof. At her trial plaintiff had called her treating clinical psychologist to testify that her mental disability was work-related. After that testimony had been received but prior to the entry of judgment, the trial court ruled that the psychologist was not qualified to give an opinion concerning the causal connection between employee's disability

and her employment because NMSA 1978, Section 52–1–28(B) requires that causation in workman's compensation cases be proved by "expert medical testimony." The trial court's exclusion of the psychologist's previously received evidence came as the result of an opinion of the court of appeals, *Fierro v. Stanley's Hardware,* 104 N.M. 401, 722 P.2d 652 (Ct.App.1985), that had been filed in the interim between trial and judgment. *Fierro* held that "expert medical testimony" meant testimony by one licensed to practice medicine. Since psychologists are not permitted to practice medicine under our licensing laws, NMSA 1978, Section 61–9–17 (Repl.Pamp.1986), *Fierro* compelled the ruling by the trial court that plaintiff's witness was not qualified to give expert medical testimony under the Workman's Compensation Act. On appeal, the court of appeals agreed in a memorandum opinion that *Fierro* controlled and affirmed the lower court's dismissal of Madrid's suit. We now reverse the court of appeals and the district court.

The crux of the appeal is whether "expert medical testimony" under the Workman's Compensation Act means testimony only from one licensed to "practice medicine" under our licensing laws.

Section 52–1–28(B) provides:

> In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by *expert medical testimony.* No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

Id. (Emphasis ours.)

We observe a basic rule of statutory construction: that words are presumed to have been used in their ordinary sense, *Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971), that is, that words are given their ordinary and usual meaning unless the context indicates otherwise. *Davis v. Comm'r of Revenue,* 83 N.M. 152, 489 P.2d 660 (Ct.App.), *cert. denied,* 83 N.M. 151, 489 P.2d 659 (1971). The word "medical" pertains to "medicine," which is "the science and art dealing with the maintenance of health and the prevention, alleviation, or cure of disease." *Webster's Third New International Dictionary* 1402 (1966). Included in the definition of "medicine," moreover, is "psychologic medicine" which, in the medical profession, means "medicine in its relation to mental diseases." *Dorland's Illustrated Medical Dictionary* 786 (26th ed. 1981). In its commonly understood sense, licensed physicians are not the exclusive possessors of "medical" knowledge. A wide range of persons, from midwives to microbiologists, acquire and use their professional medical knowledge to diagnose conditions, to maintain health and to cure disease, and to teach those skills to other medical personnel. It is common knowledge that frequently those most knowledgeable in biomechanics, relating to the relationship between trauma and injury, are Ph.D.'s, not M.D.'s.

The phrase, "expert medical testimony," describes the kind of testimony required; neither adjective describes the *witness's* educational or licensing requirements.

We defer also to a second tenet of statutory construction which is specific to the Workman's Compensation Act. That is, the Act "must be liberally construed to accomplish [the] beneficent purposes for which it was enacted, and * * * all reasonable doubts must be resolved in favor of employees." *Avila v. Pleasuretime Soda, Inc.,* 90 N.M. 707, 708, 568 P.2d 233, 234 (Ct.App.1977).

Defendants would impose on the employee a more burdensome proof requirement than the statute necessarily mandates. That position may be sustained only if there is a clear legislative intent to limit the qualifications of expert witnesses.

The argument seems to be that the provision is a limiting one and, as the *Fierro* decision indicates, we must look to other limiting factors to ascertain its intent. Such an approach disregards the fact that the Workman's Compensation Act and the Uniform Licensing Act have nothing in common, do not relate to the same subject matter, and cannot be read in pari materia.

See e.g., Day v. Penitentiary of New Mexico, 58 N.M. 391, 271 P.2d 831 (1954) (provisions of Workman's Compensation Act are not in pari materia with a statute granting the state penitentiary corporate powers, among them the right to sue and be sued, because the statutes are unrelated; one deals with corporate matters and the other is *sui generis* and exclusive.) Secondly, to approach this as a "limiting" statute is inappropriate because Section 52–1–28(B) does not "limit" the right to workman's compensation, but addresses a question of proof. Notwithstanding that the Workman's Compensation Act as a whole is *sui generis,* the specific section to be construed concerns an evidentiary matter. The provision thus should be read more properly in pari materia with our rules of evidence. *See, e.g., Beach v. Bd. of Adjustment,* 73 Wash.2d 343, 438 P.2d 617 (1968) (zoning statute relating to certiorari read with general statute relating to certiorari); *State Highway Comm'n v. Churchwell,* 146 Mont. 52, 403 P.2d 751 (1965) (code section permitting inquiry into circumstances read in pari materia with code section relating to parole evidence); *State ex rel. Day v. County Court of Platte County,* 442 S.W.2d 178 (Mo.App.1969) (statute governing judicial review of zoning decisions read in pari materia with Administrative Procedure and Review Act). The specific phrase in question concerns expert testimony, and raises a question as to expertise; ergo, it should be read in pari materia with SCRA 1986, Evid.R. 11–702, which provides:

> If scientific, technical or other *specialized knowledge* will assist the trier of fact to understand the evidence or to determine a *fact* in issue, a witness qualified as an expert by *knowledge, skill, experience, training or education* may testify thereto in the form of an opinion or otherwise.

Id. (Emphasis added.)

The use of the disjunctive "or" in Rule 11–702 indisputably recognizes that an expert witness may be qualified on foundations other than licensure. The rule lists five general factors for the trial judge to consider in qualifying one offering medical evidence, some of which factors may or may not lead to the witness being licensed as a medical doctor. Determination of a witness's expertise rests within the sound discretion of the trial judge. *See, e.g., State ex rel. State Highway Dep't v. Fox Trailer Court,* 83 N.M. 178, 489 P.2d 1176 (1971); *Dahl v. Turner,* 80 N.M. 564, 458 P.2d 816 (Ct.App.), *cert. denied,* 80 N.M. 608, 458 P.2d 860 (1969).

The *Fierro* reading of Section 52–1–28(B), on the other hand, substantially restricts the trial court's discretion by insisting upon a minimum qualification requirement that only those licensed to "practice medicine" (*i.e.,* physicians and surgeons licensed to prescribe drugs) possess adequate medical knowledge to satisfy the statute. "Medical" is commonly understood to embrace all things relative to health and medicine, not only to things relative to licensed physicians. We discern some conflict with the *Fierro* interpretation and the naming of others as "health care professionals" by the legislature in the Workmen's Compensation chapter itself, *e.g.,* optometrists, dentists, podiatrists, osteopaths, nurses and chiropractors, as well as "duly licensed or certified" psychologists. Those persons obviously are considered by the legislature to be competent within their areas of providing "* * * cure, correction, prevention or diagnosis of any physical or mental condition." *See* NMSA 1978, § 52–4–1 (Cum.Supp.1986).

It consequently appears to us a curious proposition that the legislature has enough confidence in the competence of non-physician health care providers to grant them licenses to practice their professions, and to authorize treatment by them to injured compensation claimants, but to have intended that those same health care providers be prohibited from testifying concerning the cause of an injury which lies squarely within the areas of their competency.

The employer cites to other jurisdictions that discuss the "highly speculative nature" of psychological injuries, relying on *Thomas v. Workmen's Compensation Appeal Bd.,* 55 Pa.Cmwlth. 449, 423 A.2d 784, 787 (1980), and to cases intimating that psychiatric testimony is necessary in order

to protect employers from the possibility of feigned symptoms. *E.G., Andrus v. Rimmer & Garrett, Inc.,* 316 So.2d 433 (La. App.1975). In most of the cases cited, there was no direct issue of qualification of psychologists because *psychiatric* testimony had been submitted and formed the bases for the various courts' discussions of psychiatric testimony. Were we to assume an implied prohibition of testimony by psychologists, however, we would do so without logical grounds. We are referred to nothing indicating that a psychologist is less able to detect "feigned symptoms" than is a psychiatrist nor, even though some courts have observed that psychological injuries are "highly speculative in nature," that psychologists are more likely to improperly speculate than are psychiatrists. Nor does it follow that a blanket disqualification of those with specialized knowledge in the area of psychology serves the purpose of Evidence Rule 11–702, which is to assist the trier of fact to understand the evidence and to determine the issues of fact. To argue that psychological injuries are speculative lends support to our determination that various specialists may be able to assist the factfinder in determining whether the injuries are bona fide and whether they are work-related.

Lastly, defendants argue that the legislature probably intended its proposed definition of "expert medical testimony" as part of the employer's *quid pro quo* in giving up tort defenses for limited liability under the Workman's Compensation Act. Why this should be so is not clear. An employer's already limited liability would seem to be a sufficient consideration for the employee's necessity to prove a compensable claim by reasonable medical probability. The basic purpose of Section 52–1–28(B), as we have noted, is to ensure that claims are adequately proved, not to further limit liability.

The inescapable conclusion is that there is no legislative intent to limit the qualification of expert testimony to licensed physicians. Even expert testimony is not binding on the trier of facts. *See* SCRA 1986, U.J.I.Civ. 13–2005. The phrase "expert medical testimony" speaks to the type of specialized knowledge, *i.e.,* medical knowledge, essential to show the necessary connection between the work-related injury and any disability. The phrase does not go beyond that to require a specific type of license as a qualifying requirement for one offered as an expert to give competent medical information. Had the legislature intended what appellee argues, *i.e.,* that only a licensed medical doctor could testify regarding medical causation, it could have said so in plain, simple terms.

The employer's final contention that this is a matter solely for the legislature assumes that the only interpretation of the phrase is that a licensed medical doctor must testify. Not only is it fundamental that interpretation of the law is a judicial matter, but where the question is one of construction of state statutes, the state courts may pass upon it as an issue of law. *Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.,* 77 N.M. 481, 424 P.2d 397 (1966).

Because of our holding herein, it is unnecessary to consider the constitutional grounds urged by Madrid, that is, that the *Fierro* interpretation of Section 52–1–28(B) unduly restricts the trial judge's discretion in qualifying experts and therefore violates the separation of powers doctrine. *Cf. Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976) (statutorily created journalist privilege unconstitutional). Although Section 52–1–28(B) does concern matters of proof, which are evidentiary in nature and by definition, our construction of Section 51–2–28(B) does not contravene a rule of evidence.

The district court's order excluding "expert" testimony was based solely upon the holding in *Fierro* which, as we have noted, was decided after the psychologist had been accepted as an expert and allowed to testify, but before the trial court had entered its judgment. When the evidence was first admitted, the district judge ruled that under Evidence Rule 11–702,

> pursuant to this witness's knowledge, skill, experience, education, training, she

is qualified as an expert psychologist and may offer opinion testimony in that field.

The record supports the judge's conviction, implicit in his ruling, that the witness was able to present competent medical opinion evidence. Her residency was completed at the medical branch of the University of Texas, and she had been an associate professor of mental health at the school of nursing there and at the University of New Mexico. She had also been assistant chief and acting chief psychologist at the United States Veterans Administration Hospital in St. Cloud, Minnesota, and director of psychology at the Southwestern Colorado Mental Health Center. Her extensive 30-year work experience was and is directly related to the prevention, alleviation and cure of mental disease, within typically "medical" settings, *i.e.,* medical schools, hospitals, mental health clinics and private practice. One would be hard-pressed to conclude that the witness lacks medical knowledge, skill, experience and expertise simply because she is licensed as a psychologist and not as a doctor of medicine. The district judge was, of course, correct when he initially accepted the witness as one qualified to provide expert medical testimony of causation of the plaintiff's claimed mental condition. The district judge was, of course, similarly correct in following the interim ruling of the court of appeals. Our decision today, however, requires reversal of the court of appeals and the district court, and remand to the district court to determine, considering the testimony of the clinical psychologist, whether plaintiff established her claim. Although the trial judge has since become an appellate judge, the proceedings have been fully transcribed and the transcript is sufficient for his successor to make that determination. The matter, therefore, is accordingly reversed and remanded.

IT IS SO ORDERED.

SOSA, Senior Justice, and RANSOM, J., concur.

STOWERS, J., and RICHARD B. TRAUB, District Judge, dissent without opinion.

737 P.2d 80

Ronald G. HARRIS and Sheila S. Harris, Protestants-Appellants,

v.

REVENUE DIVISION OF the TAXATION AND REVENUE DEPARTMENT, State of New Mexico, Appellee.

No. 8705.

Court of Appeals of New Mexico.

Feb. 26, 1987.

Ronald G. Harris and Sheila S. Harris, pro se.

Hal Stratton, Atty. Gen., Paula Forney-Thompson, Asst. Atty. Gen., Taxation & Revenue Dept., Santa Fe, for appellee.

OPINION

DONNELLY, Chief Judge.

Taxpayers, Ronald G. and Sheila S. Harris, appeal from an order entered by an administrative hearing officer, dismissing their administrative appeal of the denial of a solar rebate on their 1983 state income tax return. Taxpayers contend that the hearing officer abused his discretion in dismissing their appeal based upon their failure to timely file a brief setting forth their contentions and authorities in support of their administrative appeal. We remand taxpayers' appeal with instructions.

Taxpayers claimed a solar rebate on their 1983 joint income tax return. The Taxation and Revenue Department granted a portion and denied a portion of the requested rebate. Denial was predicated on the department's interpretation of regulation S.T.C. 16:23 involving the minimum R-factor necessary to receive a rebate for solar installation materials.

Taxpayers filed a protest pursuant to NMSA 1978, Section 7-1-24 (Repl.Pamp. 1983) of the Tax Administration Act and an administrative hearing officer was designated to hear the claim. Thereafter, taxpayers and the department entered into a written stipulation agreeing as to the manner in which the protest would be heard. The stipulation recited the factual basis for taxpayers' protest and recited, among other things:

> The taxpayers and the department hereby stipulate and agree to submit this matter to the hearing examiner on the basis of the facts and documents stated in and attached to [the] stipulation and upon the briefs of the parties filed according to the schedule set out * * * below.

The stipulation further provided that taxpayers would file a brief-in-chief on or before April 15, 1985, in support of their

arguments and contentions, and that the department would file a brief in response within twenty days thereafter.

Taxpayers failed to comply timely with the deadline for filing their brief. On April 24, 1985, the department filed a motion to dismiss taxpayers' protest, asserting that taxpayers' brief was not filed on or before April 15, 1985, and had not been filed as of the date of the department's motion to dismiss. The motion was served upon taxpayers. Taxpayers failed to respond to the motion and on May 16, 1985, the hearing officer entered an order granting the department's motion to dismiss and reciting that, "the taxpayers have failed to comply with the * * * stipulation between the parties, have failed to present evidence to the hearing officer for resolution of their protest and have failed to prove the validity of their protest."

On May 20, 1985, after the entry of the order of dismissal, taxpayers filed a response in opposition to the department's motion to dismiss, and on May 27, 1985, taxpayers filed a motion to reconsider the order of dismissal. On June 19, 1985, the hearing officer denied taxpayers' motion to reconsider. Pursuant to NMSA 1978, Section 7-1-25 (Repl.Pamp.1983),[1] taxpayers filed an appeal from the hearing officer's order of dismissal and their motion to reconsider.

At the outset of our review, we are presented with an issue as to whether taxpayers' appeal is from a final appealable order. We find that it is not. The statute governing taxpayers' appeal to this court from the decision of the hearing officer under the Tax Administration Act contemplates that review shall be an appeal from a final order signed by the director of Taxation and Revenue and not from the hearing officer.

Section 7-1-25 provided in pertinent part:

> A. If the protestant or claimant is dissatisfied with the action and order of the director after a hearing, he may appeal to the court of appeals for further relief, but only to the same extent and upon the same theory as was asserted in the hearing before the director.... All such appeals ... shall be taken within thirty days of the date of mailing or delivery *of the written decision and order of the director to the protesant or claimant* * * *. [Emphasis supplied.]

Under Section 7-1-24(E), a hearing officer is required to be designated to hear protests by a taxpayer. Thereafter, a hearing officer is required to render a written decision granting or denying the relief requested. Subsection H of Section 7-1-24 further specifies that "All decisions and orders shall be in the name of the director." "Director" was defined under NMSA 1978, Section 7-1-3(C) (Repl.Pamp. 1983), to mean "[t]he director or the deputy director of the revenue division[.]" Until the director approves the decision of the hearing officer appointed under Section 7-1-24, the decision is not final. *See* § 7-1-24(H).

The order that is the subject of this appeal, although it instructed taxpayers that they could appeal therefrom, was not approved or signed by the secretary; hence, it was not a final order. An administrative order which is required to be submitted to a superior for approval is not final for purposes of review. *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948). In general, an appellate court will not review the proceedings of an administrative agency until the agency has taken final action. *Colorado Health Facilities Review Council v. District Court of Denver*, 689 P.2d 617 (Colo.1984); *Renton Education Ass'n v. Washington State Public Employment Relations Comm'n*, 24 Wash.App. 476, 603 P.2d 1271 (1979). *See, also Inouye v. Board of Trustees of Employees' Retirement System*, 4 Haw. App. 526, 669 P.2d 638 (1983).

Because taxpayers' appeal is from an order which was not signed by, or issued under the name of the secretary, we remand the case to the secretary of Taxation

1. During the pendency of this appeal, the legislature amended Sections 7-1-3, -24, and -25, effective July 1, 1986, and changed the terminology from "director" to "secretary."

and Revenue Department with instructions, within thirty days, to act to either ratify the findings and order of the hearing officer or to rule otherwise, but in any event to submit an approved order signed by the secretary, the deputy secretary, or a division director designated by the secretary, with this court, so that the appeal herein may be reviewed on the merits.

IT IS SO ORDERED.

GARCIA and APODACA, JJ., concur.

737 P.2d 82

Gene W. WEBB and Jo Beth Webb, his wife; Richard P. Gelasco and Dorothy B. Gelasco, his wife; and John Mottinger and Molly Mottinger, his wife, Plaintiffs-Appellants,

v.

Jack R. FOX, Larry G. Fields, Keenan Wallace, and David Fields, partners in F & W Enterprises, a New Mexico partnership; Santa Teresa Country Club, Inc., a New Mexico corporation; and C.L. Crowder Investment Company, a New Mexico corporation, Defendants,

and

Fernando Macias, Salvador Gonzales, Ray Luchini, Jamie Stull, and Peter Cooper of the Dona Ana County Board of County Commissioners, Defendants-Appellees.

No. 8692.

Court of Appeals of New Mexico.

March 24, 1987.

Beverly J. Singleman, Martin, Cresswell, Hubert & Hernandez, P.A., Las Cruces, for plaintiffs-appellants.

Keith S. Burn, Law Offices of Keith S. Burn, P.A., Las Cruces, for defendants Fox, Fields and Wallace.

Douglas R. Driggers, Dist. Atty., Patrick A. Fort, Asst. Dist. Atty., Las Cruces, for defendants-appellees.

OPINION

FRUMAN, Judge.

Plaintiffs appeal from the trial court's dismissal of their petition for certiorari from the decision of the Dona Ana County Board of County Commissioners to grant a special use permit to F & W Enterprises. The board is the only party-defendant in this appeal. The issues raised by plaintiffs are: (1) whether F & W Enterprises is an "aggrieved person" under NMSA 1978, Section 3-21-8(B) (Repl.1985); (2) whether the decision of the board was beyond the scope of its authority and arbitrary and capricious; and (3) whether an ex parte communication between a board member and F & W Enterprises, as well as a property view by that member, violated plaintiffs' right to a fair and impartial hearing before the board. Because we reverse on the basis of the first issue, the remaining issues need not be decided.

BACKGROUND

Plaintiffs are owners of residential property. Near their property is an approximately eleven-acre tract of land owned by C.L. Crowder Investment Company. F & W Enterprises intended to purchase this eleven-acre tract in its entirety and develop it in three phases. For the first phase, storage lockers and recreational vehicle parking spaces were to be built on three of the eleven acres.

Pursuant to a zoning ordinance, F & W Enterprises applied to the Dona Ana County Planning Commission on December 28, 1983, for a special use permit to implement phase one. Following notice and a hearing, the planning commission denied the application on January 24, 1984. F & W Enterprises then appealed that denial to the Dona Ana County Board of Zoning Appeals. The board held its first hearing on March 7, 1984. After hearing statements and receiving exhibits from plaintiffs, F & W Enterprises and others, the board tabled the appeal to review the material presented and to permit an on-site view by those board members who desired to do so.

The board reconvened on March 21, 1984, received additional testimony and exhibits and considered an alternative site within the tract for phase one. It then reversed the decision of the planning commission and granted a special use permit to F & W Enterprises for phase one at the alternative site, even though it entered a finding of fact that the tract was owned by C.L. Crowder Investment Company.

In their amended petition for certiorari to the district court, plaintiffs alleged that C.L. Crowder Investment Company was selling the eleven-acre tract to F & W Enterprises but that the sale had not been consummated as of the January 1984 planning commission hearing. In its answer, F & W Enterprises admitted these allegations and added that it purchased the eleven-acre tract for C.L. Crowder Investment Company on March 22, 1984. This date of purchase is one day after the date of the board of appeals' final decision to grant the special use permit.

Plaintiffs did not allege in their petition that Section 3-21-8(B) permits only an "aggrieved person" to appeal a decision of the planning commission, nor did they allege that F & W Enterprises was not an "aggrieved person." However, plaintiffs did argue the issue to the district court, but the district court's judgment did not contain a ruling on this issue.

DISCUSSION

Plaintiffs contend that the board of appeals lacked jurisdiction to entertain the

appeal of F & W Enterprises since F & W Enterprises was not an "aggrieved person" who had standing to appeal under Section 3-21-8(B). This statute and the zoning ordinance do not provide a definition of an "aggrieved person."

In the event an applicant for a special use permit is not the owner of record of the property at issue, the zoning ordinance requires that the owner attest in writing to the proposed use statement made by the applicant. Such an attestation is not present in this case. The ordinance also permits an appeal from the planning commission's decision to the board of appeals "by any person aggrieved * * * or affected" and also "by the applicant or by any other interested party."

The board makes several arguments to convince us that F & W Enterprises is an "aggrieved person." First, the board contends that the issue was not preserved for consideration on appeal because it was not raised by plaintiffs before the board and was not specified in their petition for certiorari. We answer this contention by first noting that jurisdictional issues may be raised at any time during the pendency of a proceeding. *See Sims v. Mechem*, 72 N.M. 186, 382 P.2d 183 (1963); *State v. Doe*, 91 N.M. 356, 573 P.2d 1211 (Ct.App. 1977). Secondly, since Section 3-21-8(B) provides for appeal by an "aggrieved person," the question of whether F & W Enterprises has such standing is a jurisdictional question. *Cf. St. Sauver v. New Mexico Peterbilt, Inc.*, 101 N.M. 84, 678 P.2d 712 (Ct.App.1984). Thus, this issue is properly before us.

The meaning of an "aggrieved person" as it applies to an applicant for a zoning permit in the context of Section 3-21-8(B) has not been judicially defined. *Cf. Citizens for Los Alamos, Inc. v. Incorporated County of Los Alamos*, 104 N.M. 571, 725 P.2d 250 (1986) (protesting corporation that was not duly organized at time of zoning decision was not an "aggrieved person" under NMSA 1978, Section 3-21-9 (Repl. 1985), and thus lacked standing to appeal to district court pursuant to that section).

Upon condensing their arguments, we find general agreement between the parties that a zoning applicant who possesses a recognizable right or interest in the property is an aggrieved person with standing to appeal. For example, prospective purchasers under executed contracts to purchase have such standing. *See, e.g., Shulman v. Zoning Bd. of Appeals*, 154 Conn. 426, 226 A.2d 380 (1967); *Fail v. LaPorte County Bd. of Zoning Appeals*, 171 Ind.App. 192, 355 N.E.2d 455 (1976); *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974). Standing also exists where the purchase contract is conditioned upon the grant of the zoning request. *See, e.g., Arant v. Board of Adjustment*, 271 Ala. 600, 126 So.2d 100 (1960); *Babitzke v. Village of Harvester*, 32 Ill.App.2d 289, 177 N.E.2d 644 (1961); *Silverco, Inc. v. Zoning Bd. of Adjustment & Dep't of Licenses & Inspection*, 379 Pa. 497, 109 A.2d 147 (1954). *See also* Annot., 89 A.L.R.2d 663 (1963).

These views are consistent with our holding in *St. Sauver v. New Mexico Peterbilt, Inc.*, that "[t]o be aggrieved, a party must have a personal or pecuniary interest or property right adversely affected by the judgment." 101 N.M. at 85-86, 678 P.2d at 713-714. The party's interest must be an immediate, pecuniary and substantial consequence of the judgment, not merely nominal or remote. *Id.* An "aggrieved party" has also been defined as "[o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment." *Black's Law Dictionary* 60 (5th ed. 1979). Section 3-21-8(B) requires that the aggrieved person be "affected by a decision" of the zoning agency. Accordingly, we apply these views to the facts of this case and require a showing that at the time of the planning commission's decision, applicant F & W Enterprises had a legally recognizable right or interest adversely affected by that decision.

In this context, the board agrees that the owner of the property, C.L. Crowder Investment Company, did not sign the

application as required by the zoning ordinance. However, the board argues that since counsel for the owner stated at one hearing that the owner did support the application, this is sufficient to have the applicant meet the standing test. Since the owner did not join in the application, and since the board is bound by the requirements of its own ordinance, *see, e.g., Hillman v. Health & Social Services Dep't,* 92 N.M. 480, 590 P.2d 179 (Ct.App.1979); *Martinez v. Health & Social Services Dep't,* 90 N.M. 345, 563 P.2d 608 (Ct.App.1977), we cannot agree that the owner's verbal support was sufficient to grant F & W Enterprises standing in this case. *Cf., e.g., Welch v. City of Nashua,* 108 N.H. 92, 227 A.2d 600 (1967); *Dunham v. Zoning Bd.,* 68 R.I. 88, 26 A.2d 614 (1942); *Hickerson v. Flannery,* 42 Tenn.App. 329, 302 S.W.2d 508 (1956).

The board also argues that F & W Enterprises impliedly or apparently had an equitable interest or title to the property by virtue of its application and thus had standing. To bolster its argument, the board refers to an unsigned, undated and unexecuted warranty deed granting the property to the applicant. We do not view the record as supporting this proposition and, as the board has not cited authority for this contention, we will not give it further consideration. *See In re Adoption of Doe,* 100 N.M. 764, 676 P.2d 1329 (1984).

Lastly, the board argues that since its zoning ordinance permits an appeal from the planning commission's decision by the applicant, and since F & W Enterprises was the applicant, F & W Enterprises is an "aggrieved person." As we have previously established the parameters of an "aggrieved person" under Section 3-21-8(B) as that term applies in this case, we cannot endow a broader meaning into the zoning ordinance. *Cf. Burroughs v. Board of County Comm'rs,* 88 N.M. 303, 540 P.2d 233 (1975).

CONCLUSION

The trial court did not rule on the disputed question as to whether F & W Enterprises is an "aggrieved person" under Section 3-21-8(B). On the basis of the record before us, F & W Enterprises has failed to establish that it had either a legal or an equitable interest in the eleven-acre tract at any time during the pendency of its zoning application. Thus, F & W Enterprises has failed to establish that it had standing to apply for the special permit or that it was an "aggrieved person" who could appeal from the decision of the planning commission to the board.

For these reasons, we reverse the judgment of the trial court on the petition for certiorari and order that it enter a new judgment reversing the decision of the board, sitting as a board of zoning appeals, and affirming the decision of the planning commission. Plaintiffs' request for oral argument is deemed unnecessary and, therefore, is denied.

IT IS SO ORDERED.

DONNELLY, C.J., and GARCIA, J., concur.

737 P.2d 85

Theresa BACHICHA and Benny Bachicha, Plaintiffs-Appellants and Cross-Appellees,

v.

Norma J. LEWIS, a/k/a Jo Reynolds, Defendant-Appellee and Cross-Appellant.

No. 8706.

Court of Appeals of New Mexico.

April 7, 1987.

Matias A. Zamora, D. Diego Zamora, Santa Fe, for plaintiffs-appellants and cross-appellees.

Charlotte H. Hetherington, Simons, Cuddy & Friedman, Santa Fe, for defendant-appellee and cross-appellant.

OPINION

BIVINS, Judge.

Plaintiffs sued defendant for personal injuries and damages allegedly resulting when defendant's car struck plaintiffs' car from the rear. From a judgment on the verdict in favor of defendant and from the denial of their motions for judgment N.O.V. or for a new trial, plaintiffs appeal. Defendant cross-appeals from an order denying her costs. We remand the case for a new trial and decline to reach defendant's claim on the cross-appeal.

Plaintiff, Theresa Bachicha, was stopped behind another vehicle for a red traffic signal. Defendant, who was proceeding in the same direction, testified she was wearing new shoes and that her foot slipped off the brake pedal when she depressed it, causing her to run into the rear bumper of plaintiffs' car. No damage was done to plaintiffs' car, but there was testimony that the ashtray came loose from its bracket, the sun visor "flipped down," the trash receptacle located on the transmission bump fell to the floor, and Ms. Bachicha's purse was thrown to the floor. Ms. Bachicha also said her neck was "forcefully thrown backwards." She was wearing a seatbelt at the time.

We understand plaintiffs' issues to be as follows. They claim the trial court erred in denying their motion for a directed verdict on the question of liability made at the close of defendant's case, and in refusing to grant them a judgment N.O.V. made after the jury returned a verdict for defendant. Essentially, the claim below and on appeal is that reasonable minds could not differ as to the question of liability and the trial court should have directed a verdict in plaintiffs' favor on that question. Additionally, and related to that issue, plaintiffs claim trial error in the giving of a defense instruction on sudden emergency (and also inserting that contention as part of the issues instruction), and two instructions on violations of statutes that contain excuse and justification language. Plaintiffs contend that if they are not entitled to a directed verdict on the question of liability, at the very least they should have a

new trial since the challenged instructions injected false issues into the case. Actually these issues are interrelated because, according to plaintiffs, had the trial court not considered that fact questions existed as to sudden emergency and justification and excuse, it would have had no alternative but to direct a verdict in their favor as to liability.

In her answer brief, defendant calls our attention to the failure of plaintiffs to include as part of the record proper the trial court's jury instructions. *See* NMSA 1978, Civ.App.R. 7 (Repl.Pamp.1984); *Adams v. Loffland Bros. Drilling Co.,* 82 N.M. 72, 475 P.2d 466 (Ct.App.1970) (matters not of record will not be considered on appeal). Because the sudden emergency instruction, NMSA 1978, UJI Civ. 16.17 (Cum.Supp. 1985), is referred to in the transcript of the jury instruction settlement conference, defendant does not seriously challenge the lack of record as to that instruction. Likewise, the same rationale applies to the instructions with the justification and excuse language. While not referred to by its uniform jury instruction number in the jury settlement conference, sufficiently clear language from the trial court's memorandum opinion on plaintiffs' post-verdict motions indicates that the trial court was referring to NMSA 1978, UJI Civ. 15.3 (Repl. Pamp.1980). *See Trujillo v. Baldonado,* 95 N.M. 321, 621 P.2d 1133 (Ct.App.1980). In any event, because of matters raised by defendant concerning marginal notes made by the jury that could affect the disposition of this case, we ordered, from the district court clerk, a copy of the trial court's instructions to the jury. *See State v. Garcia,* 92 N.M. 730, 594 P.2d 1186 (Ct.App. 1978). A review of the instructions confirms the trial court gave defendant's tendered sudden emergency instruction, UJI Civ. 16.17, included sudden emergency as part of her contentions in the issues instruction, and gave two UJI Civ. 15.3 violation of statutes instructions, both of which include the excuse and justification language that plaintiffs find objectionable. We, therefore, consider plaintiffs' contentions.

In giving UJI Civ. 15.3, the trial court relied on *Whitfield Tank Lines Inc. v. Navajo Freight Lines, Inc.,* 90 N.M. 454, 564 P.2d 1336 (Ct.App.1977), which held it was reversible error not to give the form of the uniform jury instruction with the excuse or justification language under the facts of that case. In *Whitfield,* there was evidence that while the defendant-driver had encountered snowdrifts before the accident, none had caused his tractor-trailer to jackknife. The snowdrift that caused the tractor-trailer to jackknife appeared identical to the others the driver had successfully negotiated by reducing his speed. When the tractor-trailer jackknifed "suddenly and without warning," the vehicle got away from the driver. There was also evidence that an expert would have continued to drive through a snowdrift similar to the one that caused the tractor-trailer to jackknife, and that not even an expert could have avoided a jackknife. This court stated that instructions with the excuse or justification provisions should have been submitted to the jury because the tractor-trailer's "presence in the wrong lane might have been caused by snow, wind and forces beyond anyone's control." *Id.* at 458, 564 P.2d at 1340.

■ We do not believe the evidence in the case before us required the use of an excuse or justification instruction. Defendant had observed plaintiffs' car for some distance and knew it was stopped at a traffic light. Defendant, who was wearing new shoes that she had not worn before, applied her brakes preparing to stop when suddenly and without warning her foot slipped off the brake pedal, causing her to hit plaintiffs' car. Defendant had applied her brakes approximately twenty times the day of the accident without any problem. In its memorandum opinion denying plaintiffs' post-trial motions for judgment N.O.V. or for a new trial, the trial court noted that defendant's foot slipping may have occurred because of the condition of the sole or, perhaps, because of foot placement, but, in any event, defendant testified it was "a sudden, unexpected incident that left her without a way to control the vehicle once it had occurred." While a party

is entitled to an instruction on a theory of the case supported by evidence, *Whitfield Tank Lines v. Navajo Freight Lines,* we fail to see where the evidence here warrants the additional language. The slipping of defendant's foot does not constitute a "force beyond anyone's control."

The last paragraph of UJI Civ. 15.3 provides: "To legally justify or excuse a violation of a statute, the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." If a driver's foot slipping off the brake pedal could justify the additional language, there would be no need for NMSA 1978, UJI Civ. 15.1 (Repl. Pamp.1980) (the negligence per se instruction) because, in most cases, violation of the rules of the road do happen suddenly and unexpectedly. To allow the excuse or justification language here would virtually eliminate UJI Civ. 15.1. We hold the trial court erred in giving instructions Nos. 13 and 14 with the excuse and justification language.

For similar reasons, we hold the trial court erred in giving UJI Civ. 16.17 (the sudden emergency instruction). While we agree that evidence of defendant's negligence does not preclude the giving of this instruction, *Trujillo v. Baldonado,* nevertheless, where, as here, we have only defendant's negligence without any peril arising from the actual presence or the appearance of imminent danger to herself or another, the giving of the instruction was improper. *Delgado v. Alexander,* 84 N.M. 456, 504 P.2d 1089 (Ct.App.1972), *aff'd,* 84 N.M. 717, 507 P.2d 778 (1973).

Having found the giving of the objectionable instructions injected false issues, and thus constitutes reversible error, we must now decide the proper disposition. Plaintiffs argue that when the case is stripped of the objectionable instructions, there is no other choice but to remand for entry of a directed verdict in their favor on the question of liability. Defendant counters that the jury found her negligent; therefore, any error in giving the instructions was harmless, citing *Corcoran v. Albuquerque Traction Co.,* 15 N.M. 9, 103 P. 645 (1909) (a party cannot complain of the giving or refusal to give instructions on an issue that the jury found in his favor). Thus, according to defendant, since the jury found for plaintiffs on the issue of negligence, but against them on the issues of proximate causation or damages, the verdict should stand.

In reaching this conclusion, defendant is not relying on interrogatories submitted to the jury, *see* NMSA 1978, UJI Civ. 22.20 (Cum.Supp.1985) (apparently not published as of the date of trial), but rather on marginal notes made to the issues instruction. Because of its clarity, we quote from the trial court's memorandum opinion as to what occurred. In speaking of its ruling on plaintiffs' motions for judgment N.O.V. or for a new trial, the trial court said:

> While it is not necessary to a determination of this issue, it is interesting to note that in Instruction No. 1, the jury was advised that the plaintiffs had the burden of proving one of at least two contentions, and that preliminary questions would be presented to the jury to answer. The contentions presented by the plaintiff were as follows:
>
> "1. The defendant Jo Reynolds failed to keep a proper lookout for vehicles in front of her including that of plaintiff Theresa Bachicha to avoid colliding with her.
>
> 2. The defendant Jo Reynolds failed to maintain control of her vehicle as to avoid colliding with that of the plaintiff Theresa Bachicha."
>
> In the margin on Instruction No. 1, the jury answered those contentions by stating:
>
> "Yes, by 12 vote."
>
> Similarly, the jury was advised:
>
> "The preliminary questions presented for you to answer are as follows:
>
> 1. Was the defendant Jo Reynolds negligent?
>
> 2. Was any negligence of the defendant Jo Reynolds a proximate cause of plaintiff's injuries and damages?"

The jury responded to these questions by writing in the margin of Instruction No. 1 "yes" to question number 1 and "no" to question no. 2.

The next section of Instruction No. 1 advises the jury if you answer "no" to either question 1 or 2, you shall return a verdict for the defendant and against the plaintiff.

Plaintiffs do not address this problem in their reply brief; they dismiss the contention claiming that "[s]ince the jury found that Defendant Reynolds was not negligent, it did not consider proximate cause or damages." Plaintiffs do not tell us how they arrived at that conclusion.

Since there was some evidence that would support findings of no proximate cause or no damages, we would be inclined to agree with defendant that the jury's verdict should stand, *if* it is permissible to ascertain the basis of a verdict based on marginal notes. For example, there was evidence that the impact occurred at a low rate of speed, 5 m.p.h. or less; that plaintiffs' car suffered no damage; and that at least one physician expressed the opinion that the impact would not have caused the injuries of which plaintiff, Theresa Bachicha, complained. In addition, defendant submitted a videotape of plaintiff bowling subsequent to the accident.

The trial court did not rely on the notations in making its ruling on plaintiffs' motions for judgment N.O.V. or for a new trial, nor do we. Under similar circumstances, the court in *Mills v. Jackson,* 711 S.W.2d 427 (Tex.Ct.App.1986), held that handwritten notations by the jury in the margin alongside the damage elements were not a proper basis for ascertaining the jury's actual answers. That court said:

> In the case before this court, it is equally clear that there is a strong inference that the handwritten notations addressing the separate elements of damage were the basis for the jury's total damage award as they add up to equal this total. Nonetheless, it would be speculation on our part to assume that the notations represent the jury's actual answers. At most, the handwritten notations in the jury charge in this case represent the "mental process" by which the jury reached its verdict. The mental process by which the jury determined the amount of the verdict is ordinarily not cognizable by an appellate court. *Johnston Testers v. Rangel,* 435 S.W.2d 927, 933 (Tex.Civ.App.—San Antonio 1968, writ ref'd n.r.e.). The jury's reasons for reaching a particular verdict, as noted by the jury in ... a handwritten footnote notation to their [sic] verdict, are irrelevant, at least in the absence of some overt act of misconduct. *First National Bank in Dallas v. Zimmerman,* 442 S.W.2d 674, 678 (Tex.1969).

Id. at 430. We agree with that statement and hold that the handwritten notations here do not provide a basis for determining how the jury reached a verdict for defendant.

The fact that we reject the handwritten notations does not mean we must reverse with directions to enter a directed verdict for plaintiffs on the question of liability. Rather, under these circumstances where we cannot tell whether the jury based its verdict upon an improperly submitted issue, the proper procedure is to reverse and remand for a new trial on all issues. *State ex rel. Nichols v. Safeco Ins. Co. of America,* 100 N.M. 440, 671 P.2d 1151 (Ct.App.1983). On remand, assuming no additional evidence is presented, the trial court should submit UJI Civ. 15.1 (recodified, SCRA 1986, UJI 13–1501) to the jury, rather than UJI Civ. 15.3 (recodified, SCRA 1986, UJI 13–1503). While we have rejected the possible defenses of excuse, justification or sudden emergency, it is for the jury to decide whether defendant's actions violated NMSA 1978, Section 66–7–318(A) and thus constituted negligence per se. *Rogers v. Thomas,* 81 N.M. 723, 472 P.2d 986 (Ct.App.1970). While the use of the general form of verdict was proper, we note that the use of SCRA 1986, UJI 13–2220 would probably have made a new trial unnecessary under facts similar to this case.

Defendant filed a cost bill for $2,446.64, which the clerk taxed against plaintiffs. Plaintiffs objected and the trial court ordered each side to bear its own costs. De-

fendant claims abuse of discretion. We decline to reach this issue. *See generally Baca v. Marquez,* 105 N.M. 762, 737 P.2d 543 (Ct.App.1987).

Both parties requested the entire transcript of proceedings for use on appeal. Defendant did so on the basis that since the jury had written "No" alongside the issue of proximate cause, the issues of negligence, proximate cause and damages were at issue and the entire transcript was necessary for review. Plaintiffs moved this court to compel defendant to pay for the portion she requested. After a hearing, we ordered plaintiffs to pay for the initial cost of the record proper, that each side pay for the portion of the transcript of proceedings it ordered, and that the ultimate obligation to pay would be determined when the appeal was decided on the merits. We now modify that order so that defendant shall pay for the initial cost of the record proper and the filing fee. As modified, that order is hereby made permanent. We reverse and remand for a new trial consistent with this opinion.

IT IS SO ORDERED.

DONNELLY, C.J., and APODACA, J., concur.

737 P.2d 90

Mary Frances OTERO, Formerly known as Mary Frances Hill, Individually and as Personal Representative of the Estate of Richard Hill, Deceased, Plaintiff-Appellant,

v.

STATE of New Mexico and the Department of Finance & Administration, Defendants-Appellees.

No. 8886.

Court of Appeals of New Mexico.

April 9, 1987.

Certiorari Denied May 14, 1987.

James T. Roach, Albuquerque, for plaintiff-appellant.

Hal Stratton, Atty. Gen., Holly A. Hart and Kevin V. Reilly, Asst. Attys. Gen., Santa Fe, for defendants-appellees.

OPINION

BIVINS, Judge.

In this case, we must decide whether the State of New Mexico and its Department of Finance and Administration (DFA) are responsible, under the Tort Claims Act, NMSA 1978, Sections 41–4–1 to –29 (Repl. 1986), for paying a federal court judgment against a penitentiary guard when neither the state nor any of its agencies had notice of either the claim or of the federal court suit. We hold that the state and DFA are not responsible for paying the judgment.

Plaintiff's decedent, a prisoner at the penitentiary, was killed by three other prisoners. Plaintiff filed a suit in federal court based on 42 U.S.C.A. Section 1983 (West 1981) against a penitentiary guard. Plaintiff alleged that the guard allowed the three prisoners out of their cells when he knew or should have known that they intended to kill decedent. Plaintiff's complaint also alleged that the guard conspired with the three prisoners to deprive decedent of life without due process. The guard was served with process, but entered no appearance in the federal suit. Plaintiff secured a default judgment against the guard for $68,000.

Plaintiff then brought suit in state court seeking to collect the judgment from the state or DFA. As the only direct basis for recovery, plaintiff alleged, both at trial and on appeal, that defendants were obligated to pay the judgment under Section 41–4–4(D). The trial court granted summary judgment to defendants and plaintiff appeals. We affirm.

Although the state raises a number of contentions concerning the guard's acting within the scope of his duties and the state's due process right to notice within the context of the federal suit, we need only construe pertinent portions of the Tort Claims Act to hold that the state is not liable for the judgment under the facts of this case. We uphold a decision of a trial court if it is correct for any reason and do not reverse when the correct result is reached. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App.1974).

For plaintiff, defendants' obligation to pay the federal judgment is simple. She relies on Section 41–4–4(D), which provides:

> A governmental entity shall pay any settlement or any final judgment entered against a public employee for:
>
> * * * * * *
>
> (2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico, which occurred while the public employee was acting within the scope of his duty.

Plaintiff argues that: (1) the state is a governmental entity, Section 41–4–3(B) and (G); (2) the word "shall" is mandatory, NMSA 1978, Section 12–2–2(I); (3) the federal judgment is included within the plain meaning of "any final judgment"; (4) the guard is a public employee, *see* Section 41–4–3(E); (5) allowing prisoners in and out of their cells is one duty of guards who are statutorily responsible for the custody and discipline of convicts, NMSA 1978, Section 33–2–15 (Repl.Pamp.1983); and (6) the violation of rights is established by the default judgment. Plaintiff next relies on *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (Ct.App.1980), which holds that notice of claim against a state or local public body, pursuant to Section 41–4–16, need not be given to public employees. Based on the above, plaintiff urges that Section 41–4–4(D) requires no further proof and that she is entitled to prevail.

For purposes of this opinion, we assume arguendo that plaintiff's first six arguments are correct. Further, we accept that we held, in *Martinez*, that notice need not be given to employees. Nevertheless, it does not necessarily follow that the state must pay plaintiff's judgment. For us to hold the state liable for the judgment in

this situation would ignore the remainder of the Tort Claims Act and lead to intolerable results.

The Tort Claims Act was enacted in response to the judicial abolition of sovereign immunity and acts to protect the public treasury. *Garcia v. Albuquerque Pub. Schools Bd. of Educ.*, 95 N.M. 391, 622 P.2d 699 (Ct.App.1980). In so protecting the treasury, immunity is reenacted, subject to a number of limited exceptions, Sections 41–4–5 to –12, and governed by a number of procedural and substantive provisions, Sections 41–4–4 and –13 to –25.

The procedural and substantive provisions require governmental entities to cover the risks and enable the risks to be managed. Thus, Section 41–4–19 limits the amount of damages recoverable and Section 41–4–17 declares that the Tort Claims Act is an exclusive remedy. Sections 41–4–20, –22 and –25 to –29 contain detailed provisions relating to how the risks will be covered, i.e., by insurance, insurance funds and public liability funds. These provisions furnish further guidance as to how agencies responsible for covering the risks shall operate. *See also* § 41–4–24.

Significantly, for purposes of this case, we note that one way to manage the risks is to require that notice of claims be given to the governmental entities within ninety days of the occurrence. § 41–4–16; *see Ferguson v. New Mexico State Highway Comm'n*, 99 N.M. 194, 656 P.2d 244 (Ct. App.1982). The notice provision also enables governmental entities to fulfill their duty to provide a defense under Section 41–4–4(B), for without notice governmental entities cannot be aware of and properly fulfill their duty to defend.

Yet, plaintiff would have us read Section 41–4–4(D) in a vacuum so as to require governmental entities to pay judgments, notwithstanding the absence of notice of the claim and the absence of notice or knowledge of suit that would have allowed the governmental entity to provide a defense. In short, plaintiff would have us read the statutes to require payment of the judgment without the defendants having been afforded any notice or opportunity to participate or defend the lawsuit whatsoever. This we will not do.

A cardinal rule of statutory construction requires that provisions of statutes be read in connection with each other so as to produce a harmonious whole. *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 703 P.2d 169 (1985); *Atencio v. Board of Educ. of Penasco Indep. School Dist. No. 4*, 99 N.M. 168, 655 P.2d 1012 (1982). Another rule is that we may not give a statute its literal reading if such a reading would lead to injustice, absurdity, or contradiction. *Id.; Wells v. County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982).

Plaintiff's literal reading of Section 41–4–4(D) would violate both of these rules. In the context of a carefully drafted statute that: waives immunity; contains means for covering the risks; provides methods for those entities covering the risks to investigate and defend claims; and contains other stringent limitations on payment, the legislature surely could not have intended that governmental entities pay judgments arising out of the default of one alleged to be a public employee when the governmental entity did not have the benefit of any of the statutory provisions integral to the whole scheme.

Indeed, the legislature has declared the public policy of New Mexico to be "that governmental entities and public employees shall *only* be liable within the limitations of the Tort Claims Act * * *." § 41–4–2(A) (emphasis added). "The right to sue and any recovery under the New Mexico Tort Claims Act is limited to the rights, procedures, limitations and conditions prescribed in that Act." *Methola v. County of Eddy*, 95 N.M. 329, 334, 622 P.2d 234, 239 (1980). Having failed to comply with the notice requirements of Section 41–4–16, plaintiff cannot now seek payment from the very entity she failed to notify. Having so disposed of the case on this ground, we do not consider possible constitutional issues of whether an entity, precluded from vicarious liability for Section 1983 claims as a matter of federal law, can be held liable for such under our state Tort Claims Act.

See Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *McClelland v. Facteau,* 610 F.2d 693 (10th Cir.1979); *Furumoto v. Lyman,* 362 F.Supp. 1267, n. 9 (N.D.Cal.1973); *Knipp v. Weikle,* 405 F.Supp. 782, n. 4 (N.D.Ohio, E.D.1975).

In holding that the state is not liable for payment in this case, we do not overrule *Martinez,* which holds that courts have jurisdiction over suits against public employees notwithstanding the lack of notice to the governmental entity. However, to the extent that dicta in *Martinez* may be read to imply that governmental entities are required to pay judgments despite lack of notice to them, that language is not to be followed.

In holding that the lack of notice of claim to the governmental entity precludes payment of a default judgment rendered against a public employee, we do not wish to imply that notice of the claim alone would mandate payment. We can foresee the possibility of the notice requirements having been met, but neither the state nor local public body having been named as a defendant or given notice of suit, as occurred here. We stated recently in *Abalos v. Bernalillo County District Attorney's Office,* 734 P.2d 794 (N.M.App.1987), that we did not intend to relieve any unnamed entity from liability imposed by Section 41–4–4. This statement merely recognized the statutorily imposed duty on entities. *Abalos* did not, however, reach the issue of whether the entity had received the requisite notice of the claim under Section 41–4–16, notice of the suit or any other procedural requirements under the Act. We need not decide those issues here. It is enough that notice of the claim was not given.

Plaintiff also contends the state should be estopped from denying its liability to her under the particular facts of this case. The factual basis for this estoppel claim is that, shortly after the federal court judgment, plaintiff requested payment from the state and the state refused payment on the grounds that it was not notified of and had nothing to do with the federal suit. Plaintiff claims the state should be estopped because it did not avail itself of remedies provided under Fed.R. Civ.P. 60 to set aside the judgment.

This argument is frivolous. The state was not a party to the federal suit. No judgment had been entered against it in the federal suit. Except for the statute, Section 41–4–4(D), which we have held inapplicable here, the state could not be bound in any way by a suit to which it was not a party or by a judgment against a third party. The state was not required to attack the judgment under Fed.R.Civ.P. 60 and, therefore, cannot be estopped from denying its alleged liability to plaintiff under our Tort Claims Act by failing to do so. *See Peltz v. New Mexico Dep't of Health & Social Servs.,* 89 N.M. 276, 551 P.2d 100 (Ct.App.1976).

Oral argument is unnecessary. *See Garcia v. Genuine Parts Company,* 90 N.M. 124, 560 P.2d 545 (Ct.App.1977). The summary judgment is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and FRUMAN, J., concur.

737 P.2d 93

Jean DAWSON, Cynthia Shrock, Lisa Dawson, Carolyn Doolin and Debra Welke, Plaintiffs-Appellants,

v.

Carla WILHEIT, Paul McCaw, City of Farmington, Kennedy, Inc. and John Doe, Defendants-Appellees.

No. 8897.

Court of Appeals of New Mexico.

April 14, 1987.

Marvin Baggett, Farmington, for plaintiffs-appellants.

David F. Cunningham, Sumner S. Koch, White, Koch, Kelly & McCarthy, P.A., Santa Fe, for defendants-appellees Carla Wilheit, Paul McCaw and City of Farmington.

Timothy R. Briggs, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, for defendants-appellees Kennedy, Inc. and John Doe.

OPINION

BIVINS, Judge.

Plaintiffs, the mother and sisters of David Dawson (decedent), brought this action seeking compensatory, as well as punitive, damages based on alleged negligent infliction of emotional distress. They appeal from an order dismissing their complaint for failure to state a claim. We affirm.

Since defendants' Rule 12(b)(6) motions challenge the sufficiency of the statement of the claim for relief, not the facts that may support it, we accept as true all the facts that are pled. NMSA 1978, Civ.P. Rule 12(b)(6) (Repl.Pamp.1980); *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct.App.1978). The allegations of the complaint state that on or about November 20, 1983, Robert Nelson, assisted by another man, killed decedent and placed decedent's body in the trunk of Nelson's vehicle. Shortly thereafter, defendants Wilheit and McCaw, police officers with the Farmington Police Department, arrested Nelson for DWI and arranged for defendant Kennedy, Inc., a wrecker service, to tow Nelson's vehicle to its storage yard.

The complaint also alleges that, at the time, the police department's policy required the wrecker operator and a police officer to inventory jointly the contents of an impounded vehicle, a policy of which defendant Kennedy, Inc. and its driver were aware. The officers and the wrecker driver failed to inventory Nelson's vehicle and several days later, after his release, Nelson reclaimed his vehicle and took decedent's body to a remote area where it was discovered six months later. Plaintiffs further allege that when they had not seen or heard from their relative, they attempted to find him, their efforts becoming more desperate as time passed. Plaintiffs claim that but for defendants' failure to inventory the vehicle, they would have been spared the emotional distress and mental anguish during the six-month period decedent was missing.

New Mexico recognizes a cause of action for negligent infliction of emotional distress to bystanders. *Ramirez v. Armstrong,* 100 N.M. 538, 673 P.2d 822 (1983). In *Ramirez,* the supreme court adopted the following standards to apply in actions for negligent infliction of emotional distress to bystanders:

1. There must be a marital, or intimate familial relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister and to those persons who occupy a legitimate position in loco parentis;

2. The shock to the plaintiff must be severe, and result from a direct emotional impact upon the plaintiff caused by the contemporaneous sensory perception of the accident, as contrasted with learning of the accident by means other than contemporaneous sensory perception, or by learning of the accident after its occurrence;

3. There must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury;

4. The accident must result in physical injury or death to the victim.

Id. at 541–542, 673 P.2d at 825–826 (footnote omitted). While plaintiffs' complaint meets the first criteria, it cannot satisfy the remaining three. Thus, their claim must fail. Plaintiffs attempt to distinguish *Ramirez* on the basis that that case dealt only with bystander recovery. The fact that plaintiffs were not bystanders serves only to further remove their situation from the criteria necessary to state a cause of action. In *Ramirez,* we note that one of the victim's children, who was not present when the accident occurred, had no cause of action under the theory of negligent infliction of emotional distress.

Additionally, under the allegations of their complaint, plaintiffs cannot establish the necessary elements of a cause of action in negligence, which, as the *Ramirez* court points out, are still required. *Lopez v. Maez,* 98 N.M. 625, 651 P.2d 1269 (1982), sets out the elements necessary to prove an action in negligence:

1. A *duty* or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

2. A failure on his part to conform to the standard required. * * *

3. A reasonable close causal connection between the conduct and the resulting injury. [Proximate cause]

4. Actual loss or damage resulting to the interests of another.

Id. at 630, 651 P.2d at 1274 (emphasis in original). We need only examine the element of duty or obligation.

Plaintiffs seek to create a duty out of a departmental policy for inventorying impounded vehicles. In quoting from a leading authority, the supreme court, in *Ramirez,* said, "Dean Prosser defines duty, in negligence cases, as 'an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' W. Prosser, The Law of Torts § 53 (4th ed. 1971)." *Id.,* 100 N.M. at 541, 673 P.2d at 825. A departmental policy designed apparently to safeguard the arresting officers, the police department and the wrecker service and its employees from claims does not equate with an obligation to which the law will give effect for the protection of persons such as plaintiffs.

"[N]egligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person." *Ramirez v. Armstrong,* 100 N.M. at 541, 673 P.2d at 825. Having impounded Nelson's vehicle following a DWI arrest, we fail to understand how the police, unaware of the killing, could be expected to search for a dead body or to foresee that their failure to do so would inflict suffering in others.

Finally, plaintiffs rely on cases such as *Barela v. Frank A. Hubbell Co.,* 67 N.M. 319, 355 P.2d 133 (1960) and *Infield v. Cope,* 58 N.M. 308, 270 P.2d 716 (1954), which recognize a quasi-property right in a dead body vesting in the nearest relatives,

and also a right to maintain an action to recover damages for any outrage, indignity or injury to the body of a deceased. These cases are inapposite. They deal with situations where a person actually handles a dead body, such as undertakers (*Infield*) or comes into actual possession of a dead body (*Barela*). There is no allegation in plaintiffs' complaint that defendants actually handled the dead body or, for that matter, were even aware that it was in the impounded vehicle.

We affirm.

IT IS SO ORDERED.

MINZNER and APODACA, JJ., concur.

737 P.2d 96

Connie HOLGUIN, Plaintiff-Appellant,

v.

SMITH'S FOOD KING PROPERTIES, INC., Defendant-Appellee.

No. 8821.

Court of Appeals of New Mexico.

April 16, 1987.

Beverly J. Singleman, Grey W. Handy, Martin, Cresswell, Hubert & Hernandez, P.A., Las Cruces, for plaintiff-appellant.

Alice Tomlinson Lorenz, Miller, Stratvert, Torgerson & Brandt, P.A., Albuquerque, for defendant-appellee.

OPINION

DONNELLY, Chief Judge.

This is a slip and fall case. Plaintiff appeals from a judgment granting defendant's motion for summary judgment in favor of Smith's Food King Properties, Inc. The single issue presented on appeal is whether the trial court erred in awarding summary judgment and finding no genuine disputed issue of fact as to defendant's negligence. We affirm.

FACTS

Plaintiff, together with her husband and daughter, went to defendant's grocery store in Las Cruces. After returning some video tapes and renting additional movies, plaintiff walked away from the counter carrying only her purse. After plaintiff walked from ten or twenty feet, the cashier called to her that she had forgotten to pick up her change. As plaintiff turned in response, she slipped, fell and injured herself.

Plaintiff's husband, Robert Holguin, assisted her in getting up. The clerk from the video counter told plaintiff she should not have called plaintiff's name the way she did. Another cashier summoned the store manager and also told plaintiff the floor had recently been cleaned. Plaintiff alleged that the floor was shiny and slick and that there were no warning signs posted in the area.

Plaintiff's husband testified in his deposition that, after the accident, he tested the spot where his wife fell. By sliding his shoe over the floor, he ascertained that the floor would be slippery for anyone wearing leather-soled shoes.

Plaintiff also related in her deposition that, Douglas Duerre, the grocery manager, spoke to her shortly after her fall. He asked plaintiff if she wanted to go to the hospital, assured her the store would take care of her bills, and gave her an insurance claim form. On the form, the manager wrote his name and "Accident Happened at Smith's # 482, 1:00 p.m., Sunday the 17th, Smithes [sic] will take proper responsibility."

The store manager encouraged plaintiff to obtain medical attention. The plaintiff was able to stand up and walk and went directly home. The next morning plaintiff was feeling worse and went to the emergency room of the hospital. She was treated for an injury to her hip and wrist and, subsequently, incurred several thousand dollars in medical expenses. Plaintiff later filed suit against defendant alleging that, inter alia, defendant had waxed or buffed the floors or had applied some type of cleaning solution and was negligent in failing to maintain its store floors in a safe condition and failing to warn plaintiff of the danger posed by its waxed floors.

Thereafter, defendant moved for summary judgment, supported by an affidavit of Wendell Hull, a mechanical engineer. Hull's affidavit recited that he had investigated the floor where the accident occurred, and inspected the maintenance procedures and type of floor wax used by the store. Hull's affidavit further recited that the type of floor wax utilized was of a "non-skid, slip-proof type" and the maintenance procedures by the store were consistent with good commercial practice and with the floor wax manufacturer's recommendations. Hull also recited that he performed friction tests to evaluate the skid resistent qualities of the floor at the location of the accident and the skid resistence values were "very high" and adequate for waxed vinyl tile flooring. (Hull performed these tests approximately eight months after plaintiff's accident.)

Plaintiff filed a response to defendant's motion for summary judgment. Plaintiff's

affidavit recited that after she fell, she was informed by a store employee that the "floor had been recently cleaned," and "it appeared to me that the floor was very shiny, very slick, and that it had just been waxed." Plaintiff also stated that the store manager told her he would give her an insurance claim so she could have her medical bills and injuries taken care of and that the manager wrote on the form that the store would assume "proper responsibility" for her injuries.

At a hearing on the motion, plaintiff and defendant both referred to deposition testimony of plaintiff's husband, who testified that he believed his wife was wearing leather-soled shoes at the time of the accident; that he was wearing rubber-soled shoes; that immediately after his wife fell, he tested the floor and the floor was slippery.

Following a hearing on the motion, the trial court granted defendant's motion for summary judgment.

SUMMARY JUDGMENT

Plaintiff argues that the trial court erred in awarding summary judgment and cites as evidence of negligence the fact that: (1) after she fell an employee commented that the floor had been recently cleaned; (2) there were no warning signs; (3) the floor appeared shiny; (4) the grocery store manager stated that the store would take care of her bills; and (5) plaintiff's husband, immediately after the accident, tested the spot where his wife fell and ascertained that the floor was slippery to persons wearing leather-soled shoes.

Defendant was not an insurer of plaintiff's safety but did owe her the duty to exercise ordinary care to keep the premises in a safe condition for plaintiff's use as a business invitee. *See* SCRA 1986, UJI Civ. 13–1319. If a dangerous condition existed on defendant's premises, caused by defendant or its employees, or if the defendant had actual knowledge of such a condition, then it had a duty to exercise ordinary care to correct it, or to warn plaintiff of the presence of the condition. *Id.; see also Mahoney v. J.C. Penney Co.*, 71 N.M. 244, 377 P.2d 663 (1962).

In *Kitts v. Shop Rite Foods*, 64 N.M. 24, 323 P.2d 282 (1958), our supreme court upheld a trial court's directed verdict for defendant where plaintiff slipped and fell on a waxed floor in a grocery store. The supreme court held:

> We are not prepared to say that proof of a slippery spot on a floor, standing alone, will support an inference that it resulted from the proprietor's negligence. *De Baca v. Kahn*, 49 N.M. 225, 161 P.2d 630 * * * * [T]he doctrine of *res ipsa loquitur* does not apply in slip and fall cases. Persons frequently sustain falls where and when others do not. There is a total absence of any evidence in this case as to how or by whom the slippery spot was created. No evidence was introduced tending to show that the defendant was negligent in the treatment of the floor or that the type of polish used was improper or was used in excessive amounts. The creation of a slippery condition by the defendant is not a reasonable inference from the whole of the evidence. A slippery condition may arise temporarily in any store though the proprietor has exercised due care.

Id. at 27–28, 323 P.2d at 284 (citation omitted).

In the case before us, plaintiff introduced evidence that the floor was recently cleaned by defendant's employees, that it was shiny, and that it was slippery to a person wearing leather-soled shoes. Plaintiff's husband, however, did not verify with certainty the fact that plaintiff was actually wearing leather-soled shoes at the time of her fall. (The plaintiff testified in her deposition that she was wearing sandals with rubber soles.) Plaintiff emphasizes, on appeal, that evidence the floor had recently been cleaned creates a reasonable inference that the floor could have been damp and, therefore, left in an unreasonably dangerous condition.

In *Kitts v. Shop Rite Foods*, the court cited with approval the case of *Abt v. Leeds & Lippincott Co.*, 109 N.J.L. 311, 162 A. 525 (1932), noting that a nonsuit was proper where the only proof supporting plain-

tiff's claim of negligence in a slip and fall case was that, "[t]he stairs were waxed, highly polished and *very slippery,* without any evidence that the stairs were improperly constructed or out of repair, or that the waxing or polishing was improper or had been done in an improper manner." *Kitts* at 28, 323 P.2d at 285 (emphasis in original). The court also quoted from *Nelson v. Salem Danish Lutheran Church,* 296 N.Y. 870, 72 N.E.2d 608 (1947), observing that: " 'The fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of negligent application of wax or polish, does not give rise to a cause of action.' " (Citations omitted.) *Kitts* at 29, 323 P.2d at 285 (quoting *Nelson v. Salem Danish Lutheran Church,* 270 App.Div. 1030, 63 N.Y.S.2d 145).

In *Key v. J.C. Penney Co.,* 165 Ga.App. 176, 299 S.E.2d 895 (1983), the Georgia Court of Appeals considered a case factually similar to the cause before us. Defendant's motion for summary judgment in *Key* was supported by affidavits establishing that the material used in waxing and polishing the floor of the store entryway was slip resistant or slip retardant and that the wax had been properly applied. The court held:

> We turn first to the question of whether genuine issues of material fact remain with regard to appellee's negligence in maintaining a "highly waxed and/or polished floor." * * * " 'proof of nothing more than the occurrence of the fall is insufficient to establish the proprietor's negligence.' " * * * *[T]he plaintiff must, at a minimum, show that the defendant was negligent either in the materials he used in treating the floor or in the application of them."* *Alterman Foods v. Ligon,* 246 Ga. 620, 624, 272 S.E.2d 327 (1980).

Id. at 176, 299 S.E.2d at 896 (emphasis added).

Summary judgment is not proper where there is the slightest issue as to a material fact. *Perry v. Color Tile of New Mexico,* 81 N.M. 143, 464 P.2d 562 (Ct.App.1970). It is appropriate only if there are no genuine issues as to the material facts and the movant is entitled to judgment as a matter of law. *Westgate Families v. County Clerk of Incorporated County of Los Alamos,* 100 N.M. 146, 667 P.2d 453 (1983); SCRA 1986, R. 1–056(C). The moving party need only make a prima facie showing that he is entitled to summary judgment, *Koenig v. Perez,* 104 N.M. 664, 726 P.2d 341 (1986), and is not required to show beyond all possibility that a genuine issue of fact does not exist. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). Once a prima facie showing is made, the burden is then shifted to the party resisting the motion, who must show at least a reasonable doubt as to the existence of a genuine issue of fact. *Koenig v. Perez.*

Here, plaintiff failed to rebut defendant's prima facie showing. The fact that plaintiff fell does not raise an inference of negligence on the part of defendant. *See* UJI Civ. 13–1616; *cf. Anaya v. Tarradie,* 70 N.M. 8, 369 P.2d 41 (1962). As noted in *Kitts v. Shop Rite Foods,* the fact the floor is slippery by reason of its smoothness or polish, in the absence of proof of negligent application of wax or polish does not establish negligence. *See also Williamson v. Piggly Wiggly Shop Rite Foods, Inc.,* 80 N.M. 591, 458 P.2d 843 (Ct.App.1969) (presence of slippery spot, standing alone, does not prove negligence because this condition may arise temporarily in any place of business).

Similarly, the mere fact the floor had been cleaned recently would not entitle a trier of fact to find that there was any negligence in maintaining the floor through such cleaning. *See De Baca v. Kahn,* 49 N.M. 225, 161 P.2d 630 (1945) (fact that customer slipped and fell on store floor left in wet, oily condition from recent oiling did not, without showing of a specific act of negligence or existence of obviously dangerous condition, amount to sufficient evidence from which an inference of negligence would issue). *See generally,* Annotation, *Slippery Floor—Injury,* 63 A.L.R.2d 587 (1959). Liability cannot be predicated upon surmise or conjecture as to the cause of the injury. *Vance v. Lucky*

Stores, Inc., 134 Ill.App.3d 166, 89 Ill.Dec. 281, 480 N.E.2d 167 (1985).

Plaintiff also argues that the offer by the grocery manager that the store would pay her medical bills constituted an admission against interest. We disagree. Generally, an offer to pay another's medical bills is not admissible to prove liability. *See* SCRA 1986, Rule 11–409; *see generally* Annotation, *Admissibility of Evidence Showing Payment, or Offer or Promise of Payment of Medical, Hospital, and Similar Expenses of Injured Party by Opposing Party,* 65 A.L.R.3d 932 (1975). "The reasons often given for the above rule are that such payment, offer, or promise is usually made from humane impulses, rather than from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person." *Id.* at 941; *see also Home Ins. Co. v. Spears,* 267 Ark. 704, 590 S.W.2d 71 (App. 1979).

The Federal Rule of Evidence 409 advisory committee note states that, "[c]ontrary to Rule 408, dealing with offers of compromise, [Rule 409] does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay." Fed.R.Evid. 409, 28 U.S.C.A. n. at 350 (West 1984). The statement of the grocery manager, written on the insurance form that Smith's would "take full responsibility," was a part of the offer to pay plaintiff's medical bills. *See Hughes v. Anchor Enters.,* 245 N.C. 131, 95 S.E.2d 577 (1956) (statement of restaurant assistant manager at hospital to husband of patron who slipped and fell to go ahead and put wife in private room, get the best medical care available, and "they would take care of it" was an inadmissible offer to pay medical expenses).

Finally, we note that plaintiff's assertion of negligence based on defendant's failure to place warning signs in the area was not evidence properly before the trial court for consideration on the motion for summary judgment. Plaintiff did not refer to this assertion in her affidavit or at the hearing on the motion. Although plaintiff alleged failure to warn in her complaint, the complaint was not verified; hence, the allegations contained therein could not properly be considered as evidence in opposition to defendant's motion for summary judgment. *Cf. Poorbaugh v. Mullen,* 96 N.M. 598, 633 P.2d 706 (Ct.App.1981).

In the present case, plaintiff failed to show that defendant departed from a duty of ordinary care to keep its premises in a safe condition. Plaintiff made no showing that the floor was unsafe or that it was not properly maintained.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

737 P.2d 100

Arthur MARTINEZ, next friend and natural father and on behalf of Lydia V. MARTINEZ, Plaintiffs-Appellants,

v.

Judith VIGIL and Andy Vigil, Defendants-Appellees.

No. 8881.

Court of Appeals of New Mexico.

April 16, 1987.

Robert Crollett, Crollett & Sanchez, P.A., Taos, for plaintiffs-appellants.

Louise Gibson, Butt, Thornton & Baehr, P.C., Albuquerque, for defendants-appellees.

OPINION

BIVINS, Judge.

This appeal presents the question of whether fault may be apportioned among individuals who, although not in control of the instrumentality that caused the harm, nevertheless contributed to bringing about the harm. We hold it may, under the circumstances of this case, and affirm the trial court. We also affirm on the issue of damages.

Plaintiff Lydia Martinez (Lydia), a minor, brought this action by her father and next friend to recover damages for personal injuries suffered when a pickup truck, owned by defendant Andy Vigil and driven by his daughter, defendant Judith Vigil (Judith), either struck Lydia or another girl causing the latter to fall on Lydia, injuring Lydia's knee. Following a bench trial, the trial court found that Lydia suffered total damages in the sum of $40,000, but that she was entitled to no recovery for future pain and suffering. The trial court found Judith negligent in the operation of the vehicle and apportioned 1/6 of the damages against her and her father, the latter's liability being based on the "family purpose" doctrine. The trial court apportioned the remaining 5/6 fault equally among Lydia and four other girls, all of whom were fighting around the truck as it was leaving or attempting to leave a picnic. The four girls were not sued. Plaintiffs appeal, claiming substantial evidence will not support (1) the findings apportioning fault; or (2) the finding that Lydia will not suffer future pain or suffering as a result of the accident. We affirm.

1. Apportionment

Plaintiffs contend that Judith's negligence in the operation of the vehicle was the sole proximate cause of the accident and resulting injuries. While conceding substantial evidence supports the findings that fights erupted around Judith's truck as she was leaving, plaintiffs argue these

findings will not support the conclusion reached. First, plaintiffs claim that since no threats were made to Judith and she did not observe the fights, the fights could have had no effect on her state of mind. Second, according to plaintiffs, when each fight is isolated, it is easy to see that none caused the accident.

Summarizing the trial court's findings and the evidence supporting them, an unsanctioned high school "senior picnic" was held in Pilar, New Mexico, on May 18, 1983. Judith, aged 18, accompanied by Annabelle Romero, who was pregnant, went to the picnic at the request of Judith's mother to pick up Judith's sister, Anna Mae Vigil. Also attending the picnic were Lydia, aged 15, and a number of her friends, including Lisa Fernandez, sister of Tony Fernandez to whom Judith had been married and had a child. The trial court described two factions at the picnic, with Judith, Annabelle, Judith's sister and one other girl belonging to one faction, and Lydia, Lisa Fernandez and three other girls belonging to the other faction. There was a history of problems between members of the two factions before the picnic. There was widespread use of alcohol at the picnic. Words were exchanged between the two factions, as well as name calling. Lydia's group called Judith and her friend "the Ewings" (as in the television series "Dallas"). Judith and Annabelle decided to leave before a fight erupted. Judith's sister refused to go with them.

As Judith and Annabelle were about to leave, more words were exchanged between the members of the factions and "the situation became sensitive." Rocks and bottles were thrown at the truck. Lisa Fernandez reached inside the truck and grabbed Judith's hair. Annabelle grabbed the steering wheel and put the gearshift in park. Judith kicked out through her open window at Lisa. Lisa withdrew. A fight erupted between Judith's sister, Anna Mae, and Yvonne Medina. Another fight erupted between Anna Herrera and Lydia. These fights occurred around the truck and the "situation was confusing." Other members of the two factions were around the truck. "There was much confusion" and it "was a dangerous situation" when Judith was trying to leave because of all the fighting and all the people.

Judith waited for a car in front of her to move and then left. Lydia, who had been fighting in front and to the left of the truck, fell from a rock and was injured when the truck hit her knee or when Anna fell on her after the truck brushed Anna. Judith was not aware she had hit either girl. She was upset when she left and pulled over and stopped the truck. Someone came along and told Judith what had happened. A friend drove her home.

We disagree with plaintiffs' claim that no threats were made to Judith. Certainly the rocks and bottles thrown at the truck, coupled with Lisa's reaching in and grabbing Judith by the hair, presented threats. Nor are we persuaded by plaintiffs' argument that since Judith could not say who else was fighting, these fights did not contribute to her state of mind. Plaintiffs' view of the facts is too simplistic. Judith was upset. Objects had been thrown at her truck. Lisa reached in and grabbed her while the truck was starting to move. Judith wanted to leave. Her companion was pregnant. People were surrounding the truck. The mere fact that Judith could not recall the particulars of this overall tense situation, i.e., the two other fights, does not mean those fights did not add to the confusion or serve to increase the tension.

Moreover, plaintiffs' view of the facts is not quite accurate. While Judith did say at trial she could not recall who was fighting, plaintiffs' counsel, at one point, confronted her with a statement she gave to the police shortly after the incident in which she did identify Lydia fighting.

In *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156 (Ct.App.1985), we recited the standard of appellate review as follows:

> In reviewing the findings of fact of a trial court * * * this court is subject to the rule that such findings shall not be disturbed if supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. This court is bound to view the evidence in the light most favorable to

support the trial court's findings, and to disregard all evidence unfavorable to that finding. It is for the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistent statements of the witnesses, and determine where the truth lies. The appellate court may not reweigh the evidence nor substitute its judgment for that of the trier of fact.

Id., 102 N.M. at 475–476, 697 P.2d 158–159 (citations omitted).

Applying that standard, we are satisfied substantial evidence supports the trial court's findings that the actions of the other five girls, including Lydia, in fighting around the truck as it attempted to leave, contributed to the tension and confusion that caused Judith to hit Lydia or Anna. Also, Lydia, by fighting in close proximity to the truck as it was attempting to leave, failed to use due care for her own safety.

While recognizing the rule that two or more concurrent and directly cooperative proximate causes may contribute to an injury, plaintiffs argue that the conduct of each actor must be isolated and a determination made as to "whether the conduct of each actor, in itself, would have caused Lydia Martinez' injuries." Plaintiffs then take each of the fights engaged in by the five girls and conclude that none caused Judith to fail to keep a proper lookout.

We believe plaintiffs view the law and the facts too narrowly. In *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982), the supreme court said: "A person who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof, although the act of a third person contributes to the final result." The court went on to hold that a person may be subject to liability if he or she breaches a duty by selling or serving alcohol to an intoxicated person, the breach of which is found to be a proximate cause of injuries to a third party. If a tavernkeeper can be held liable for the foreseeable consequences of selling or serving alcohol to an intoxicated person, who later injures a third party, we see no reason why fault may not be apportioned to persons who engage in conduct that creates a dangerous situation under the facts of this case. In the case of a tavernkeeper, it is foreseeable that intoxicated drivers cause accidents that injure people. In the case of combatants who terrorize a driver, it is likewise foreseeable that such conduct can cause fear, which in turn may cause the driver to be less careful. While each act affects the judgment of the driver in a different way, the result may be the same.

We affirm the apportionment made by the trial court.

2. Future Pain and Suffering

The trial court found that "Lydia Martinez will not suffer any future pain and suffering as a result of the accident in May of 1983, attributable to the accident, but any future pain and suffering incurred by Lydia Martinez is attributable to her own actions." Based on that finding, the trial court concluded that Lydia was not entitled to recover damages for future pain and suffering.

Plaintiffs argue that substantial evidence does not support the finding made. The only medical evidence offered in the trial came through the deposition of Dr. James Buchanan, an orthopedic surgeon. This deposition is replete with discussion to the effect of Lydia's failure to follow instructions, perform exercises and the effect of a subsequent fight between Lydia and her sister that resulted in Lydia being hit on her legs with a chair. This evidence can be summarized by quoting the trial court's findings that immediately precede the challenged finding:

38. Lydia Martinez went to see Dr. Hassemer after her injury and he prescribed exercises, but Lydia Martinez failed to follow the exercises prescribed by him.

39. Lydia Martinez went to see Dr. Buchanan who prescribed exercises both before and after the surgery.

40. Lydia Martinez failed to do a number of exercises prescribed by Dr. Buchanan.

41. Lydia Martinez failed to do the type of exercises prescribed by Dr. Buchanan through June of 1984.

42. Lydia Martinez did not follow doctor's orders with respect to the care for her knee.

43. Lydia Martinez stopped using crutches before the doctor told her to.

44. Lydia Martinez removed a leg brace against doctor's instructions.

45. Lydia Martinez did exercises incorrectly and contrary to the way in which Dr. Buchanan prescribed them.

46. This failure to do exercises, failure to use the crutches and removal of the brace contributed to any future knee pain which Lydia Martinez may incur.

47. Lydia Martinez compromised Dr. Buchanan's surgery by failing to use the crutches and removing her brace and failing to do her exercises properly.

48. The ligaments stretched after the surgery because [of] Lydia Martinez's failure to follow doctor's instructions with respect to her leg.

49. Lydia Martinez was involved in an altercation with her sister in August of 1984 which involved the left knee as well as the right knee and which contributed to problems with the left knee.

While the challenged finding is couched in language as to no future pain or suffering as a result of the accident, when examined in context of the above findings that precede it, and the amount of the total damages, we believe a reasonable interpretation is that the trial court was reducing the damages for failure to mitigate or engaging in practices which exacerbated the injury. The trial court found Lydia suffered total damages in the amount of $40,000 as a result of the accident, but did not itemize all the elements included.

The uniform jury instruction on mitigation, SCRA 1986, UJI 13–1811, provides: "In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen his damages. Damages caused by his failure to exercise such care cannot be recovered."

Under the doctrine of avoidable consequences, a person injured by the tort of another is not entitled to recover for losses that he or she could have avoided by the use of due care. *Rutledge v. Johnson,* 81 N.M. 217, 465 P.2d 274 (1970) (plaintiff injured in a rear-end car accident and thereafter further injured in three household accidents). Further, an award may not include any sums for physical or mental pain and suffering caused by failure to reasonably care for the injuries sustained, and this includes negligence in failure to follow the doctor's advice or otherwise care for the injuries. *Moulton v. Alamo Ambulance Serv., Inc.,* 414 S.W.2d 444 (Tex. 1967). A reasonable interpretation of the finding in question satisfies us that the trial court was only disallowing an award for pain and suffering attributable to avoidable consequences or Lydia's failure to mitigate her injuries, not an award for the accident itself. This interpretation is reinforced by another finding that Lydia has scars on her left knee as a result of surgery following the injury. Plaintiffs argue these scars now cause and will continue to cause Lydia embarrassment. By its findings, the trial court apparently agreed. We also affirm on this point.

Without attempting to prescribe a fixed rule, the better practice in cases where there is evidence to justify a reduction in damages would be for the trial court to decide the damage issue without including any award for damages proximately caused by an injured party's failure to care for and treat his or her injury. *See* UJI 13–1811; *Moulton v. Alamo Ambulance Serv., Inc.* We believe that was done here, except for the unnecessary finding as to future pain and suffering. It should be sufficient to find, as an ultimate fact, that Lydia failed to exercise ordinary care to minimize or lessen her damages and that no damages caused by that failure are being allowed.

The judgment is affirmed.

IT IS SO ORDERED.

GARCIA and FRUMAN, JJ., concur.

737 P.2d 527

Abran RODRIGUEZ, d/b/a Abe Rodriguez and Associates, Petitioner,

v.

Georgianne CONANT, Respondent.

No. 16203.

Supreme Court of New Mexico.

May 7, 1987.

Rehearing Denied June 4, 1987.

Montoya, Murphy, Kauffman & Garcia, Donald D. Montoya, Santa Fe, Francis & Arland, Kathryn Levy, Albuquerque, for petitioner.

Moore & Golden, Michael J. Golden, Santa Fe, for respondent.

OPINION

STOWERS, Justice.

We granted Respondent Georgianne Conant's request for rehearing in this matter. The opinion filed on December 31, 1986 is withdrawn and the following substituted therefor.

Defendant Abran Rodriguez, d/b/a Abe Rodriguez and Associates (defendant), moved the district court to set aside default judgments entered against him in favor of plaintiff Georgianne Conant (plaintiff) and cross-claimant and co-defendant Catherine Katona (Katona). The district court granted the motion, and plaintiff and Katona appealed. The Court of Appeals reversed and ordered the reinstatement of the default judgments, holding that the district court had abused its discretion by setting aside the judgments without sufficient grounds for relief under SCRA 1986, Rule 1–060(B) (formerly codified at NMSA 1978, Civ.P.R. 60(b) (Repl.Pamp.1980)). This Court granted defendant's petition for a writ of certiorari, and we now reverse the Court of Appeals' decision, affirm the district court's order, and remand to the district court for trial on the merits.

This case presents the following issues for our determination:

(1) Was the district court as a matter of law compelled to vacate these default judgments because defendant was not notified of the hearing held on damages?

(2) If its order was not compelled as a matter of law, did the district court abuse its discretion under Rule 1–060(B) by setting aside the default judgments in the circumstances of this case?

We hold, first, that the district court was not required by SCRA 1986, Rule 1–055(B) (formerly codified at NMSA 1978, Civ.P.R. 55(b) (Repl.Pamp.1980)), or by due process of law to set aside for lack of notice default judgments entered against a defendant who failed to appear in the action after being personally served with process. We do not reach the Rule 1–060(B)(1) ground relied upon by the Court of Appeals but hold, second, that the district court's exercise of discretion was supported, in the circumstances of this case, by "any other reason justifying relief" under Rule 1–060(B)(6) and meritorious defenses presented in defendant's motion.

In 1979, plaintiff initiated this suit against her former employer, Katona, alleging that Katona had terminated her employment and had published defamatory statements accusing plaintiff of stealing money from the shop where she worked and of failing a polygraph examination regarding the theft. Katona in fact had retained defendant's business to conduct polygraph examinations of several employees, and plaintiff had been examined once by Leo Gurule and once by defendant. Following an April 1981 discovery deposition of defendant, plaintiff sought and obtained leave of the court to file an amended complaint naming Gurule and defendant as additional defendants.

The record indicates that defendant was personally served with a summons and a copy of the amended complaint on Novem-

ber 1, 1981. He made no appearance, answer, or other pleading in response to that summons. Upon plaintiff's motion, without further notice to defendant, the district court on January 4, 1982, entered a partial default judgment of liability against him. The record also indicates that defendant was personally served with a summons and a copy of Katona's cross-complaint on January 23, 1982. He entered no appearance and, on May 17, 1982, without further notice to him, the district court entered another partial default judgment of liability.

Damages were not assessed in these partial default judgments, but on April 20, 1983, without notice to defendant, a hearing was held on the issue of damages. In the interim, on August 24, 1982, plaintiff and Katona had settled their claims for the sum of $1,900. On May 4, 1983, the district court entered a default judgment awarding plaintiff $5,000 in compensatory damages and $50,000 in punitive damages as prayed for in her complaint.

Defendant filed a motion to set aside the default judgments on August 25, 1983. In it, he alleged that he had no knowledge that he was a party to the suit between plaintiff and Katona until he was subpoenaed in aid of execution on August 12, 1983. Although he admitted finding the summons and amended complaint, but not the summons and cross-complaint, in his Albuquerque office files, defendant asserted that he could not recall being personally served with either summons. Had he been aware of the claims against him, he further asserted, he would have contacted counsel, responded to the court's process, and defended himself.

Defendant's motion was set for hearing five times, and each setting was vacated. Ultimately, the district court determined the matter on affidavits. On July 13, 1984, it entered an order granting the motion and setting aside the default judgments, from which plaintiff and Katona timely appealed.

The Court of Appeals held that defendant had not "appeared" within the meaning of Rule 1–055(B) and, therefore, that he was not entitled to notice of any application for default judgment or any hearing on damages. Under these circumstances, it held that defendant had not demonstrated "mistake, inadvertence, surprise, or excusable neglect" that would support the district court's decision under Rule 1–060(B)(1). The Court of Appeals further held that defendant had not offered any justification for setting aside the default judgments other than excusable neglect; therefore, he had not demonstrated "any other reason justifying relief" that would support the district court's decision under Rule 1–060(B)(6). The Court of Appeals concluded that the district court had abused its discretion by setting aside the default judgments.

I. Notice Requirements.

This Court has held that where notice of a motion for default judgment is required by Rule 1–055(B) but is not given, the default judgment entered must be set aside as a matter of law. *Mayfield v. Sparton Southwest, Inc.*, 81 N.M. 681, 683, 472 P.2d 646, 648 (1970); *Board of County Comm'rs v. Boyd*, 70 N.M. 254, 258, 372 P.2d 828, 830 (1962). By its terms, Rule 1–055(B) requires written notice to the party against whom default judgment is sought only if that party "has appeared in the action." SCRA 1986, 1–055(B); *see Mayfield v. Sparton Southwest, Inc.*, 81 N.M. at 682, 472 P.2d at 647; *see also Marberry Sales, Inc. v. Falls*, 92 N.M. 578, 581, 592 P.2d 178, 181 (1979) (dicta).

Defendant's attendance at a deposition nearly eight months before he was served with a summons and a copy of the amended complaint cannot be considered an "appearance," even under our liberal Rule 1–055(B) construction of that term, because it could not possibly have indicated either knowledge of the suit against him or an intention to meet his obligations as a party. *See Mayfield v. Sparton Southwest, Inc.*, 81 N.M. at 682–83, 472 P.2d at 647–48; *see also Gengler v. Phelps*, 89 N.M. 793, 798–99, 558 P.2d 62, 67–68 (Ct.App.1976) (Sutin, J., specially concurring). Therefore, defendant was not entitled to notice of the applications for default judgments against him.

This Court often has held that the district court must conduct an evidentiary hearing pursuant to its Rule 1–055(B) authority when the plaintiff seeks an award of an unliquidated amount of damages. *See, e.g., United Salt Corp. v. McKee,* 96 N.M. 65, 68, 628 P.2d 310, 313 (1981); *Armijo v. Armijo,* 98 N.M. 518, 520, 650 P.2d 40, 42 (Ct.App.1982); *Gallegos v. Franklin,* 89 N.M. 118, 122, 547 P.2d 1160, 1164 (Ct.App.), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976). Although Rule 1–055(B) does not by its terms require written notice of such a hearing to the party against whom default judgment is sought, we believe that the damages hearing must be regarded as a hearing on the application for default judgment and that written notice must be given if the party "has appeared in the action." *Cf. Board of County Comm'rs v. Boyd,* 70 N.M. at 257–58, 372 P.2d at 830 (hearing on compensation in eminent domain proceeding); *see generally* Annotation, *Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages,* 15 A.L. R.3d 586 (1967). Because defendant failed to make an appearance in this case, however, he was not entitled to notice of the damages hearing in accordance with the requirements of Rule 1–055(B).

This Court also has held that the due process clause of our constitution requires notice of default judgment proceedings pursuant to Rule 1–055(B) "when matters [stand] at issue." *Adams & McGahey v. Neill,* 58 N.M. 782, 786, 276 P.2d 913, 916 (1954), *quoted in Daniels Insurance Agency, Inc. v. Jordan,* 102 N.M. 162, 164, 692 P.2d 1311, 1313 (1984); *see* N.M. Const. art. II, § 18. Fundamental due process requirements were met in this case by service of process by personal service within the state of the summons and complaint. *See Clark v. LeBlanc,* 92 N.M. 672, 673, 593 P.2d 1075, 1076 (1979); *see also Moya v. Catholic Archdiocese,* 92 N.M. 278, 279–80, 587 P.2d 425, 426–27 (1978). Having failed to appear and to put matters in issue, defendant was not entitled to notice of the damages hearing on constitutional grounds. *Cf.* SCRA 1986, 1–055(B); SCRA 1986, 1–005 (Rules of Civil Procedure generally do not require notice to or service upon parties in default for failure to appear).

We conclude that neither the due process clause nor our Rules of Civil Procedure for the District Courts required that defendant be notified of the applications for default judgments or of the hearing on damages after he failed to appear in this action. The district court therefore was under no mandatory duty to set aside the default judgments entered against defendant.

II. Rule 1–060(B) Relief.

A party seeking relief from a default judgment must show the existence of grounds for opening or vacating the judgment and a meritorious defense or cause of action. *Springer Corp. v. Herrera,* 85 N.M. 201, 203, 510 P.2d 1072, 1074 (1973). Upon such a showing, the district court has the discretionary authority to set aside the judgment. *Id.,* 85 N.M. at 202, 510 P.2d at 1073; SCRA 1986, 1–060(B). On appellate review, its ruling will not be set aside except for an abuse of that discretion. *Id.*

This Court often has stated that the district court should be liberal in determining what is a meritorious defense and whether there are grounds for setting aside a default judgment. *See, e.g., Franco v. Federal Bldg. Serv., Inc.,* 98 N.M. 333, 334, 648 P.2d 791, 792 (1982); *Dean Witter Reynolds, Inc. v. Roven,* 94 N.M. 273, 274, 609 P.2d 720, 721 (1980); *Springer Corp. v. Herrera,* 85 N.M. at 203, 510 P.2d at 1074. It should bear in mind that default judgments are not favored and that, generally, cases should be decided upon their merits. *Springer Corp. v. Herrera,* 85 N.M. at 202, 510 P.2d at 1073; *Wooley v. Wicker,* 75 N.M. 241, 245, 403 P.2d 685, 688 (1965). When there exist grounds for relief under Rule 1–060(B) and a meritorious defense, and when there are no intervening equities, the default judgment should be set aside and the case tried on its merits. *Dean Witter Reynolds, Inc. v. Roven,* 94 N.M. at 274, 609 P.2d at 721.

Indeed, other than the Court of Appeals' decision here, we have not discovered any

New Mexico case holding that the district court abused its discretion by setting aside a default judgment. On the other hand, our appellate courts have not hestitated to view the district court's refusal to set aside such a judgment as an abuse of discretion. *See, e.g., Franco v. Federal Bldg. Serv., Inc.; Dean Witter Reynolds, Inc. v. Roven; Springer Corp. v. Herrera.* We are convinced that the Court of Appeals in this case applied too strict a standard of review to the district court's determination that there were grounds for relief under Rule 1–060(B).

We cannot agree with the Court of Appeals that the only ground advanced by defendant was excusable neglect under Rule 1–060(B)(1). The district court's order did not expressly rely on that part of the rule, nor did defendant's motion to set aside the default judgments, which requested relief "on the grounds of mistake, inadvertence, excusable neglect, and for other reasons." Because we conclude that the district court's decision to set aside the default judgments was supported under Rule 1–060(B)(6), we need not review the Court of Appeals' holding that defendant's mere carelessness did not constitute "excusable neglect" under Rule 1–060(B)(1). We note, however, that in the first instance, it is for the district court to determine what is a good excuse, and that the district court should be liberal in that determination. *See Springer Corp. v. Herrera,* 85 N.M. at 203, 510 P.2d at 1074; *Board of County Comm'rs v. Boyd,* 70 N.M. at 258, 372 P.2d at 831.

A party seeking to set aside a default judgment under Rule 1–060(B)(6) must show the existence of exceptional circumstances and reasons for relief other than those set out in Rules 1–060(B)(1) through (5). *Wehrle v. Robison,* 92 N.M. 485, 487, 590 P.2d 633, 635 (1979); *Parks v. Parks,* 91 N.M. 369, 371, 574 P.2d 588, 590 (1978). Defendant's motion points out that he was at all times accessible to plaintiff and Katona and, in fact, had communicated with them at some time during plaintiff's lawsuit. We have recognized that the failure of the party seeking to sustain a default judgment to give notice to opponents whose whereabouts were known may be a factor supporting the district court's decision to set aside that judgment. *See Dyer v. Pacheco,* 98 N.M. 670, 674, 651 P.2d 1314, 1318 (Ct.App.1982) (exceptional circumstances under Rule 1–060(B)(6)), *overruled on other grounds, Chase v. Contractors' Equip. & Supply Co.,* 100 N.M. 39, 43, 665 P.2d 301, 305 (Ct.App.), *cert. denied,* 99 N.M. 740, 663 P.2d 1197 (1983); *cf. Dean Witter Reynolds, Inc. v. Roven,* 94 N.M. at 274, 609 P.2d at 721 (excusable neglect under Rule 1–060(B)(1)). In addition, defendant's motion points out that the default judgment against him awarded $55,000 in damages, while plaintiff settled similar claims against Katona for a mere $1,900. We have held that, if it reasonably can be avoided, cases involving large sums of money should not be determined by default judgments. *United Salt Corp. v. McKee,* 96 N.M. at 68, 628 P.2d at 313; *Springer Corp. v. Herrera,* 85 N.M. at 203, 510 P.2d at 1074. Under the circumstances of this case, we cannot say as a matter of law that the district court could not have found exceptional circumstances and other reasons justifying relief under Rule 1–060(B)(6).

Nor can we say as a matter of law that defendant failed to show the second prerequisite for relief from a default judgment, the existence of a meritorious defense. In his motion to set aside the default judgments, defendant alleged that he had obtained two releases of liability from plaintiff before conducting her polygraph examinations; that he acted on behalf of Katona as her agent; and that Gurule was not defendant's employee but an independent contractor. Defendant also argued that plaintiff's complaint against him failed to state a cause of action based upon his failure to inform Katona that the polygraph examination conducted by Gurule was inconclusive. Without commenting on the merits of any of these defenses, we are satisfied that they demonstrate the existence of a meritorious defense. *Cf. Home Savings & Loan Ass'n v. Esquire Homes, Inc.,* 87 N.M. 1, 1–2, 528 P.2d 645, 645–46 (1974) (release); *Springer Corp. v. Herr-*

era, 85 N.M. at 203, 510 P.2d at 1074 (agency).

Because defendant demonstrated both a meritorious defense and grounds for relief under Rule 1–060(B)(6), we cannot say that the district court abused its discretion by setting aside the default judgments. The Court of Appeals erred in reversing the district court's decision and in reinstating the default judgments.

For the foregoing reasons, the decision of the Court of Appeals is reversed, the order of the district court is affirmed, and the case is remanded to the district court for trial on the merits.

IT IS SO ORDERED.

WALTERS and RANSOM, JJ., and JOSEPH F. BACA, District Judge, concur.

SOSA, Senior J., specially concurs.

SOSA, Senior Justice, specially concurring.

I concur with the majority that reversal of the Court of Appeals is proper. I, however, feel that the majority should, in the exercise of judicial economy, go further and hold that the alleged defamatory statements were privileged as a matter of law. I refer to our earlier opinion in this case, filed December 31, 1986, wherein we concluded that plaintiff's complaint failed to state a cause of action, and therefore the default judgment was void. Not only did we hold that defendant had demonstrated a meritorious defense, but also that the allegations of the complaint, taken as true, reveal that the allegedly defamatory statements were privileged as a matter of law.

I concur with the majority holding that the trial court did not abuse its discretion in setting aside the default judgment, but would have based it on the reasons set forth in our opinion filed December 31, 1986 and would have gone further for the reason set forth above.

737 P.2d 532

ANCHOR EQUITIES, LTD.,
Plaintiff-Appellant,

v.

PACIFIC COAST AMERICAN and James J. Kelly,
Plaintiffs-Appellees,

v.

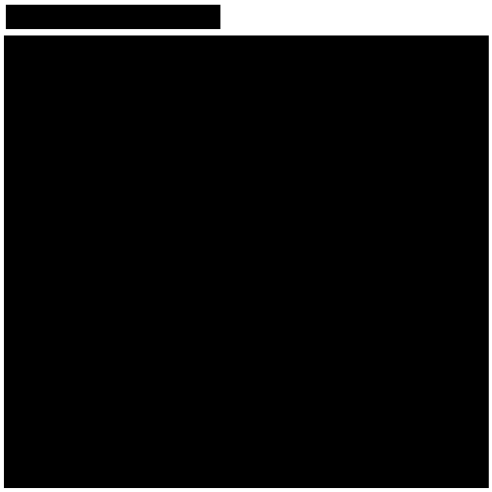
SUNWEST FINANCIAL SERVICES, INC., Sunwest Bank of Raton, N.A., United States Fire Insurance Co., Shirley Koenig, Title Services, Inc., Title Escrows, Inc., Alan Edward Clare, the underwriting members of Lloyd's of London, Don Arthur d/b/a Don Arthur Insurance Agency, and Dwight Tope Insurance Agency, Inc., Defendants-Appellees.

No. 16672.

Supreme Court of New Mexico.

May 11, 1987.

Rehearing Denied June 4, 1987.



James M. Kennedy, P.C., James M. Kenndey, Albuquerque, for appellant.

Keleher & McLeod, Robert Conklin, Albuquerque, for Don Arthur.

Montgomery & Andrews, Robert J. Mroz, Helen L. Stirling, Albuquerque, for US Fire Ins.

OPINION

WALTERS, Justice.

Appellee United States Fire Insurance Company (USFI) issued a comprehensive dishonesty, disappearance, and destruction policy to defendant Title Escrow, Inc. That policy, or fidelity bond, was purchased by Title Escrow in compliance with the Escrow Company Act. NMSA 1978, §§ 58-22-2 to 33 (Repl.Pamp.1986).

In June 1985, appellant Anchor Equities, Ltd. (Anchor) transferred $80,254.00 into Title Escrow's trust account. The purpose of the transfer was to provide permanent financing for and improvements on real estate owned by plaintiff James Kelly. (Neither Title Escrow nor Kelly is a party to this appeal.)

Anchor alleged in its complaint that the owner and sole employee of Title Escrow misappropriated and absconded with the funds which it had deposited into Title Escrow's trust account.

Without having first brought suit against Title Escrow or its owner/employee, Anchor asserted a direct cause of action against USFI as issuer of the fidelity bond. Obviously, the insured owner/employee did not, and probably would not, seek recovery on the bond for her own defalcation. USFI answered the complaint, and raised the affirmative defense of failure to state a claim upon which relief could be granted. The trial court granted USFI's motion to dismiss.

Anchor appeals and raises the following issue: Does a fidelity bond, procured by force of legislative enactment, inure to the benefit of the public so as to permit an injured party, other than the named insured, to bring a direct cause of action for damages against the bond issuer?

We hold, particularly under the circumstances of this case, that it does, and we reverse the trial court's order dismissing USFI as a party defendant.

The law governing a direct cause of action against an insurer has been addressed by this Court previously. *See Lopez v. Townsend,* 37 N.M. 574, 25 P.2d 809 (1933); *Breeden v. Wilson,* 58 N.M. 517, 273 P.2d 376 (1954); *England v. New Mexico State Highway Comm'n,* 91 N.M. 406, 575 P.2d 96 (1978).

In *England,* we articulated the following three-part test for determining whether a direct cause of action will be permitted against an insurer:

1) Was the insurance procured by force of legislative enactment?

2) Does the benefit from the purchase of the insurance coverage inure to the benefit of the public? and,

3) Is there anything in the language of the statute which negates the idea of joinder of an insurance company?

England, at 408-409, 575 P.2d at 98-99.

USFI urges under *Ronnau v. Caravan Int'l Corp.,* 205 Kan. 154, 468 P.2d 118 (1970) (cited with approval in *New Mexico Livestock Bd. v. Dose,* 94 N.M. 68, 73, 607 P.2d 606, 611 (1980)), that the *England* test should not apply to this case because *Lopez* and its progeny were concerned with direct actions against or joinder of liability insurers, not of fidelity bond issuers.

Ronnau is not helpful in the present case because it did not deal with a statute mandating insurance coverage designed to protect the money or property of the public. We do not consider it significant that this is a fidelity bond since, as we stated in *England,* "when insurance coverage is *mandated by the Legislature* the *only* time an insurer *cannot* be joined as a party defendant is when the statute which requires the purchase of insurance negates the idea of such joinder." (Emphasis added.) *England,* 91 N.M. at 408, 575 P.2d at 98. Section 58–22–10 contains no language that would negate the idea of joinder. We see no reason why *England* should not control.

NMSA 1978, Section 58–22–10 (Repl. Pamp.1986), mandates that all escrow companies be "covered by an employee dishonestly bond insuring the escrow company against loss of money or negotiable securities." Therefore, the insurance that Title Escrow purchased was procured by force of legislative enactment, and the first requirement of the *England* test is met.

With reference to *England's* second requirement, USFI maintains that the legislatively-required interest to be protected by the purchase of the fidelity bond is the interest of the insured company itself from the dishonest acts of its employees so that the insured company can continue as a going concern.

We noted in *Breeden* that it is a "meaningless search [to determine whether the coverage inures to the benefit of the public] since the only possible legislative authority to pass such acts or purpose for passing such acts is the protection of the public." *Breeden,* 58 N.M. at 524, 273 P.2d at 380. With regard to fidelity insurance for escrow companies, however, the legislature clearly stated the purpose of the Escrow Company Act in Section 58–22–2, that "[i]t is the intent of the legislature that the large and growing escrow industry be supervised and regulated by the financial institutions division of the commerce and industry department * * * *in order to protect the citizens of the state.*" (Emphasis added.) This language leaves no room for doubt that the purchase of the fidelity bond inures to the benefit and protection of the public.

Finally, the third prong of the *England* test requires that there be nothing in the language of the statute which negates the idea of joinder of the insurance company. If the language of a statute is not specific on allowance of a direct action, "the construction placed upon the language [will be] based largely upon public policy as it is envisaged by the particular court." *Breeden,* at 522, 273 P.2d at 378.

Section 58–22–10 does not specifically allow a direct action against an insurer; nevertheless, the language of Section 58–22–10 does not in any way negate the joinder of the insuring company as a defendant, and the policy behind the statute, *i.e.,* protection of the public, together with the rule of *England,* clearly support a direct action against an insurer.

Consequently, under the holding of *England,* and particularly under the circumstances of the instant case, the trial court's order dismissing USFI as a party defendant must be reversed, and the matter remanded for reinstatement of the complaint.

The costs of this appeal are assessed against USFI. SCRA 1986, 12–403.

IT IS SO ORDERED.

SCARBOROUGH, C.J., SOSA, Senior J., and RANSOM, J., concur.

STOWERS, J., dissents.

STOWERS, Justice, dissenting.

I respectfully dissent. United States Fire Insurance Company (USFI) issued a fidelity bond, not a liability insurance policy, to Title Escrows, Inc. (Title Escrows). While the majority does not consider this distinction significant, it is the fundamental inquiry upon which any relevant analysis must be premised.

The purpose and intent of the fidelity bond issued by USFI was to indemnify Title Escrows against proven losses of money or property through acts of employee dishonesty. The bond did not insure Title Escrows against liability to third par-

ties. Any claim for loss on the bond had to be made by Title Escrows itself, and the benefit of any recovery belonged to Title Escrows, not to the general public.

The majority attempts to methodically apply the three part test developed by the *England* court to the situation here in which a fidelity bond was mandated by the Escrow Company Act, NMSA 1978, Section 58–22–1 to –33 (Repl.Pamp.1986) (the Act). This analysis fails for three reasons.

First, one prong of the *England* test questions whether the benefit from the purchase of insurance coverage inures to the benefit of the public. The majority contends that the fidelity bond requirement pursuant to Section 58–22–10 meets that test. In support of their analysis, the majority cites to one section of the Act regarding the overall intent and purpose of regulating the escrow industry. Admittedly, the State of New Mexico has an interest in regulating the escrow industry and maintaining its orderly business; any legislation imposed by the state is designed to ultimately benefit its citizens. The existence of this statutory protection, however, does not necessarily provide the public with a direct cause of action against the insurer.

The majority's reliance on Section 58–22–2, which states the general purpose of the Act, is misplaced for another reason. The particular section of the Act at issue is entitled "Employee dishonesty bond required." The phrase "employee dishonesty bond" as used in Section 58–22–10 is unambiguous; the type of insurance involved in this section is that of fedelity, not liabilty. Under ordinary rules of statutory construction, we must consider the language of an act as a whole and construe each part in connection with every other part so as to produce a harmonious whole. *Atencio v. Board of Educ.*, 99 N.M. 168, 655 P.2d 1012 (1982); *Westgage Families v. County Clerk*, 100 N.M. 146, 667 P.2d 453 (1983). "In interpreting statutes, we seek to give effect to the intention of the Legislature, which is to be determined primarily by the language of the statute itself." *Rutledge v. Fort*, 104 N.M. 7, 9, 715 P.2d 455, 457 (1986). "[W]e will not read into the Act language which is not there, particularly if it makes sense as written * * *." *Westgate Families v. County Clerk*, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983). "When the words used are free from ambiguity and doubt, no other means of interpretation should be resorted to." *State v. Sinyard*, 100 N.M. 694, 696, 675 P.2d 426, 428 (Ct. App.1983), *cert. denied*, 100 N.M. 689, 675 P.2d 421 (1984). The phrase "employee dishonesty bond" in Section 58–22–10 is unambiguous and should not be construed to include liability coverage.

Finally, while the *England* case involved liability insurance purchased pursuant to the Tort Claims Act, the sole purpose of which was to protect and benefit the public, the purpose of the fidelity bond in the present action was to protect Title Escrows against acts of dishonesty by its employees. There is a well-recognized difference between contracts of indemnity against loss and contracts of indemnity against liability. This significant distinction has been acknowledged in New Mexico as well as several state and federal courts. *See, e.g., New Mexico Livestock Bd. v. Dose*, 94 N.M. 68, 607 P.2d 606 (1980) (the terms of a faithful performance bond providing coverage for loss sustained by the insured through fraudulent or dishonest acts committed by any of its employees are clear and unambiguous and do not provide liability insurance coverage to third parties); *Ronnau v. Caravan Int'l Corp.*, 205 Kan. 154, 468 P.2d 118 (1970) (a fidelity bond is an indemnity insurance contract whereby one for consideration agrees to indemnify the insured against loss arising from the want of integrity, fidelity, or honesty of employees or other persons holding positions of trust; it is direct insurance procured by a company in favor of itself, as contrasted with insurance running to the benefit of members of the public harmed by the misconduct of the covered individual, which bonds are third-party beneficiary contracts); *Fidelity & Deposit Co. v. Smith*, 730 F.2d 1026 (5th Cir.1984) (an insurance company issuing a comprehensive dishonesty, disappearance, and destruction policy is a fidelity insurer of the insured, not a surety of the insured's em-

ployees; further, a fidelity bond is an indemnity insurance contract because the insurer's liability does not arise until the insured had suffered a proven loss); *Hatch v. Reliance Ins. Co.,* 758 F.2d 409 (9th Cir.), *cert. denied,* — U.S. —, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985) (a complaint by investors of insured company that insurer negligently issued a fidelity bond was without merit as investors in insured company had no direct claim under the fidelity bond; the bond ran solely to the benefit of the insured company); *175 E. 74th Corp. v. Hartford Accident & Indemnity Co.,* 51 N.Y.2d 585, 435 N.Y.S.2d 584, 416 N.E.2d 584 (1980) (regarding a determination as to whether a fidelity bond was a policy insuring against liability asserted by a third party within the meaning of its statute, the New York Court of Appeals stated that the fidelity bond only covered loss to the insured sustained through the dishonesty of its employees and did not contemplate the assertion of a third-party claim). *See also Kriegler v. Aetna Casualty & Surety Co.,* 108 A.D.2d 708, 485 N.Y.S.2d 1017 (1985); *Foxley Cattle Co. v. Bank of Mead,* 196 Neb. 587, 244 N.W.2d 205 (1976).

These cases reflect the courts' concern with initially determining the kind of insurance purchased by the insured. An insured can certainly invest in liability coverage for its company. If a company has liability insurance, it is protected against third party claims for losses which may be caused by its own acts. However, if an escrow company purchases a fidelity bond, as required by New Mexico statutory law, and an employee commits an act of dishonesty against the company, the escrow company can make a claim under its bond, thereby protecting the security of all other items given to it by members of the public to hold in safekeeping. To allow a direct action on that bond would be to risk losing all of the bond money to the first claimant, thereby potentially putting the escrow company out of business and threatening the loss of all other property held by it. As recognized by the district court in this case, such a result could not have been intended by the Legislature. The court stated:

> If we assume a large number of persons who have suffered from the type of dishonesty resulting in loss that is traditionally covered by an employee dishonesty bond, is the first one to the courthouse the one that takes all the money? I don't think the legislature would even listen to that. I think that the legislature * * * in sticking to what appears to be the traditional form of employee dishonesty bond, says once again, "We're going to let the company, the escrow company, determine the loss, make proof of loss, and then recover the funds, and it is these funds that may be subject to judgment at the hands of persons who have been aggrieved." I don't think that with all the experience the legislature has had in mechanics' and materialmen's liens * * * the ranking and priority of nearly every claim that can be made against parties in a number of different circumstances, it's hard to believe that the first person to know about a loss and to run in to get the $100,000.00 that may be available, recovers to the exclusion of the $500,000.00 that have been suffered as a loss by a bunch of other people who have not yet filed in court. I think that the concept that solvency of the company is the basic objective, in the thought that with solvency of the company, there will be protection of the public, probably has not changed.

Because the majority fails to properly recognize the distinction in purpose and coverage between a fidelity bond and a liability insurance policy, I dissent.

737 P.2d 537

WESTERN BANK, a New Mexico Corporation, Plaintiff-Appellant,

v.

AQUA LEISURE, LTD., a New Mexico Limited Partnership, Daniel Angelini, Defendants,

v.

William F. BARNHART, Pool Enterprises, Inc., Dudden Elevators, Inc. and Richard Dudden, Gregory L. Bamford, J. Kent Bamford and Bamford Land Company, Defendants-Appellees.

No. 16612.

Supreme Court of New Mexico.

May 13, 1987.

Rehearing Denied June 4, 1987.

Civerolo, Hansen & Wolf, Dennis E. Jontz, Ross L. Crown, Albuquerque, for plaintiff-appellant.

Johnson & Lanphere, Gerald R. Cole, Albuquerque, for defendants-appellees Pool Enterprises, et al.

Bruce E. Pasternack, Nancy Augustus, Albuquerque, for defendant-appellee Barnhart.

OPINION

SCARBOROUGH, Chief Justice.

Western Bank (Western) appeals a district court order denying Western's motion for summary judgment and granting appellees' cross-motions for summary judgment. Western brought suit on two promissory notes originally executed by Malibu Pools of New Mexico, Inc. (Malibu) and accompanying guaranty agreements signed by William Barnhart, Pool Enterprises, Inc. (not subject to Western's motion for summary judgment), Dudden Elevators, Inc., Richard Dudden, Gregory Bamford, J. Kent Bamford, and Bamford Land Company (appellees). We reverse the summary judgment in favor of appellees.

In 1978 and again in 1980, Malibu borrowed money from Western as evidenced by two notes, the repayment of which was secured by Western's perfected security interest in Malibu collateral. Between February 1978 and September 1981, appellees individually executed continuing guaranty agreements to Western guarantying payment of the two notes. On October 21, 1981, without the prior consent of appellees, Western released Roger Rankin (Rankin), a coguarantor on the Malibu notes, from any further guarantor obligation. Malibu later defaulted on the notes and was placed in bankruptcy.

On October 18, 1983, in conjunction with the purchase of Malibu's assets, Aqua Leisure, Ltd. (Aqua) entered into a written agreement with Malibu and Western in which Aqua agreed to assume and be responsible for the Malibu notes. Pursuant to the assumption agreement (Aqua agreement), interest and payment terms on the Malibu notes were changed. New guarantors with additional security were brought in, and Malibu conveyed its interest in the Malibu collateral to Aqua subject to Western's security interest. Paragraph seven of the Aqua agreement provided that existing guaranties should remain in place as they then currently applied. With the exception of Pool Enterprises, Inc. (Pool), all appellees approved and signed the agreement.

This case presents four issues for decision:

1. Were appellees released from their guaranty obligations by the release of coguarantor Rankin; and if so, to what extent?
2. Were appellees released from their guaranty obligations by Aqua's assumption of Malibu's debts?
3. Was summary judgment in favor of Western precluded by appellees' allegations that Western disposed of collateral in a commercially unreasonable manner?
4. Was summary judgment in favor of Western against appellee Dudden Elevators, Inc. (Dudden) precluded by Dudden's claim of economic coercion?

ISSUE (1):

Paragraph seven of the Aqua agreement is silent as to the consequences of the release of Rankin as a coguarantor. Western argues that this paragraph establishes appellees' after-the-fact consent to the Rankin release. Appellees disagree and claim they were discharged as guarantors of the Malibu notes because Rankin was discharged without their consent. We agree with appellees.

A guarantor is discharged from his obligation if there is a material change in the obligation unless the guarantor consents to the change. *See Pacific Nat'l Agric. Credit Corp. v. Hagerman,* 39 N.M. 549, 51 P.2d 857 (1935). Rankin's release

materially changed appellees' guaranty obligations. In view of the favored status of guarantors and of the principle that a guarantor's liability will not be extended by implication (*see Shirley v. Venaglia,* 86 N.M. 721, 724, 527 P.2d 316, 319 (1974)), we do not read paragraph seven of the Aqua agreement to constitute after-the-fact consent to the release of Rankin; the agreement does not mention the Rankin release. Therefore, at the time the parties entered into the Aqua agreement, appellees had already been discharged as guarantors on the two Malibu notes to the extent allowed by law.

Appellees contend that they were completely discharged as guarantors by virtue of their lack of consent to Rankin's release. Western, on the other hand, contends that appellees were discharged only to the extent of their right of contribution from Rankin. We are of the opinion that appellees are not entitled to a complete release from their guaranty agreements; rather, they are entitled to discharge only to the extent of their right to contribution from Rankin.

At common law, the release of one surety without the consent of cosureties operated to totally discharge the remaining sureties;

> [b]ut in most jurisdictions this common-law rule has been modified or departed from by the interposition of equitable principles according to which the cosurety is granted a release from liability to the extent to which he suffered actual prejudice * * * exonerating him to the extent to which he could have claimed contribution from his cosurety had the latter not been released.

74 Am.Jur.2d *Suretyship* § 83 (1974); *see also* Restatement of Security § 135 (1941); *cf. Clark Leasing Corp. v. White Sands Forest Prods., Inc.,* 87 N.M. 451, 455–56, 535 P.2d 1077, 1081–82 (1975) (secured party's failure to dispose of collateral in a commercially reasonable manner does not result in forfeiture of right to deficiency, but only requires reduction of the claimed deficiency by the amount of any loss occasioned by such failure). Equity is best served by the modified rule. We therefore adopt the rule that where a surety is released without the consent of cosureties, the cosureties are discharged only to the extent that they were prejudiced by the release, i.e., to the extent of their right to contribution from the released surety. Appellees therefore remained liable on the Malibu guaranties and were discharged only to the extent of their right to contribution from Rankin.

ISSUE (2):

Appellees claim the Aqua agreement was a new contract with a new debtor, Aqua, and argue that the Aqua agreement extinguished the Malibu debts and discharged appellees as Malibu guarantors by operation of law. The trial court was obviously persuaded by appellees' arguments. It found there was a novation, a substituted contract with Aqua, which discharged appellees as guarantors of the Malibu debt. If there was a novation, it must be inferred from the conduct of the parties; substitution of one contract for the other was not mentioned in the Aqua agreement. Western denies that there was a novation and argues that it had no intention of releasing appellees by executing the Aqua agreement.

There are several features of a novation. *See Sims v. Craig,* 96 N.M. 33, 35, 627 P.2d 875, 877 (1981). One feature is the extinguishment of the old obligation. Moreover, " '[i]n order to effect a novation there must be a clear and definite intention on the part of all concerned [that a novation take place].' " *Id.* (quoting 58 Am.Jur.2d *Novation* § 20 (1971)). There was no express extinguishment of the Malibu notes, and there is no evidence in the record to suggest that Western intended to extinguish the Malibu debt: the Malibu notes were not marked paid; they are the basis of and are attached to Western's complaint. We therefore decline to infer a novation from the facts of this case.

Importantly, all appellees except Pool signed the Aqua agreement in which they expressly agreed to be Aqua's guarantors to the extent they were then Malibu's guar-

antors, i.e., according to the terms of their guaranties and taking into account their partial discharges resulting from Rankin's release. In sum, the Aqua agreement was an assumption agreement and not a substitute contract or novation. The trial court erred in reaching a contrary conclusion.

Appellee Pool was granted summary judgment on its cross-motion against Western. Pool was a guarantor of the Malibu notes but did not sign the Aqua agreement. As already stated, Pool is entitled to discharge from its guaranty of the Malibu notes to the extent of its right to contribution from Rankin. Although we have concluded that the Aqua agreement did not constitute a novation, questions of fact remain concerning whether Pool consented to the terms of the Aqua agreement and whether, absent consent, the Aqua agreement materially changed the nature of Pool's obligation so as to completely discharge Pool from liability. The trial court erred in ruling as a matter of law that Pool was discharged from its guaranty obligation.

ISSUE (3):

Appellees argue that Western was obligated to dispose of the Malibu collateral in a commercially reasonable manner. A similar argument was rejected by us in *American Bank of Commerce v. Covolo,* 88 N.M. 405, 540 P.2d 1294 (1975). The rights of the guarantor as against the creditor are determined by the terms of the contract between them. *Id.* at 408, 540 P.2d at 1297. The continuing guaranty agreement signed by each appellee specifically provides that Western may "sell, at public or private sale, and for such price and upon such terms as it may deem reasonable, any collateral now or hereafter held by it ... without in any manner affecting the liability of the [guarantor]." The language of the contract between the parties affords appellees none of the rights they assert in connection with Western's disposal of the Malibu collateral. Western's alleged failure to dispose of collateral in a commercially reasonable manner therefore should not preclude entry of summary judgment in favor of Western.

ISSUE (4):

Appellee Dudden claims there are further unresolved factual issues which preclude entry of summary judgment against it. Dudden claims there is a factual dispute concerning the signature on the guaranty agreement, and it claims evidence exists showing that the Dudden guaranty was secured by economic coercion or duress. Western says Dudden never raised these defenses in the trial court. We observe that Dudden admitted execution of the guaranty in its answer to Western's complaint. Deposition testimony of Richard Dudden, who signed the guaranty on behalf of Dudden, indicated the guaranty was signed to forestall Western from instituting collection action against Malibu on a delinquent account. Agreeing to forbear from collection action on a delinquent account in exchange for a guaranty does not constitute economic coercion or duress. *See B & W Construction Co. v. N.C. Ribble Co.,* 105 N.M. 448, 734 P.2d 226 (1987). Dudden's arguments are frivolous and should not preclude entry of summary judgment in favor of Western.

Costs of this appeal are assessed against appellees. The summary judgment in favor of appellees is reversed, and this case is reinstated on the docket of the district court for action consistent with this opinion.

IT IS SO ORDERED.

STOWERS and WALTERS, JJ., concur.

737 P.2d 541

FIREMAN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, Plaintiff-Appellee,

v.

Mary Jo BUSTANI, Individually and as Personal Representative of the Estate of Debra Lynn Bustani, Deceased, and Hilary Earnest Harding, Individually and a Personal Representative of the Estate of Robert Dale Harding, Deceased, Defendants-Appellants.

Hilary Earnest HARDING, Individually and as Personal Representative of the Estate of Robert Dale Harding, Deceased, Plaintiff-Appellant,

v.

Doris LUCERO, Defendant.

No. 16569.

Supreme Court of New Mexico.

May 20, 1987.

Roger A. Wagman, Albuquerque, for defendant-appellant Harding.

Ray Tabet, Albuquerque, for defendant-appellant Bustani.

Farlow, Simone, Roberts & Weiss, Randal W. Roberts, Albuquerque, for plaintiff-appellee.

OPINION

WALTERS, Justice.

Fireman's Fund filed an interpleader action in state district court, depositing $100,000 in the court registry. Following developments in a federal court proceeding related to Fireman's liability, it was allowed to dismiss its interpleader suit. The plaintiffs appeal and we affirm.

FACTS

On March 21, 1982, Doris Lucero (not a party to this appeal) was involved in an automobile accident in which Debra Bustani and Robert Harding were killed. Shortly thereafter, Mary Jo Bustani, a Florida resident, filed a suit for the wrongful death of her daughter in federal district court. On January 8, 1985, Fireman's Insurance Company, Lucero's insurer, filed its interpleader action and suit for injunction, naming Bustani, the personal representative of Robert Harding's estate (Harding), and Donna Apodaca (no longer a potential claimant) as defendants. Upon the district court's order, Fireman's paid the limits of the liability insurance policy into the court registry. The Harding estate then filed a wrongful death action in state district court, and sought to intervene in the interpleader action, moving also to consolidate the two cases. Consolidation was granted.

On June 28, 1985, the Bustani wrongful death action went to trial in federal district court. The federal court suggested that the suit be dismissed without prejudice until the interpleader matter had been resolved. Bustani elected to proceed in federal court, and a jury returned a special verdict in favor of Lucero of no liability. Appeal of that verdict is still pending.

Bustani and Harding, in February 1986, jointly moved for distribution of the interpleaded funds. In response, Fireman's pursuant to SCRA 1986, 1-041(A)(2), sought dismissal without prejudice of its interpleader action, asserting that the

funds should be returned because Bustani's claim was barred by the federal verdict, leaving the Harding estate as the single claimant. Fireman's urges that one purpose of interpleader is to protect a stakeholder from the threat of exposure to "double or multiple liability," SCRA 1986, 1–022, and because only one claimant remained, the need for interpleader had disappeared. On that basis, the district court, following a hearing on motions of all parties, entered an order denying the joint motion of Bustani and Harding to distribute the interpleaded funds, and granting Fireman's motion to dismiss.

DISCUSSION

This is a case of first impression in New Mexico. We have not found case law from other jurisdictions addressing the specific issue raised by Bustani and Harding, that is:

> Whether the filing of an interpleader action constitutes an irrevocable admission of liability to the extent of the funds deposited, thereby precluding a trial judge from granting a motion for dismissal and withdrawal of the funds?

Fireman's deposit of the money was conditioned upon the court's ruling regarding entitlement of the respective claimants to the proceeds, as evidenced by allegations that all of the named defendants had claimed or might claim a right to the proceeds of the insurance policy, and by Paragraph 2 of Fireman's prayer for relief, which requests the court to

> order that the Defendants who may make claim to the proceeds herein described *interplead and establish their respective claims* and that the Plaintiff be discharged from any *other or further* liability to said Defendants by virtue of the payment of full amounts of the proceeds under the registry of the Court. (Our emphasis.)

According to 48 C.J.S. *Interpleader*, § 31 at 183, the general rule in interpleader actions is that "[p]ayment or deposit of the fund or property into court ordinarily constitutes an admission by the stakeholder that he is liable to someone."

We note, however, that Rule 1–022 of the New Mexico Rules of Civil Procedure expands the nature of interpleader to avoid the general rule. SCRA 1986, 1–022. Traditionally, one of the essential requirements in an equitable interpleader action was that the plaintiff seeking interpleader be entirely indifferent to the conflicting claims, asserting no interest in the fund or property deposited. Interpleader relief under the rule now provides for a new and more liberal joinder in the alternative. It is no longer a ground for objection that "the plaintiff avers that he is not liable in whole or in part to any or all of the claimants." *Id.*

Construing defendant's pleadings to do substantial justice, as we must (*see* SCRA 1986, 1–008(F)), especially in view of the verdict in federal court which effectively removed one of the likely claimants to any entitlement to the insurance proceeds, we believe Fireman's adequately raised a question of entitlement and put at issue the obligation of all of the claiming parties to "establish their respective claims" to any part of the fund before it be distributed.

Since the turn of events following the filing of the interpleader action eliminated Bustani and Apodaca as potential claimants (Bustani by verdict and Apodaca by default), only one claiming defendant now remains. That party's entitlement to any recovery still can be settled or litigated expeditiously and without prejudice to the estate's recovery against Lucero if that be the result after trial.

To affirm the trial court would effect no harm to either Fireman's or the Harding estate, since the estate will be required to "establish" its case in its pending suit against Lucero, just as it would have been required to do in the interpleader action.

For the foregoing reasons, we affirm the trial court and remand for further proceedings in the Harding wrongful death action.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and RANSOM, J., concur.

737 P.2d 543

Maria Concepcion BACA, Personal Representative of the Estate of Felix Vallejos Baca, Deceased, Plaintiff-Appellant,

v.

Ramon MARQUEZ, M.D. and Russell H. Kesselman, M.D., Defendants-Appellees.

No. 8482.

Court of Appeals of New Mexico.

Jan. 22, 1987.

Certiorari Quashed May 21, 1987.

Mary L. Vermillion, Aguilar, Vermillion & Kirkwood, Albuquerque, for plaintiff-appellant.

W. Robert Lasater, Jr., Ellen G. Thorne, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee Ramon Marquez, M.D.

Alice Tomlinson Lorenz, Miller, Stratvert, Torgerson & Brandt, P.A., Albuquerque, for defendant-appellee Russell H. Kesselman, M.D.

William H. Carpenter, Carpenter Law Offices, Ltd., Albuquerque, for New Mexico Trial Lawyers Ass'n amicus curiae.

OPINION

GARCIA, Judge.

Plaintiff appeals from the trial court's assessment of costs in proportion to the percentages of negligence found by the jury.

FACTS

Plaintiff's claim for medical malpractice was tried to a jury which determined that plaintiff's decedent was 80% negligent, defendant Ramon Marquez, M.D., was 15% negligent and defendant Russell H. Kesselman, M.D., was 5% negligent.

Plaintiff subsequently filed a cost bill. Defendant Kesselman responded with objections and a motion to strike cost bill where he raised the issue of the propriety of apportioning costs in proportion to the percentage of fault. Following hearings on these matters, the trial court issued a memorandum opinion determining that, although plaintiff was the prevailing party, the trial court had discretion to apportion the costs under the circumstances of the case. The trial court allowed plaintiff to partially recover her costs, assessing 5% against defendant Kesselman and 15% against defendant Marquez.

ISSUE

The sole issue on appeal is whether the trial court erred and abused its discretion by awarding costs in proportion to the percentages of negligence found by the jury. We hold that the trial court's decision to

assess costs on the basis of comparative fault, as articulated in its well reasoned memorandum opinion, was within its discretion and we affirm.

DISCUSSION

We first address defendants' contention that plaintiff failed to preserve this issue for appeal. Under the facts of this case, we do not agree. There is a twofold purpose in stating an objection: to alert the trial court to error and to preserve the issue for review. *See El Paso Electric Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 651 P.2d 105 (Ct.App.1982). Here, defendant Kesselman raised the issue in his motion to strike cost bill and objections to cost bill. Additionally, the trial court was clearly aware of the issue of whether to assess costs in proportion to the negligence of the parties since it specifically addressed this issue in the memorandum opinion. Consequently, we believe the issue was preserved.

Under NMSA 1978, Civ.P. Rule 54(e) (Cum.Supp.1985), costs may be awarded "to the prevailing party unless the court otherwise directs." Pursuant to this rule, we have held that "the matter of assessing costs * * * lies within the discretion of the trial court, and an appellate court will not interfere with the trial court's exercise of this discretion in this regard, except in the case of abuse." *Hales v. Van Cleave*, 78 N.M. 181, 185, 429 P.2d 379, 383 (Ct.App.), *cert. denied*, 78 N.M. 198, 429 P.2d 657 (1967); *see also In re Estate of Head*, 94 N.M. 656, 615 P.2d 271 (Ct.App.1980).

In the case of *Eichel v. Goode, Inc.*, 101 N.M. 246, 680 P.2d 627 (Ct.App.1984), the trial court awarded costs against the defendants, nearly in proportion to their liability. We upheld the trial court's award determining that there was no abuse of discretion. Further, we held that a direct relation of percentage of fault to cost was not required; rather, the matter was within the trial court's discretion. *Id.* at 252, 680 P.2d 627. A related argument was advanced in *Jaramillo v. Fisher Controls Co.*, 102 N.M. 614, 698 P.2d 887 (Ct.App. 1985), where the defendant complained because the trial court failed to apportion costs based on the percentage of liability. Again, we affirmed the trial court, recognizing wide discretion in the granting of costs. There need be no direct relation between percentage of fault and costs, *Robison v. Campbell*, 101 N.M. 393, 683 P.2d 510 (Ct.App.1984), but it is within the trial court's discretion to award costs in such a manner. Trial courts are under no compulsion to apportion costs on the basis of fault, yet, in exercising their discretion, they may do so if they wish. The trial court determined that costs should be assessed against defendants in proportion to their fault and had wide latitude to so decide. Thus, the trial court is affirmed.

IT IS SO ORDERED.

DONNELLY, C.J., and FRUMAN, J., concur.

737 P.2d 544

Reginald Lee WALKER, Plaintiff-Appellant,

v.

John MARUFFI, Joseph Polisar, K. Kraemer, Richard Ness, Elroy "Whitey" Hansen, and City of Albuquerque, Defendants-Appellees.

No. 8128.

Court of Appeals of New Mexico.

March 19, 1987.

Certiorari Denied May 14, 1987.

John L. Walker, Albuquerque, for plainitff-appellant.

Barbara J. Merryman, Asst. City Atty., Wayne C. Wolfe, Paul L. Civerolo, David A. Baca, Civerolo, Hansen & Wolfe, P.A., Albuquerque, for defendants-appellees.

OPINION

MINZNER, Judge.

This tort case has been pending on our docket and ready for submission since February of 1985. In August of 1986, upon the recommendation of and with the assistance of the State Bar of New Mexico, which assistance is greatly appreciated, this court adopted an experimental plan pursuant to which cases would be assigned to advisory committees of experienced attorneys. Pursuant to our order adopting the plan, once the advisory committee rendered an opinion, that opinion would be served on the parties with an order to show cause why the opinion should not be adopted as the opinion of the court. The parties would then have the opportunity to submit response memoranda to the court.

This case was submitted to an advisory committee and the parties were so notified. That committee rendered a unanimous opinion which proposed to decide the case in favor of the plaintiff. The parties were notified of the opinion and of their right to submit response memoranda. Defendants and plaintiff filed timely response memoranda. We scheduled oral argument, and we have considered the record on appeal, the original and supplemental briefs in this case, the opinion of the advisory committee, both responses, and the contentions at oral argument. It is the decision of the court that the opinion of the advisory committee should be adopted, as modified, as follows.

BACKGROUND.

This case raises again the question of the statute of limitations to be applied for civil rights actions filed in the New Mexico state courts. We first state the facts, briefly review other cases in which the question has been discussed, and then state the appellate issues.

On February 20, 1984, plaintiff brought suit against the City of Albuquerque and five Albuquerque police officers in the Bernalillo County District Court, alleging various counts arising under the Civil Rights Act of 1871, codified as 42 U.S.C. Section 1983 *et seq.* (1982). The complaint alleged a number of violations of plaintiff's constitutional rights. The record is unclear as to exactly when the alleged constitutional violations ceased so as to begin the running of the proper statute of limitations. However, there appears to be no dispute between the parties that all events took place more than two years prior to the filing of

this action, and at least some events took place within three years prior to the filing of this action.

On May 18, 1984, defendants answered and moved to dismiss the complaint on the ground that the action was barred by the two-year statute of limitations provided by the New Mexico Tort Claims Act, NMSA 1978, Section 41-4-15 (Repl.1986). After a hearing, the district court granted defendants' motion to dismiss, ruling that the case was controlled by the supreme court's decision in *DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 563, 642 P.2d 166 (1982).

In *DeVargas v. State,* the supreme court quashed a writ of certiorari, stating:

> Under New Mexico law, the most closely analogous state cause of action is provided for by the New Mexico Tort Claims Act under Section 41-4-12, N.M. S.A.1978. The statute of limitations applicable to a cause of action under Section 41-4-12 is set forth in Section 41-4-15, N.M.S.A.1978. Under Section 41-4-15, the action must be commenced within two years after the occurrence which results in the injury.

Id. at 564, 642 P.2d at 167. After that decision, an inconsistency existed between state and federal courts as to the relevant statute of limitations.

In *Gunther v. Miller,* 498 F.Supp. 882 (D.N.M.1980), a federal district court had ruled that the general limitations periods provided by New Mexico law applied to Section 1983 claims. *See* NMSA 1978, § 37-1-4 (four years, unspecified actions); NMSA 1978, § 37-1-8 (three years, injury to person or reputation). The court expressly rejected the two-year limitations period provided in Section 41-4-15 of the New Mexico Tort Claims Act as inappropriate, reasoning that state tort claims acts are based on concepts of sovereign immunity alien to the purposes served by the Civil Rights Act. This court subsequently rejected the reasoning of the federal district court; we concluded that either the three-year limitations period in Section 37-1-8 for personal injuries or the two-year period in Section 41-4-15 of the Tort Claims Act was a more appropriate limitations period. *See DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 447, 640 P.2d 1327 (Ct.App.1981), *cert. quashed,* 97 N.M. 563, 642 P.2d 166 (1982). Although we stated that the two-year period was the most appropriate, we declined to reach the issue because plaintiff's claims were barred under either period. In quashing its writ, the supreme court agreed with this court that the appropriate limitations period was the two-year period provided in Section 41-4-15.

Between the time plaintiff filed his complaint and the time defendants answered and moved for dismissal, the Tenth Circuit held, on appeal from a decision of the New Mexico federal district court, that selection of the statute of limitations applicable to Section 1983 claims is a matter of federal law and that the most appropriate limitations period for Section 1983 claims is the three-year period for personal injuries found in Section 37-1-8. *See Garcia v. Wilson,* 731 F.2d 640 (10th Cir.1984), *aff'd,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

Plaintiff argued to the trial court that *DeVargas v. State* did not control because the selection of the appropriate statute of limitations for Section 1983 claims is a matter of federal law. Under *Garcia v. Wilson,* he contended, the three-year statute of limitations for injury to the person or reputation of any person provided by Section 37-1-8 is the appropriate statute of limitations. Plaintiffs also argued to the trial court that in an opinion subsequent to the decision in *DeVargas v. State,* the supreme court recognized a significant distinction between claims brought under Section 1983 and those brought under the Tort Claims Act. *See generally* Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act,* 13 N.M.L.Rev. 1, 45-50 (1983) (discussing *Wells v. County of Valencia,* 98 N.M. 3, 644 P.2d 517 (1982)).

As we understand plaintiff's argument at trial, it had two parts: (1) the supreme court had never addressed the issue of whether federal law controlled the characterization of Section 1983 claims; and (2) if

addressed, that issue should be resolved as the Tenth Circuit had resolved it in *Garcia v. Wilson.* The trial court ultimately rejected the argument on the ground that the relevant issues were questions of state law. The court stated in its letter decision: "Until such time that the Supreme Court of the United States rules to the contrary, the *DeVargas* case is the law in the State of New Mexico to which the trial courts are bound." The order of dismissal was entered August 22, 1984.

Plaintiff appealed, making the same argument he had made at trial, as well as a claim that the two-year statute of limitations provided by the Tort Claims Act is not consistent with the broad remedial purpose of Section 1983.

While the present appeal was pending in this court, the United States Supreme Court issued its opinion in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). On appellant's motion, this court granted the parties the right to file supplemental briefs. As a result, the appellate issues before this court became (1) the effect of *Wilson v. Garcia,* and (2) whether that case controls the timeliness of plaintiff's complaint, or rather should be given purely prospective effect.

EFFECT OF *WILSON v. GARCIA.*

Defendants assert that we are not bound by *Wilson v. Garcia* because *DeVargas v. State* was not expressly or impliedly overruled. They contend that in this case the supremacy clause of the United States Constitution does not apply. *See* U.S. Const. art. VI, clause 2. They also urge that even if under the supremacy clause *Wilson v. Garcia* might otherwise apply, we are constrained under the principles enunciated in *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) and *State v. Manzanares,* 100 N.M. 621, 674 P.2d 511 (1983) to apply the two-year limitations period approved in *DeVargas v. State.* We address these contentions separately.

First, *Wilson v. Garcia* holds that the choice of the applicable state statute of limitations in a Section 1983 case is a matter of federal, not state, law. We are bound by decisions of the United States Supreme Court affecting federal law. *Bourguet v. Atchison, Topeka & Santa Fe R.R.,* 65 N.M. 200, 334 P.2d 1107 (1958).

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal.

United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), *cert. denied,* 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971).

The Civil Rights Act of 1871 does not contain a statute of limitations. 42 U.S.C. Section 1988 provides, in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts ... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect....

However, the United States Supreme Court has stated that the federal courts are to apply the state statute of limitations governing the cause of action provided by state law which is most closely analogous to 42 U.S.C. Section 1983 and which is not inconsistent with the constitution and laws of the United States. *Board of Regents of the University of the State of New York v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

The Supreme Court, in *Wilson v. Garcia,* was guided by the principles set forth in *Burnett v. Grattan,* 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). In that case, the Court set forth a three-step process in determining, pursuant to Section 1988, the proper rules of decision applicable to civil rights claims:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts

undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."

Id. at 47–48, 104 S.Ct. at 2928 (citations omitted) (*quoted in Wilson v. Garcia,* 471 U.S. at 267, 105 S.Ct. at 1942).

Because no "suitable" federal statute of limitations exists for Section 1983 claims, the Court determined, in *Wilson v. Garcia,* that the case "principally involve[d] the second step in the process: the selection of 'the most appropriate,' or 'the most analogous' state statute of limitations to apply." 471 U.S. at 268, 105 S.Ct. at 1943. Writing for the Court, Justice Stevens concluded that the selection of the appropriate state statute of limitations was a question of federal rather than state law. He explained:

> Our identification of the correct source of law properly begins with the text of § 1988. Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law—the second step in the process—should not be undertaken before principles of federal law are exhausted. The characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. *Since federal law is available to decide the question, the language of § 1988 directs that the matter of characterization should be treated as a federal question.* Only the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.
>
> This interpretation is also supported by Congress' third instruction in § 1988: state law shall only apply "so far as the same is not inconsistent with" federal law. This requirement emphasizes "the predominance of the federal interest" in the borrowing process, taken as a whole. [Footnotes and citation omitted.]

471 U.S. at 168–269, 105 S.Ct. at 1943. (Emphasis added.)

The Court went on to explain why a single characterization rule was necessary. The Court said:

> When § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace. The simplicity of the admonition in § 1988 is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.
>
> Although the need for national uniformity "has not been held to warrant the displacement of state statutes of limitations for civil rights actions," *Board of Regents v. Tomanio,* 446 U.S., at 489 [100 S.Ct., at 1797], uniformity within each State is entirely consistent with the borrowing principle contained in § 1988. We conclude that the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach. [Footnotes omitted.]

471 U.S. at 275, 105 S.Ct. at 1946–47.

For these reasons, *Wilson v. Garcia* characterizes "all § 1983 actions as involving claims for personal injuries" to minimize "the risk that the choice of a state statute of limitations would not fairly serve

the federal interests vindicated by § 1983." 471 U.S. at 279, 105 S.Ct. at 1949. The Court concluded that any choice of a statute of limitations which discriminates between plaintiffs, based upon their choice of forum or the public or private status of the defendants, does not serve the federal interests vindicated by Section 1983.

For New Mexico, the Court identified Section 37-1-8 as the relevant limitations statute. This choice was designed to best insure that "the borrowed period of limitations not discriminate against the federal civil rights remedy." 471 U.S. at 276, 105 S.Ct. at 1947. The Court specifically rejected the Tort Claims Act statute of limitations applicable for wrongs committed by public officials. *See* § 41-4-15. The Court stated that "[i]t was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place." 471 U.S. at 279, 105 S.Ct. at 1949.

The fact that the United States Supreme Court did not expressly overrule *DeVargas v. State* is irrelevant. Every state court that has examined *Wilson v. Garcia* has concluded, as we do, that *Wilson v. Garcia* is controlling in the state courts. *Henderson v. State,* 110 Idaho 308, 311, 715 P.2d 978, 981, *cert. denied,* — U.S. —, 106 S.Ct. 3282, 91 L.Ed.2d 571 (1986) ("In view of the holding in *Wilson,* 42 U.S.C. § 1983 actions in Idaho must now meet the two-year Idaho statute of limitations for personal injury actions"); *Fuchilla v. Layman,* 210 N.J.Super. 574, 583, 510 A.2d 281, 286 (1986) ("In *Wilson v. Garcia* ... the Court made clear that in interpreting a § 1983 claim a state tort claims act period of limitations is inappropriate and the state's general statute of limitations governing personal injury actions should be applied"); *Frisby v. Bd. of Educ. of Boyle County,* 707 S.W.2d 359, 361 (Ky.Ct.App. 1986) ("... the United States Supreme Court determined that a state's personal injury statute of limitation governs § 1983 actions ..."); *cf. Rovenhagen v. Webber,* 143 Ill.App.3d 954, 956, 97 Ill.Dec. 927, 928, 493 N.E.2d 734, 735 (1986) ("... the United States Supreme Court directed each state to select the most appropriate statute of limitations for all Section 1983 claims and, due to the nature of the remedy, suggested that the statute for personal injury actions provided the appropriate limitations period").

Defendants misconstrue *Wilson v. Garcia* as dealing only with a question of state law. The state law questions are the "length of the [statute of] limitations period [for personal injury actions], and closely related questions of tolling and application." 471 U.S. at 269, 105 S.Ct. at 1943. Thus, while a state legislature may choose to shorten or lengthen the limitations period for personal injury claims, and thereby shorten or lengthen the limitations period applicable to Section 1983 claims, it must do so uniformly so as not to discriminate against civil rights claims. New Mexico must follow the United States Supreme Court's characterization rule, and under that rule, at the present time, the statute of limitations for personal injuries is applicable to all Section 1983 claims as a matter of federal law.

Second, we believe we are not constrained by the New Mexico Supreme Court decision in *DeVargas v. State.* We note that the New Mexico Supreme Court quashed its writ of certiorari in a ruling called a "decision." "Decisions" ordinarily are not to be published. *See* SCRA 1986, Rule 12-405. *Cf. Champlin Petroleum Co. v. Lyman,* 103 N.M. 407, 708 P.2d 319 (1985) (court of appeals certified question of continued viability of prior published opinion in light of later United States Supreme Court decision interpreting prior opinion as inconsistent with federal law).

Furthermore, neither this court nor the New Mexico Supreme Court was presented with the issue of which statute of limitations is applicable as a matter of federal law. In *Alexander v. Delgado,* this court was criticized for abolishing a defense to a negligence action which had been presented to the New Mexico Supreme Court and rejected. Therefore, we were precluded from erasing the previously-established precedent. *State v. Manzanares* is likewise inapposite. Although there we attempted to overrule an established prece-

dent as a result of an intervening opinion of the United States Supreme Court, the issues raised presented matters of federal constitutional law previously acknowledged and addressed as such by the New Mexico Supreme Court.

DeVargas v. State presented the question of which state statute of limitations applied as a matter of state law; the parties assumed that the second step in the process of determining the relevant rule was a matter of state law. Neither in that case nor in any other opinion has the New Mexico Supreme Court addressed the question of whether federal or state law controlled the characterization of a Section 1983 claim for statute of limitations purposes. Because *Wilson v. Garcia* resolves a question never presented to the supreme court, the supreme court decision in *DeVargas v. State* is not the controlling precedent.

In an appropriate case, this court may consider whether the New Mexico Supreme Court precedent is applicable. *See State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App. 1977), *overruled on other grounds sub nom. State v. Reynolds,* 98 N.M. 527, 650 P.2d 811 (1982). On these facts, for these reasons, we conclude that *Wilson v. Garcia* controls.

PROSPECTIVE APPLICATION.

We next turn to defendants' assertion that *Wilson v. Garcia* should not be applied to the facts of this case but rather should be applied prospectively. To determine whether a new case should be given only prospective effect, the following factors articulated in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106–107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971) are generally applicable:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, [citation omitted], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, [citation omitted]. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citations omitted.]

Whenry v. Whenry, 98 N.M. 737, 739, 652 P.2d 1188, 1190 (1982) (quoting *Chevron Oil Co. v. Huson*). In applying this analysis, we conclude that neither the first factor nor the second prohibits retrospective application. The critical factor is the third: whether a substantially inequitable result will occur if the rule is applied retrospectively. We think it will not.

Although *Wilson v. Garcia* established a uniform statute of limitations for Section 1983 claims in New Mexico, and this result was not foreshadowed by prior Supreme Court precedent, *see Smith v. City of Pittsburgh,* 764 F.2d 188 (3rd Cir.), *cert. denied,* — U.S. ——, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985), these facts are not determinative as to the first factor. *Id.* Given the inconsistency between federal and state courts, defendant could not justifiably have relied on a two-year limitations period to have barred liability.

If defendants were to have relied on any statute of limitations to set this case in repose, given the state of the law, it would more probably have been the four-year period rather than the two-year period. *See generally DeVargas v. Montoya,* 796 F.2d 1245 (10th Cir.1986) (discussing federal district court precedent in New Mexico prior to *Wilson v. Garcia*). *See also* Davis, *What New Mexico Statute of Limitations Applies in Federal Civil Rights Actions?,* XII The New Mexico Trial Lawyer 37, 47 (April 1984) (indicating that the federal district court had filed its opinion in *Garcia v. Wilson* applying the four-year statute of limitations on July 29, 1982, and had followed its decision consistently).

In their response to the advisory committee opinion, defendants contend that the opinion ignores *Jackson v. City of Bloomfield,* 731 F.2d 652 (10th Cir.1984) (holding that *Garcia v. Wilson* was to be applied prospectively). However, at least one court has expressed the view that *Jackson v. City of Bloomfield* is not applicable after *Wilson v. Garcia. See Fowler v. City of Louisville,* 625 F.Supp. 181 (W.D.Ky. 1985). *Cf. Young v. Biggers,* 630 F.Supp. 590 (N.D.Miss.1986) (distinguishing *Jackson v. City of Bloomfield* because plaintiffs justifiably could have relied on the Tenth Circuit's own precedent to delay filing their employment discrimination suit). This question is one on which the federal courts are divided. *See* cases collected in *Chris N. v. Burnsville, Minnesota,* 634 F.Supp. 1402, 1403, n. 1 (D.Minn.1986). At least one circuit has held that *Wilson v. Garcia* is to be applied prospectively when prospectivity serves to lengthen the statute of limitations and retrospectively when retrospectivity serves to lengthen the statute. *See Gibson v. United States,* 781 F.2d 1334 (9th Cir.1986). The Tenth Circuit has expressly reserved the question of whether *Wilson v. Garcia* will be applied retrospectively if that would serve to lengthen the statute. *Corbitt v. Andersen,* 778 F.2d 1471 (10th Cir.1985).

Defendants also contend that we should not apply *Wilson v. Garcia* because it serves to revive a claim that was barred when plaintiff filed his complaint. We do not think the principle is applicable. *See Dolezal v. Blevins,* 105 N.M. 562, 734 P.2d 802 (App.1987). The claim was not barred under the rule followed in federal court.

In short, we are not persuaded that pure prospectivity is appropriate. *Cf. Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975) (decision abolishing sovereign immunity applied purely prospectively). Plaintiff pursued his claim in state court, raising the very issue that was resolved in his favor by the United States Supreme Court. Because his case was pending on appeal when *Wilson v. Garcia* was decided on April 17, 1985, and the issue of the applicable statute of limitations was properly preserved, defendant is entitled to the benefit of the Supreme Court decision. *Cf. Whenry v. Whenry.*

Accordingly, we hold that the statute of limitations to be applied in this case is the three-year period of Section 37–1–8. We therefore reverse the trial court and remand this case for further proceedings consistent with this opinion.

IT IS SO ORDERED.

This court acknowledges the aid of Attorneys Raymond W. Schowers, James Branch, and J.J. Monroe in the preparation of this opinion. These attorneys constituted an advisory committee selected by the Chief Judge of this court, and this court expresses its gratitude to these attorneys for volunteering for this experimental plan and for the quality of work submitted.

ALARID, J., concurs.

DONNELLY, C.J., concurs in part and dissents in part.

DONNELLY, Chief Judge (concurring in part and dissenting in part).

I respectfully dissent from the majority decision which construes the ruling in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) to have retroactive application in the present case.

I concur with that portion of the majority opinion that determines that under the United States Supreme Court decision in *Wilson,* the applicable New Mexico statute of limitations governing actions grounded upon alleged violations of civil rights under 42 U.S.C. Section 1983, et seq. (1982), is three years. *See* NMSA 1978, § 37–1–4. My disagreement with the majority opinion concerns the issue of whether the ruling in *Wilson* should be applied retroactively.

In *DeVargas v. State,* 97 N.M. 563, 642 P.2d 166 (1982), the New Mexico Supreme Court held that the two-year statute of limitations under the State Tort Claims Act was the controlling statute of limitations. *Wilson* overturned the rationale for *DeVargas* stating that the federal courts would determine the appropriate state statute of limitations applicable to actions for abridgment of civil rights and held that,

"the appropriate statute of limitations for § 1983 actions brought in New Mexico was the 3-year statute applicable to personal injury actions." 471 U.S. at 265, 105 S.Ct. at 1941. The United States Supreme Court decision in *Wilson*, however, did not address the issue of retroactivity.

The complaint in the instant case was filed on February 20, 1984, pleading that the alleged wrongful acts of the defendants occurred in 1981. Thus, at the time plaintiff's complaint was filed in this case, *DeVargas* was the controlling law because *Wilson* was decided on April 17, 1985.

In *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir.1984), the Tenth Circuit Court of Appeals considered an issue similar to that presented herein, and held that under the facts therein, *Garcia v. Wilson* was to be applied prospectively. I would follow that precedent in this case. In the present case, the trial court relied upon *DeVargas* in ruling upon the motion to dismiss. Because *DeVargas* was the controlling authority at the time plaintiff filed the action herein, *Wilson* should not be accorded retroactive application, thus, retroactively modifying *DeVargas* so as to apply to the facts of the case before us. *Cf. State v. Manzanares*, 100 N.M. 621, 674 P.2d 511 (1984).

I would not apply the ruling in *Wilson* retroactively.

737 P.2d 552

Epifanio ARMIJO, Plaintiff-Appellant,

v.

The STATE of New Mexico Through its Agency the TRANSPORTATION DEPARTMENT and the Motor Vehicle Division, Defendant-Appellee.

No. 8824.

Court of Appeals of New Mexico.

March 31, 1987.

Mark J. Riley, Padilla, Riley & Shane, P.A., Albuquerque, for plaintiff-appellant.

Wanda Wilkinson, Transp. Dept., Santa Fe, for defendant-appellee.

OPINION

GARCIA, Judge.

This case involves an appeal from a district court review of an administrative revocation of appellant's driver's license pursuant to NMSA 1978, Section 66–8–112 (Cum.Supp.1986). We are asked to address the question of whether a motorist's statements and other evidence obtained by the police following the traffic stop are admissible at an administrative hearing when the motorist was not given *Miranda* warnings; and, whether the exclusionary rule is applicable to administrative hearings conducted for the purpose of revoking a driver's license.

FACTS

Appellant was stopped by an off-duty motorcycle police officer when the officer observed appellant's truck pass through an intersection against a red light. After turning on his emergency signals and stopping appellant, the officer approached the truck and requested that appellant step down. The officer detected a strong odor of alcohol on appellant's breath and observed that appellant had to hold onto the truck for balance after getting out. The officer testified that he asked appellant whether he had been drinking and appellant responded that he had had two beers. The officer then conducted field sobriety tests which appellant failed. The officer suspected appellant of driving while under the influence of intoxicating liquor (DWI) and asked him to get back into his truck while the officer radioed headquarters to dispatch a unit to transport appellant to the detention center.

A second officer arrived at the scene while the first officer was writing a citation to appellant for driving through a red light. The first officer told him that he believed appellant was DWI.

The second officer testified that he considered appellant under suspicion and investigation for DWI and not free to leave the scene of the stop. The second officer approached appellant and questioned him about his drinking. These questions were initiated without advising appellant of his *Miranda* rights. *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant told the officer that he consumed about five beers. The second officer asked appellant to step out of the vehicle and had him repeat the field sobriety tests. The second officer testified that appellant again failed the field sobriety tests and that he was then formally placed under arrest, transported to the Bernalillo County Detention Center and administered a breathalizer test. The results of the test registered a .15% blood alcohol content.

Subsequently, an administrative hearing was held and appellant's driver's license was revoked. Appellant appealed to the district court, NMSA 1978, Section 66–8–112(G), which affirmed the revocation. The district court found that under the facts presented, appellant was not entitled to *Miranda* warnings, and further held that

the exclusionary rule does not apply to civil proceedings.

ISSUE 1

No New Mexico case addresses the question of whether *Miranda* warnings must be given incidental to a routine traffic stop. This issue, however, has been considered by the United States Supreme Court in *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). In *Berkemer,* a case factually similar to our own, the Supreme Court opined that "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda.*" *Id.* at 440, 104 S.Ct. at 3150. The roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation. *Miranda* warnings are required after a traffic stop only if defendant can "demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." *Id.* at 441, 104 S.Ct. at 3151. The fact that the motorist may temporarily feel that he is not free to leave does not render him "in custody" for purposes of *Miranda. See State v. Hackworth,* 69 Or.App. 358, 685 P.2d 480 (1984); *see also State v. Hervey,* 70 Or.App. 547, 689 P.2d 1322 (1984).

Appellant makes much of the fact that the second officer did not believe appellant was free to leave the scene. However, the police officer's subjective state of mind is not the appropriate standard for determining whether an individual has been deprived of his freedom of movement in any significant way. *People v. Wallace,* 724 P.2d 670 (Colo.1986) (en banc); *see also Berkemer v. McCarty; State v. Hackworth.*

In *State v. Bramlett,* 94 N.M. 263, 609 P.2d 345 (Ct.App.1980), this court held that when the officer testified he would have "persuaded" defendant to stay had he tried to walk away, defendant was effectively in custody and entitled to be advised of his rights. However, in *Berkemer,* the Supreme Court disapproved such a test and stated: "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." 468 U.S. at 442, 104 S.Ct. at 3151 (footnote omitted). The question before us is whether a reasonable person in appellant's situation would have understood himself to be in custody or under restraints comparable to those associated with a formal arrest. *People v. Wallace; State v. Hackworth.* We agree with the district court's finding and hold that appellant in this case was not so restrained. To the extent that *State v. Bramlett* is contrary to the holding in this case as well as the holding in *Berkemer v. McCarty* it is overruled.

The cases subsequent to *Berkemer* uniformly hold that noncoercive questioning, necessary to obtain information to issue a traffic citation, does not rise to the level of custodial interrogation requiring *Miranda* warnings. *See, e.g., People v. Wallace; People v. Archuleta,* 719 P.2d 1091 (Colo. 1986) (en banc); *State v. Kuba,* 706 P.2d 1305 (Haw.1985); *State v. Wyatt,* 687 P.2d 544 (Haw.1984); *City of Billings v. Skurdal,* 730 P.2d 371 (Mont.1986); *State v. Hervey.* The same is true of reasonable requests by officers to perform field sobriety tests. *See id.*

The facts in this case do not indicate that appellant was "in custody". That he was asked to repeat the field sobriety tests and answer questions posed by the second officer does not elevate the stop to custody. Generally, custodial interrogation does not occur at a traffic stop based upon: "(1) the routineness of the questions; (2) the generally brief detention; and (3) the fact that such stops are in the public view." *City of Billings v. Skurdal,* 730 P.2d at 374; *see Berkemer v. McCarty.*

The privilege against self-incrimination is not necessarily implicated whenever a person is compelled in some way to cooperate in developing evidence which may be used against him. *State v. Wyatt.* As a general rule, questions asked by offi-

cers during their investigations are not subject to *Miranda* warnings if the defendant is not in custody. *See State v. Swise,* 100 N.M. 256, 669 P.2d 732 (1983). On the scene questioning does not require advisement of *Miranda* rights. *State v. Segotta,* 100 N.M. 18, 665 P.2d 280 (Ct.App.1983). A field sobriety test, in and of itself, does not violate this privilege. *See id.* Inculpatory statements made to police during the traffic stop, prior to formal arrest, are not the product of "custodial interrogation." *See State v. Roberti,* 298 Or. 412, 693 P.2d 27 (1984) (en banc).

In light of the foregoing, appellant's *Miranda* rights were not violated. We affirm on this issue.

ISSUE 2

As noted earlier, the district court held that the rule excluding evidence improperly obtained against a person's constitutional rights does not apply in a civil proceeding. We agree as to noncustodial interrogation. This appeal does not involve a criminal prosecution but, rather, a civil forfeiture procedure. In general, *Miranda* requirements are inapplicable to driver's license forfeiture proceedings, since such a proceeding is civil in nature. *Village of Menomonee Falls v. Kunz,* 126 Wis.2d 143, 376 N.W.2d 359 (Ct.App.1985); *see also Miranda v. Arizona.* Since this case does not involve a criminal prosecution, appellant did not incriminate himself by virtue of his statements and other evidence obtained at the time of the traffic stop.

Nonetheless, because our ruling today only applies to noncustodial interrogation, we do not wish to imply that statements made in custodial situations, in violation of constitutionally protected rights, are admissible in civil proceedings. *See Village of Menomonee Falls v. Kunz.* Fifth amendment rights are retained in a civil forfeiture proceeding. *See id.*

We appreciate that under our legal residuum rule a reviewing court must set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial. *See Young v. Board of Pharmacy,* 81 N.M. 5, 462 P.2d 139 (1969). The Supreme Court did not hold, nor did we, that *Miranda* warnings are never required when police arrest a person for allegedly committing a misdemeanor traffic offense. To the contrary, the Court reaffirmed the principle that a person subjected to *custodial* interrogation is entitled to the *Miranda* safeguards. *Berkemer,* 468 U.S. at 434, 104 S.Ct. at 3147. We note that when the "motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" *See Berkemer,* 468 U.S. at 440, 104 S.Ct. at 3150.

In sum, we adopt the holding in *Berkemer v. McCarty* and hold that routine traffic stops are noncustodial for purposes of *Miranda* warnings. The revocation of appellant's driver's license is affirmed.

IT IS SO ORDERED.

BIVINS and ALARID, JJ., concur.

737 P.2d 555

CIBOLA ENERGY CORPORATION, Appellant,

v.

Gemma O. ROSELLI, Valencia County Assessor, and the County of Valencia, New Mexico, Appellees.

No. 8641.

Court of Appeals of New Mexico.

April 9, 1987.

Joseph T. Sprague, Albuquerque, for Valencia County Valuation Protests Bd.

Louis E. Valencia, Esquibel, Valencia, Sanchez & Griego, Los Lunas, for appellees.

OPINION

GARCIA, Judge.

Appellant Cibola Energy Corporation (Cibola) filed a petition protesting valuations made by the Valencia County Assessor of land in Valencia County, for property taxation purposes. After the hearing, the Valencia County Protest Board (Board) entered an order fixing valuations and Cibola appeals from the portion of that order fixing values for units 6 and 8 in Tierra Grande. Cibola asserts there is insufficient evidence to support the Board's valuations and the decision and order are arbitrary and not in accordance with law. Because the county failed to rebut Cibola's showing on valuations, Cibola further requested that judgment be entered in favor of those valuations. We find Cibola's arguments persuasive.

FACTS

The properties involved in this tax dispute have a checkered past. The last tax assessment on the properties occurred in 1972 when the lands were owned by Horizon Corporation. In its efforts to stimulate and promote land sales, Horizon prepared slick, colorful brochures picturing the vacant land as a virtual utopia. Modern shopping centers, schools, commercial, industrial and residential districts were depicted. Horizon filed subdivision plats with the county, but the land itself remained undeveloped.

The county's initial assessment was based on the intended uses of the property contained in Horizon's brochure: single-family residential, multi-family, industrial and commercial. There were no county zoning restrictions applicable to these properties. Nevertheless, the assessor's valuations, based on Horizon's own use designations, resulted in certain units of property

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Jonathan B. Sutin, Lewis R. Sutin, Sutin, Thayer & Browne, P.C., Albuquerque, for appellant.

being assessed at greater values than others.

The shopping malls, schools, commercial and residential development never materialized. For the most part, the land in question remained barren and undeveloped. In 1981, the Federal Trade Commission issued a cease and desist order against Horizon, prohibiting it from engaging in various sales practices. This effectively brought an end to land sales. After a series of complicated agreements, loans, foreclosures and auctions, Cibola, a gas and exploration company, came to own the lands in question.

In 1984, Cibola filed a formal protest of the county assessor's valuations of lands owned by Cibola in Valencia County. The lands which were the subject of the protest were vacant lands east of Belen and consisting of two parcels; one of approximately 70 acres and the other approximately 3,650 acres.

The Board's valuations of Cibola's lands were that approximately 3,400 acres should be valued at $600 per acre and certain lands abutting the railroad of $400 per acre.

DISCUSSION

ISSUE I

Under NMSA 1978, Section 7-38-28(D) (Repl.1986), the decision of a County Valuation Protest Board is to be set aside if it is:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record taken as a whole; or

(3) otherwise not in accordance with law.

Judicial review of decisions by our agencies are based on the whole record. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 681 P.2d 717 (1984). This requires the courts to review and consider not only evidence in support of one party's contention, but also to look at evidence which is contrary to the finding; the reviewing court must than decide whether, *on balance*, the agency's decision was supported by substantial evidence. *Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 734 P.2d 245 (App. 1987). "Substantial evidence in an administrative agency review requires whole record review, not a review limited to those findings most favorable to the agency order." *Id.*, at 470, 734 P.2d at 248 (quoting *Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n*, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984)). *See also Trujillo v. Employment Sec. Dep't.*

As Professor Louis Jaffe recognized in his definitive commentary on the issue of whole record review, the role of the judge is not that of a machine or "automaton."

> [I]f [a judge] is to apply his conscience to the whole record, then all the elements of the record that would move a man's conscience are relevant. It would seem that the purpose of the "whole record" test is to limit the opportunity for transmuting a preconception into judgment by picking and choosing what will support that preconception and wilfully ignoring whatever weighs against it.

Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record"*, 64 Harv.L. Rev. 1233, 1241 (1951).

We do not reweigh the evidence to the extent that the reviewing court may reach a contrary result from that of the administrative agency when that agency's decision is supported by substantial evidence, but where the evidence as a whole does not support the decision, the reviewing court may reverse. In this case, we hold that the Board's decision is not supported by the record.

NMSA 1978, Section 7-38-6 (Repl.1986) provides in part: "Values of property for property taxation purposes determined by the * * * county assessor are presumed to be correct." This statute places the burden on the taxpayer to overcome the presumption of correctness. However, the burden shifts to the county assessor to show a correct valuation once that burden of correctness is overcome. *Bakel v. Bernalillo County Assessor*, 95 N.M. 723, 625 P.2d 1240 (Ct.App.1980). We turn to the taxpayer's evidence to determine whether the statutory presumption is overcome.

Prior to the protest, the assessor's valuation of Cibola's property was based on the plats submitted to the county by Horizon Corporation. As previously noted, these plats were no more than predictions that never came to pass. The assessor herself admitted that the valuations were incorrect. She could offer no explanation of the values placed on the lots. The county's sole expert witness also testified that the assessor's valuations were inconsistent, unequal, not uniform and without logical pattern. Based on the evidence presented, the county was forced to concede, on appeal, that Cibola carried its burden. The county states "[t]he taxpayer obviously overcame the legal presumption of Section 7-30-6, N.M.S.A. 1978, in favor of the valuations placed on its property by the Assessor."

With the concession that the initial assessment was incorrect, we turn to the record to determine whether the county was able to overcome Cibola's showing. The assessor put on one expert witness in rebuttal who had re-evaluated the property. His re-evaluation, however, did not take into account access to roads, access to utilities, locations, buyer motivations or other variables. It also did not take into account the history of the rural communities, the dramatic changes in the development and development plans or the FTC proceedings. Moreover, the valuation was based on 1980 rather than on 1984, contrary to statute. NMSA 1978, § 7-38-7 (Repl.1986) (property is to be valued as of January 1 of each tax year). Nonetheless, his valuations were still 60% lower than the assessor's. The county's expert could only claim his assessment was 79% accurate. Cibola's expert determined the re-evaluation was only 56% accurate.

The parties also disputed the best use of the land. The properties involved were vacant and many were leased for grazing purposes. The county's expert agreed that the highest and best use of the property is its present use, until such time as development occurs, and that the highest and best *future* use of the property was that of speculative land. Again, the county's expert seems to base this opinion on the plats from Horizon Corporation. This is shaky ground. Additionally, in this same vein, all of Cibola's experts agreed that the failure by the county's expert to consider the location of the land, access to utilities and the like rendered his analysis not credible and unreliable.

The Board determined that the tax assessor's valuations were too high and that Cibola's valuations were too low. We cannot agree, however, that the Board's valuations were "just right." Once the assessor's valuation of the property was rebutted by Cibola, the burden shifted to the assessor to show a correct valuation. *See Plaza Del Sol Ltd. Partnership v. Bernalillo County Assessor*, 104 N.M. 154, 717 P.2d 1123 (Ct.App.1986); *Bakel v. Bernalillo County Assessor.*

In its order, the Board determined that the property was vacant land, not oil and gas property, not mineral property, not residential property, not grazing land and not entitled to a developer discount. While the Board concluded "that there was sufficient evidence of the comparable sales data presented at the hearing to determine the value of the property," we can find nothing in the record to indicate how or why the Board arrived at the valuations it did. It appears that the Board chose valuations in between those offered by Cibola and the assessor's expert as a compromise. This was not appropriate. Although, "[o]nce an error is ascertained, the Board has the power to adjust or correct the valuation in order to equalize the taxpayer's assessment", *Plaza Del Sol Ltd.*, 104 N.M. at 161, 717 P.2d at 1130, "its decision must be based upon competent evidence." *Id.* at 160, 717 P.2d at 1129. A valuation may not be placed on property arbitrarily. Thus, we think it clear from the above that the Board's decision had no sound basis.

ISSUE II

Cibola further argues that since it rebutted the presumption of correctness of the assessor's valuations, judgment should be entered in favor of its own valuations. Since the whole record review standard allows "independent findings by the review-

ing court reaching a contrary result from that of the administrative agency * * * where the decision of the administrative agency is not supported by substantial evidence * * *." *Trujillo*, at 470, 734 P.2d at 248, we agree. *See also Alonzo v. New Mexico Employment Sec. Dep't*, 101 N.M. 770, 689 P.2d 286 (1984). The county's expert testified that the assessor's valuations were inconsistent, unequal, not uniform and without logical pattern; he could not "find that much to argue with" in Cibola's valuation. Cibola did a direct comparison of bulk acreage sales appraisals with a bulk acreage premise. This method of valuation is a generally accepted appraisal technique. *Cf. First National Bank v. Bernalillo County Valuation Protest Bd.*, 90 N.M. 110, 560 P.2d 174 (Ct.App.1977). Cibola's valuation is supported by the whole record in that after rebutting the assessor's valuation and presenting a prima facie case for its own valuation, the Board failed to rebut Cibola's appraisal. *See Bakel v. Bernalillo County Assessor; First National Bank v. Bernalillo County Valuation Protest Bd.* Thus, we reverse the decision of the Board and remand with instructions that the Board enter judgment for Cibola in favor of its valuations.

Finally, as an aside, we address Cibola's complaint regarding the Board's refusal to enter findings of fact and conclusions of law. In failing to make findings of fact and conclusions of law, the Board noted that it "recognize[d] the great expense to the parties which would be incurred to submit same and the Board has not asked the parties to do so." We are not impressed with this reasoning. In fact, Cibola did submit requested findings of fact and conclusions of law to the Board that were evidently ignored. As this court noted in *First National Bank*, 90 N.M. at 115, 560 P.2d 174 (quoting Davis, Administrative Law Treatise, § 16.05 at 444 (1958)):

> The practical reasons for requiring *administrative findings* are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, *irrespective of a statutory requirement.* The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdictions. (Emphasis added.)

Although in this case, from our review of the entire record, we are able to make a determination regarding the Board's findings, this may not always be the case. "For purposes of judicial review, the order must, at least, indicate the reasoning of the board and the basis on which it acted." *Id.* We cannot help but think that the expense incurred by having findings of fact and conclusions of law would be repaid ten-fold by the expense and energy saved on judicial reviews.

In sum, under the standard of whole record review, we find the Board's order to be arbitrary and unsupported by substantial evidence. We reverse the Board's order and remand so that judgment may be entered in favor of Cibola's valuations of the property. Cibola's valuations are supported by competent evidence on the record as a whole.

IT IS SO ORDERED.

DONNELLY, C.J., and APODACA, J., concur.

737 P.2d 559

Perri HAMBY, Plaintiff-Appellant,

v.

Henry GONZALES, M.D., Defendant-Appellee.

No. 8964.

Court of Appeals of New Mexico.

April 14, 1987.

Certiorari Denied May 20, 1987.

Dick A. Blenden, Paine, Blenden & Diamond, Carlsbad, for plaintiff-appellant.

Mark C. Meiering, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendant-appellee.

OPINION

DONNELLY, Chief Judge.

Plaintiff, Perri Hamby, appeals from an order of the trial court dismissing her complaint for medical malpractice for improper venue. The single issue presented on appeal is whether the trial court erred in dismissing plaintiff's complaint grounded upon lack of venue. We affirm.

Plaintiff filed a complaint in the District Court of Eddy County, alleging that the defendant, Henry Gonzales, M.D., negligently performed a hysterectomy upon her without her informed consent. Defendant filed an answer denying the allegation and moved to dismiss the complaint on the ground that venue in Eddy County was improper.

Following a hearing, the trial court announced it would grant defendant's motion but before entry of an order, plaintiff filed an amended complaint alleging that "Plaintiff and Defendant were residents of Hobbs, Lea County, New Mexico, at all times material to the actions of the Defendant, but Plaintiff is now, and at the time of the filing of the original complaint, a resident of Wichita, Kansas, and has been such a resident since 1984." Plaintiff then filed a motion to reconsider to which she attached the affidavit of Judith Anne Moore, a professor of English.

The trial court denied plaintiff's motion to reconsider and entered its order granting defendant's motion to dismiss for lack of venue. Plaintiff contends that the dismissal was improper and that the action could properly be instituted in Eddy County as a transitory action.

The dispositive statute governing venue for actions filed in the district courts is NMSA 1978, Section 38–3–1. The statute provides in applicable part:

> All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows, and not otherwise:
>
> A. first, except as hereinafter provided in Subsection F of this section, relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant or some one of them, in case there be more than one of either, resides; or second, in the county * * * where the cause of action originated * * * *or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides*[.] [Emphasis added.]

Plaintiff essentially argues that under Section 38–3–1(A), she is entitled to file against the defendant in the district court of any of the three counties within the Fifth Judicial District. In furtherance of this contention, plaintiff asserts that the pronoun "either" as used in the underscored portion of subsection A, referring to "in any county in which the defendant or either of them may be found" should be interpreted to mean that plaintiff may, at her election, file the action against defendant in any county in which either the plaintiff or defendant may be found. Thus, according to plaintiff, since she "found" herself in her attorney's office in Eddy County, that county is a proper venue. In making this contention, plaintiff relies on the affidavit of Professor Moore that "either" in the last line, as a parallelism to its use in the prior sentences, means the plaintiff or defendant. While the affidavit does not say exactly that, we accept plaintiff's interpretation.

Notwithstanding plaintiff's arguments, we are persuaded that the trial court properly construed Section 38–3–1(A) as it factually applies to the present case. In interpreting the statute, we look both to the language of the statute and legislative intent. The practical inquiry in construing statutes is to discover and give effect to legislative intent, and so far as practicable, make them harmonious and sensible. *State ex rel. Clinton Realty Co. v. Scarborough,* 78 N.M. 132, 429 P.2d 330 (1967).

Since, at the time of the filing of this action, plaintiff no longer resided in New Mexico, under Section 38–3–1(A) she was required to file suit either in the county where defendant actually resided (Lea County), or where the cause of action originated (Lea County), or in some other county of the judicial district wherein defendant could be actually served with a copy of the complaint and summons. The term "transitory" as used in the statute does not evidence an intent by the legislature to permit a non-resident plaintiff, in her discretion, to select any county within the same judicial district in which to properly file her cause of action against the defendant. Since a plaintiff is not served with process, to adopt plaintiff's construction of the language that she could file her action in any county in the district in which she found herself would bring about an illogical result.

The venue statute, Section 38–3–1, was originally enacted over a century ago, and has been substantially amended by the legislature since its enactment. Venue controls the place of an action. *Peisker v. Chavez,* 46 N.M. 159, 123 P.2d 726 (1942). Venue is determinative of the particular county in which plaintiff's action may be brought. *Kalosha v. Novick,* 84 N.M. 502, 505 P.2d 845 (1973).

It is apparent that the trial court, rather than applying a narrow or technical construction of the statute, properly construed the venue statute in keeping with the original legislative intent. Our reading of the statute is consistent with the result reached by the trial court. In the first portion of the statute, the legislature provided that in the event there were multiple defendants, proper venue for one defendant would determine proper venue for all defendants. *See Teaver v. Miller,* 53 N.M. 345, 208 P.2d 156 (1949). This same intent is applicable to the third provision contained in Section 38–3–1(A).

Section 38–3–1(A) controls the county in which plaintiff's action may properly be initiated. Since plaintiff did not reside in Eddy County at the time her suit was filed, plaintiff was obliged to file the action in the county wherein defendant resided, or in a county included in the judicial district where defendant resides wherein defendant might be found. In this case, the cause could only have been filed in Lea County. We have considered each of the arguments raised by plaintiff and determine that the ruling of the trial court below was correct.

The trial court's order of dismissal is affirmed.

IT IS SO ORDERED.

BIVINS and APODACA, JJ., concur.

737 P.2d 894

Kenneth R. LOPEZ, Deceased, By and Through his surviving Natural Father and Personal Representative, Bonifacio LOPEZ and Lawrence J. Maestas, Plaintiffs-Appellees,

v.

TRUCKSTOPS CORPORATION OF AMERICA, a Florida corporation, Defendant-Appellant,

and

Albert Martinez, Defendant.

No. 9725.

Court of Appeals of New Mexico.

April 14, 1987.

Certiorari Denied May 20, 1987.

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

John M. Wells, Deborah H. Mande, Ruud, Wells & Mande, Albuquerque, for defendant-appellant.

Leof T. Strand, P.C., Albuquerque, for plaintiffs-appellees.

OPINION

FRUMAN, Judge.

This is an interlocutory appeal brought by defendant Truckstops Corporation of America (Truckstops Corporation) from the denial of its motion for change of venue. The issues raised are whether that denial (1) was an abuse of the trial court's discretion, and (2) deprived Truckstops Corporation of a fair trial and violated its constitutional right of due process. Because there has not yet been a trial, we address only the first issue. *Cf. Deats v. State,* 80 N.M. 77, 451 P.2d 981 (1969). We affirm.

In its motion, Truckstops Corporation sought to have venue changed out of the Fourth Judicial District because of a community bias against non-resident corporate defendants, such as Truckstops Corporation. Following an evidentiary hearing, the trial court entered findings of fact and based its decision on those findings. Truckstops Corporation challenges the findings that Guadalupe County residents are not prejudiced against defendant or non-resident corporations; a fair and impartial jury of twelve could be selected who would not be prejudiced against defendant; and the jurors would be faithful to their oath to be fair and impartial and to decide the issues as instructed by the trial court.

Truckstops Corporation contends that the denial of its motion was an abuse of discretion by the trial court because it was only required to show a reasonable apprehension or a well-grounded fear that it could not obtain an impartial jury, and that it met this burden. Where the movant's allegations are not controverted, they must

be accepted as true. *See McCauley v. Ray,* 80 N.M. 171, 453 P.2d 192 (1968). Where, however, evidence is offered in opposition to the motion, the trial court must weigh the evidence, *id.,* make findings, and may either grant or overrule the motion. NMSA 1978, § 38-3-5.

The provisions of the change of venue statute are mandatory when the prescribed steps have been taken, unless the production of evidence is requested. NMSA 1978, §§ 38-3-3, 38-3-5; *State v. Turner,* 90 N.M. 79, 559 P.2d 1206 (Ct.App.1976). Once evidence is requested and a hearing held, the mandatory provisions become discretionary. § 38-3-5; *State v. Turner.* If a hearing is held, it is the duty of the court to determine the question by its findings. *State v. Fernandez,* 56 N.M. 689, 248 P.2d 679 (1952).

■ Since the decision is discretionary with the trial judge, this court reviews only for an abuse of discretion. *State v. Rushing,* 85 N.M. 540, 514 P.2d 297 (1973). We do not believe this standard has changed as a result of *State ex rel. S. Pac. Transp. Co. v. Frost,* 102 N.M. 369, 695 P.2d 1318 (1985). The burden of showing that the trial court abused its discretion in denying the motion for a change of venue is on the movant. *State v. Jimenez,* 84 N.M. 335, 503 P.2d 315 (1972). In this case, we do not believe defendant has met that burden. Defendant's argument, basically, is that the trial judge abused his discretion because he did not accept defendant's evidence and reject that offered by plaintiffs. However, it is the trial court's function to weigh the evidence and determine the credibility of witnesses. *McCauley v. Ray.*

■ In reviewing the evidence presented to the trial court, and discarding all evidence and inferences therefrom that would contradict the decision of the trial court, we find the following. Plaintiffs presented affidavits of six Guadalupe County residents and the deposition testimony of one resident. These residents stated, in effect, that there is no prejudice in the county against non-resident corporations and that a jury of county residents would be fair and impartial. Plaintiffs also presented its expert witness who reviewed and commented upon the testimony of Truckstops Corporation's expert witness.

Truckstops Corporation's expert had reviewed the results of a telephone poll and of a district litigation survey in arriving at his opinion that county residents were prejudiced against non-resident corporations. Plaintiffs' expert characterized the telephone poll as having a critical, fundamental flaw in that the poll was not also conducted in any other community so as to establish a control factor. In his opinion, absent a control factor and by limiting the poll solely to Guadalupe County residents, the poll could not form the basis of an opinion of prejudice. Plaintiffs' expert had also studied the litigation survey of the judicial district and found that the cases reviewed contained too many unidentified variables to permit any meaningful conclusions to be drawn from the survey regarding the existence of prejudice.

In the opinion of plaintiffs' expert witness, defendant's expert did not have sufficient information or evidence to measure or establish the existence of prejudice among the residents of Guadalupe County. Plaintiffs' expert discredited the factors used by defendant's expert, and characterized the methodology used by defendant's expert as misleading and not particularly suitable in determining predictability. Plaintiffs' expert did state that there was a possibility of prejudice, or a difference in attitude, against non-resident corporate defendants, but that no evidence has been presented in this case to substantiate an opinion that such prejudice exists.

Because there is substantial evidence to support the trial court's decision, defendant's assertion of an abuse of discretion must fail. *See State v. Atwood,* 83 N.M. 416, 492 P.2d 1279 (Ct.App.1971). We note that defendant's evidence and the trial court's findings concern Guadalupe County and not the other counties in the Fourth Judicial District. As defendant was requesting a change of venue outside the district, evidence was also required to show that it could not receive a fair trial in any county in the district. *See* NMSA 1978,

§ 38-3-7. Since we are affirming the trial court's decision to retain venue in Guadalupe County, we do not reach this issue.

As oral argument is unnecessary, Truckstops Corporation's request for oral argument is denied. The decision of the trial court in denying the motion for change of venue is affirmed, and this cause is remanded to the trial court for further proceedings.

IT IS SO ORDERED.

ALARID and MINZNER, JJ., concur.

737 P.2d 896

Garrett R. QUINTANA and Richard P. Montoya, Plaintiffs-Appellants,

v.

FIRST INTERSTATE BANK OF ALBUQUERQUE, a National Bank, Defendant-Appellee.

No. 8405.

Court of Appeals of New Mexico.

April 23, 1987.

Certiorari Denied June 1, 1987.

F. Joel Roth, Carl Bryant Rogers, Roth, Van Amberg, Gross, Amarant & Rogers, Santa Fe, for plaintiffs-appellants.

Russell Moore, Kurt Wihl, Keleher & McLeod, P.A., Albuquerque, for defendant-appellee.

OPINION

BIVINS, Judge.

In this lawsuit, plaintiffs sought compensatory and punitive damages against defendant (the Bank) for alleged tortious interference with plaintiffs' contractual or prospective contractual relations. Plaintiffs appeal from an order dismissing their complaint for failure to state a claim upon which relief can be granted. We affirm.

Where the trial court grants a motion to dismiss for failure to state a claim, the allegations of the complaint must be taken as true for the purposes of appeal. *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct.App.1981). The complaint alleged that in April 1984, plaintiffs contracted to purchase from Guardian Property Guild, Inc. (Guardian), commercial rental property located on Menaul Boulevard in Albuquerque. This contract was conditioned on receiving consent from the Bank. As partial payment of the purchase price, plaintiffs agreed to assume two promissory notes held by the Bank that were secured by mortgages against the real property to be sold. One mortgage secured a promissory note with a balance of approximately $1,150,000 and the other secured a note with a balance of approximately $250,000. Both mortgages contained the following provision:

> (i) ACCELERATION. The maturity of the principal indebtedness secured hereby may be accelerated in any of the following events.
>
> ....
>
> (7) If the Mortgagor or assignee sells or conveys (or contracts to sell or convey) all or any part of the mortgaged property without the written consent of the holder of said note.

Guardian sought the consent of the Bank, but the Bank refused, advising Guardian it would consider any sale to plaintiffs "in the absence of the Bank's written consent to constitute a default of the above referenced acceleration provision." The Bank also advised it would consider other prospective purchasers provided they were suitably qualified, and would waive prepayment penalties to facilitate retirement of the loans if Guardian insisted on selling to plaintiffs. Following receipt of a letter from plaintiffs' counsel demanding approval of the assumption of the mortgages and advising that failure to consent would result in a damage action, the Bank responded setting out what it termed the "legitimate business and credit concerns" that influenced its decision not to approve assumption by plaintiffs. These concerns included (1) plaintiffs' lack of the same financial strength and credit history as Guardian; (2) lack of confidence in plaintiffs' ability to perform, based on past experience; and (3) concern over a nonrecourse provision in the larger mortgage that relieved the maker from personal liability. Notwithstanding those concerns, the Bank indicated it would approve plaintiffs if the entire remaining obligation was rewritten into a new note and mortgage. The Bank offered to rewrite the loans at a higher interest rate, with Guardian to become personally liable along with plaintiffs. Plaintiffs declined and Guardian subsequently sold the property to another purchaser, whom the Bank accepted without any change in terms. This suit followed.

Although the parties raised a number of issues below, the trial court based its decision on the absolute discretion of a lender to withhold its consent under the terms of the two mortgages, declining to imply, as urged by plaintiffs, a requirement of "good faith, commercial reasonableness, fairness, justice and right dealing." In refusing to imply the requested language in the mortgages, the trial court relied on the provisions of the "due-on-sale" law, NMSA 1978, Sections 48–7–15 to –24 (Cum.Supp.1985) and *Brummund v. First National Bank of Clovis*, 99 N.M. 221, 656 P.2d 884 (1983).

New Mexico has already determined that due-on-sale clauses in a commercial mortgage are not a restraint on alienation of property. *Brummund v. First Nat'l Bank of Clovis; see also* § 48–7–17. The trial court cited *Brummund* for the proposition that a lending institution should be able to deal with transfers of collateral at its own best discretion. We read *Brummund* to state generally that due-on-sale

clauses are allowed; *Brummund* does not appear to address how much discretion lenders have in exercising options under such clauses. Further, *Brummund* dealt with the actual sale of secured property without the consent of the secured party. In our case, we are concerned only with the pre-sale implications of the Bank's refusal to consent to plaintiffs as new mortgagors, rather than with the post-sale implications of the due-on-sale clause. Plaintiffs urge us to impose a "good faith" requirement on the pre-sale consent required by the Bank. In this respect, *Brummund* provides no guidance because *Brummund* did not reach the issue of whether the acceleration of the balance due on the secured note was predicated on good faith.

We also find it unnecessary to reach that issue here. Because we hold that, apart from the due-on-sale clause, the Bank had the absolute right to decide with whom it wished to do business, any requirements of good faith and commercial reasonableness, which might be involved in the due-on-sale clause, are not pertinent considerations. Instead, our analysis examines the cause of action of tortious interference with contractual or prospective contractual relations.

On that basis, we now turn to the issue of whether the Bank's refusal to accept plaintiffs as mortgagors, or acceptance of them as mortgagors on different terms, constitutes tortious interference with plaintiffs' contractual or prospective contractual relations. We hold it does not and affirm the trial court on that basis. We uphold a decision of a trial court if it is correct for any reason and will not reverse when the correct result is reached. *H.T. Coker Constr. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App. 1974).

To state a claim for tortious interference with existing or prospective contractual relations, plaintiffs must establish that the Bank interfered with an improper motive or by improper means, *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 612 P.2d 241 (Ct.App.1980), or acted without justification or privilege, *Williams v. Ashcraft*, 72 N.M. 120, 381 P.2d 55 (1963). The complaint alleges, at most, that the Bank refused to enter into any business relation with plaintiffs. There is no allegation that the Bank did more. It did not advise Guardian not to do business with plaintiffs; there is no indication it disparaged plaintiffs in any manner. In fact, in the same letter in which it denied consent, the Bank offered to waive any prepayment penalties if Guardian decided to go ahead with the sale to plaintiffs.

The mere refusal to deal with a party cannot support a claim for tortious interference with contractual relations. Restatement (Second) of Torts § 766 comment b (1979). As long as the Bank merely refused to enter into business relations with plaintiffs and left Guardian to make its own decision on what to do about the Bank's refusal, plaintiffs have no cause of action. Restatement, *supra*, comment *l*. As stated in Restatement of Torts § 762 (1939):

> One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not
>
> (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or
>
> (b) a means of accomplishing an illegal effect on competition, or
>
> (c) part of a concerted refusal by a combination of persons of which he is a member.

This section was omitted from the Restatement, *supra*, Section 766, because the American Law Institute felt that the principles stated were more appropriately located in the field of trade regulation than in tort. Restatement, *supra*, Division 9, Introductory Note, at 2. It is still a viable statement of the law and continues to be cited by courts. *E.g., Vermont Nat'l Bank v. Dowrick*, 144 Vt. 504, 512, 481 A.2d 396, 400, n. 1 (1984), and cases cited therein.

In our case, none of the above three conditions can be met, and the Bank was free to reject plaintiffs as mortgagors. The Supreme Court of Vermont, in *Dowrick,* referring to Restatement, *supra,* Section 762, said: "The rationale for this rule 'rests upon fundamental assumptions in free business enterprise. Each business enterprise must be free to select its business relations in its own interest.' *Id.,* comment a. The Restatement also recognizes that the rule covers a situation involving a lender and borrower. *Id.,* comment d." *Id.,* 144 Vt. at 512, 481 A.2d at 400–401.

The Bank's privilege to refuse to do business with plaintiffs existed regardless of the motive for its decision. The fact that the Bank may have denied consent because of the earlier lawsuit is immaterial. *See Turner Constr. Co. v. Seaboard Sur. Co.,* 98 A.D.2d 88, 469 N.Y.S.2d 725 (1983); *see also Posa, Inc. v. Miller Brewing Co.,* 642 F.Supp. 1198 (E.D.N.Y.1986) (holding that refusal to maintain trade relations is an inherent right that every person may exercise lawfully for reasons he deems sufficient or for no reason whatever). Thus, the Bank was privileged to decide not to get involved in business with plaintiffs, and its desire to avoid such business cannot be considered an improper motive.

Plaintiffs seem to argue that the Bank breached its contractual obligations with Guardian and, therefore, used improper means to interfere with plaintiffs' conditional purchase and sale contract. We note that Guardian made no claim that the Bank breached the mortgage provisions or tortiously interfered with Guardian's contractual relations. *See Torgerson-Forstrom H.I. of Willmar, Inc. v. Olmsted Fed. Sav. & Loan Ass'n,* 339 N.W.2d 901 (Minn.1983). Even if it can be said that Guardian had certain contractual rights it could enforce against the Bank, and that the Bank breached its obligation, a breach of a contract with a third party is not the sort of improper means that has been held sufficient to support a claim of tortious interference with contractual relations. *See Kelly v. St. Vincent Hosp.,* 102 N.M. 201, 692 P.2d 1350 (Ct.App.1984) (as a matter of law, violations of corporate bylaws or procedural due process are not improper means sufficient to support a claim of tortious interference with contractual relations).

The right to choose freely one's business relations has been described as a fundamental right, *Posa, Inc. v. Miller Brewing Co.,* and as a fundamental assumption in free business enterprise. *Turner Constr. Co. v. Seaboard Sur. Co.; Vermont Nat'l Bank v. Dowrick.* There is no allegation that the Bank infringed on any established societal interest such as the maintenance of a free and competitive market or freedom from racial or sexual discrimination. *See Posa, Inc. v. Miller Brewing Co.* Plaintiffs had no independent right to demand that the Bank accept them as mortgagors. Since plaintiffs only allege the Bank exercised its fundamental right to choose with whom it will enter into business relations, the complaint fails to state a claim for tortious interference with an existing or prospective contract. *See Martin v. Texaco, Inc.,* 304 F.Supp. 498 (S.D.Miss.1969); *Wolf v. Perry,* 65 N.M. 457, 339 P.2d 679 (1959).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

737 P.2d 1165

STATE of New Mexico
Plaintiff-Appellee,

v.

Ibn OMAR-MUHAMMAD, aka Khayree Omar-Muhammad, aka Loren Jerome Fugett, Defendant-Appellant.

No. 16026.

Supreme Court of New Mexico.

May 13, 1987.

Jacquelyn Robins, Chief Public Defender, Kathryn Hormby, Asst. Appellate Defender Santa Fe, for defendant-appellant.

Hal Stratton, Atty. Gen., Anthony Tupler, Asst. Atty Gen., Santa Fe, for plaintiff-appellee.

OPINION

STOWERS, Justice.

Ibn Omar-Muhammad (defendant) appeals from his second conviction of first degree depraved mind murder, pursuant to NMSA 1978, Subsection 30–2–1(A)(3) (Repl. Pamp.1984), for the death of Allen Gates Cross, a bystander killed when defendant drove through a police roadblock at a speed of approximately 100 miles per hour. Initially, defendant was tried by a jury and convicted of depraved mind murder and three counts of aggravated assault on a police officer. He appealed from the murder conviction, for which he was sentenced to life imprisonment, and this Court reversed, holding that the jury had been instructed improperly on the elements of depraved mind murder. *See State v. Omar-Muhammad,* 102 N.M. 274, 694 P.2d 922 (1985) (*Omar-Muhammad I*).

Upon remand for a new trial on the murder count, defendant again was tried by a jury, convicted of first degree depraved mind murder, and sentenced to life imprisonment. He appeals from this judgment and sentence. We reverse and remand to the district court for a new trial.

This case presents the following issues:

(1) Did the district court commit reversible error when it refused to instruct the jury on homicide by vehicle by reckless driving, pursuant to NMSA 1978, Section 66–8–101 (Cum.Supp.1986) and NMSA 1978, Section 66–8–113, as a lesser included offense of depraved mind murder?

(2) Did the district court commit reversible error when it refused to instruct the jury on homicide by vehicle while under the influence of drugs, pursuant to NMSA 1978, Section 66–8–101 (Cum.Supp.1986), as a lesser included offense of depraved mind murder?

(3) Did the district court commit reversible error when it admitted, for purposes of impeachment, defendant's in-custody statement to police obtained in violation of the requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)?

(4) Did the district court commit reversible error when it allowed cross-examination of defendant regarding his unauthorized departure from a Colorado juvenile detention facility six weeks before the incident for which defendant was tried?

(5) Was defendant denied a fair trial by statements in the prosecutor's closing argument describing defendant's acts in terms not identical to those of the jury instructions given by the district court?

We conclude that the district court should have instructed the jury on the lesser included offenses of vehicular homicide by reckless driving and vehicular homicide while under the influence of drugs. We therefore reverse the district court's judgment and sentence and remand this case for a new trial. Because similar evidentiary questions will arise on retrial, we also

consider the other issues raised by this appeal, discussing each of defendant's contentions separately.

I. Failure to Instruct on Vehicular Homicide by Reckless Driving.

The facts of this case were described in detail in our *Omar-Muhammad I* opinion. The evening before Allen Gates Cross's death occurred on a two-lane state highway north of Clovis, New Mexico, the seventeen-year-old defendant accepted an offer to drive with a stranger, one Mr. Griffin, from his hometown of Oklahoma City, Oklahoma, to California. They left Oklahoma City in Mr. Griffin's red Mercedes between 11 and 12 o'clock the night of September 29, 1983.

Mr. Griffin drove from Oklahoma City to Amarillo, Texas, where he and defendant stopped and slept in the Mercedes for a couple of hours. Setting out again on Interstate 40 shortly after dawn, defendant drove from Amarillo to San Jon, New Mexico. As they drove, they shared a number of marijuana cigarettes. While Mr. Griffin was in a gas station restroom in San Jon, defendant took the car and headed southward.

Driving at sixty-five or seventy miles per hour, defendant first encountered a police vehicle some fourteen miles north of Clovis. He sped away at approximately 100 miles per hour, eluding the officers' attempt to chase him. They radioed ahead, and another officer set up a roadblock by parking his marked vehicle, with emergency lights blinking, in one lane of traffic, and positioning himself, with a gun, in the open lane. As he approached the roadblock, defendant neither stopped nor steered around the officer. He laid his head down on the seat and drove through the open lane of the roadblock, forcing the officer to get out of the way of the Mercedes. Continuing southward at a high rate of speed, defendant pulled into the northbound lane to pass a truck and remained in that lane until he forced a northbound police vehicle off the road. The officer driving that vehicle turned around and, with siren and emergency lights on, pursued defendant.

Further down the road, two police officers set up a two-car roadblock and positioned themselves on the pavement outside their vehicles. Defendant passed the vehicle immediately ahead of his and drove through this roadblock, again with his head on the seat, at approximately 100 miles per hour. When he cleared the roadblock, defendant was aware that he had hit one of the police cars and that his left front tire was damaged. Defendant did not try to stop his vehicle and was unable to control its swerving. The Mercedes hit a stationary hay truck, flew over an embankment into a field, and hit Cross and his motorcycle, killing the young man. The Mercedes continued across the field. When it finally came to rest, defendant emerged and attempted unsuccessfully to run away from the police.

Defendant testified that he did not see the young man or his motorcycle and that he did not know he had struck and killed Cross until he was apprehended by angered police officers. He asserted that he failed to see one of the police vehicles pursuing him, and the lights and markings on the others, because he was not wearing his eyeglasses. He claimed that he attempted to evade the roadblocks because he wanted to go home and was scared of being arrested, in possession of marijuana, by small-town police officers. Defendant believed he could get through the final roadblock because he had seen a vehicle ahead of him do so, and felt that he was driving safely at 95 to 100 miles per hour. He denied wanting to hurt anyone, including the officers at the roadblocks.

The only homicide charge filed against defendant was first degree depraved mind murder, pursuant to Subsection 30–2–1(A)(3). At trial, defendant tendered requested jury instructions on vehicular homicide by reckless driving, pursuant to Sections 66–8–101 and 66–8–113, as a lesser included offense of depraved mind murder. The district court refused to give these instructions, concluding that there was insufficient evidence to support a conviction

for the lesser offense. On appeal, defendant challenges that ruling.

In *Omar-Muhammad I,* this Court established that vehicular homicide by reckless driving is a lesser included offense of depraved mind murder. *See State v. Omar-Muhammad,* 102 N.M. at 278–79, 694 P.2d at 926–27. Comparing the relevant elements of each offense, we concluded that one cannot commit depraved mind murder without also committing vehicular homicide by reckless driving; therefore the lesser offense was "necessarily included" in the greater. *Id.* (citing *State v. DeMary,* 99 N.M. 177, 179, 655 P.2d 1021, 1023 (1982)).

In *Omar-Muhammad I,* we also reiterated the rule that the trial court must give instructions on a lesser included offense only where the evidence could support a conviction for the lesser offense. *Id.,* 102 N.M. at 279, 694 P.2d at 927. We concluded that the evidence offered at defendant's first trial was insufficient to support a conviction for vehicular homicide by reckless driving, and that the trial court therefore had not erred in refusing the defendant's requested instruction. *Id.* In most cases, however, it is for the jury to determine whether the defendant acted with the subjective knowledge of great danger to the lives of others required to establish depraved mind murder or merely with the mental state of conscious wrongdoing (i.e., whether he purposefully did an act the law declares to be a crime) required to establish vehicular homicide. *See State v. McCrary,* 100 N.M. 671, 673, 675 P.2d 120, 122 (1984); *cf. State v. Kappel,* 53 N.M. 181, 186–87, 204 P.2d 443, 446–47 (1949) (first and second degree murder). *See generally State v. Omar-Muhammad,* 102 N.M. at 278, 694 P.2d at 926 (elements of offenses).

We must look at all the evidence adduced in this trial in order to determine whether there was evidence from which the jury could have found that defendant purposefully did an act the law declares to be a crime but lacked a subjective knowledge of the risk posed by his acts. We conclude that there was such evidence, and that the district court therefore erred in refusing to instruct the jury on the lesser included offense of vehicular homicide by reckless driving. Its error cannot be considered harmless, *see State v. Reynolds,* 98 N.M. 527, 529, 650 P.2d 811, 813 (1982), so we reverse defendant's conviction and remand this case for a new trial.

II. Failure to Instruct on Vehicular Homicide While Under the Influence of Drugs.

Defendant testified that when they left Oklahoma City, he and Mr. Griffin possessed about three-quarters of an ounce of marijuana. As they drove from Oklahoma City to Amarillo in the early hours of September 30, 1983, they smoked twelve to fifteen marijuana cigarettes. Back on the road at dawn, they smoked another four to six marijuana cigarettes between Amarillo and San Jon. Approximately one-half hour after defendant left San Jon alone, he sped through three roadblocks and into Cross.

The only direct testimony offered regarding the effect of this marijuana consumption on defendant was his statement that due to his own smoking, he probably could not tell if Mr. Griffin's driving during the night was impaired. Defendant did testify, however, to his thoughts and perceptions during his attempt to elude the police. The police vehicle he forced off the road seemed to lift up off the road and accelerate toward him. He felt that he was driving safely as he outraced the police vehicle on an unfamiliar highway, and he believed that he could safely negotiate the roadblocks by maneuvering in the same manner as slower-moving vehicles ahead. Furthermore, defendant repeatedly expressed his thought that, like in the movie "Smokey and the Bandit," he could get away if only there was a side road onto which he could turn.

At trial, defendant tendered requested jury instructions on vehicular homicide while under the influence of drugs, pursuant to Section 66–8–101, as a lesser included offense of depraved mind murder. The district court refused to give these instruc-

tions. On appeal, defendant challenges that ruling.

Whether vehicular homicide while under the influence of drugs is a lesser included offense of depraved mind murder presents a question of first impression for this Court; defendant did not seek instructions on this offense at his first trial. The instructions tendered by defendant at this trial required proof that "as a result of using a drug, [defendant was] less able, to the slightest degree, either mentally or physically, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to himself and others." SCRA 1986, 14–243. Because depraved mind murder can be committed without proof of such drug-induced impairment, vehicular homicide while under the influence of drugs is not necessarily included in the greater offense charged in the criminal information. *See State v. Omar-Muhammad,* 102 N.M. at 278, 694 P.2d at 926.

Nevertheless, we long ago said that "'[n]ecessarily included' fairly, *though perhaps not best,* expresses the relationship between [different degrees of homicide]." *State v. Burrus,* 38 N.M. 462, 471, 35 P.2d 285, 291 (1934) (emphasis added). We have analyzed felonious homicide, the unlawful taking of human life, as a "generic offense" encompassing several degrees or forms. *See id.,* 38 N.M. at 468, 35 P.2d at 289; *see also State v. Ulibarri,* 67 N.M. 336, 338, 355 P.2d 275, 276 (1960); *State v. Roy,* 40 N.M. 397, 412, 416–17, 60 P.2d 646, 655, 658 (1936); *cf. State v. King,* 90 N.M. 377, 379, 563 P.2d 1170, 1172 (Ct.App.1977) (open charge of murder), *overruled on other grounds, State v. Reynolds,* 98 N.M. 527, 650 P.2d 811 (1982). We repeatedly have held that it is error for the trial court to refuse to instruct on a degree of homicide for which there is substantial evidence, and error to submit a degree of homicide for which there is no evidence. *See Torres v. State,* 39 N.M. 191, 193, 43 P.2d 929, 930 (1935) (quoting *State v. Reed,* 39 N.M. 44, 47, 39 P.2d 1005, 1006 (1934)); *see also State v. Omar-Muhammad,* 102 N.M. at 279, 694 P.2d at 927; *Smith v. State,* 89 N.M. 770, 774, 558 P.2d 39, 43 (1976); *State v. Ulibarri,* 67 N.M. at 338, 355 P.2d at 276. Like first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter, *see State v. McFall,* 67 N.M. 260, 265, 354 P.2d 547, 550 (1960), we believe that vehicular homicide under Section 66–8–101 is a degree of the generic offense of felonious homicide. *Cf. State v. Deming,* 66 N.M. 175, 177–78, 344 P.2d 481, 482–83 (1959); *State v. Sandoval,* 88 N.M. 267, 269, 539 P.2d 1029, 1031 (Ct. App.1975) (relationship between statutory offenses of vehicular homicide and involuntary manslaughter); SCRA 1986, 14–240 through 14–243 (uniform jury instructions on vehicular homicide compiled with other homicide instructions). We therefore hold that vehicular homicide while under the influence of drugs is a lesser included offense of first degree depraved mind murder.

The trial court must give requested instructions on vehicular homicide while under the influence of drugs as a lesser included offense only where the evidence could support a conviction for the lesser offense. *See State v. Omar-Muhammad,* 102 N.M. at 279, 694 P.2d at 927. On review, we must determine whether evidence was adduced in this trial from which the jury could have found that, as a result of using a drug, defendant's ability to drive safely was impaired to the slightest degree. *See State v. Deming,* 66 N.M. at 180, 344 P.2d at 484–85; *State v. Dutchover,* 85 N.M. 72, 73, 509 P.2d 264, 265 (Ct.App. 1973); SCRA 1986, 14–243. We believe that the evidence of defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. We therefore hold that the district court committed reversible error in refusing to instruct the jury on the lesser included offense.

III. Admissibility of In-Custody Statement for Impeachment Purposes.

While in police custody on October 6, 1983, and after his request to speak to his parents and his lawyer had been denied, defendant gave a recorded statement to the

police. Early in the course of these proceedings, the defense moved the court to suppress that statement on the ground that it was elicited in violation of the requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because the prosecution conceded that its admissibility was questionable and chose not to use the statement in the State's case in chief, no ruling on the motion was invoked. At trial, however, the prosecution obtained the court's permission and used the statement to impeach defendant's testimony during cross-examination. On appeal, defendant contends that his statement was involuntary and therefore inadmissible for impeachment purposes.

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), authorizes the prosecution to impeach the defendant's testimony by the use of prior statements inadmissible against him in the State's case in chief under *Miranda* if "the trustworthiness of the evidence satisfies legal standards." *Id.* at 224, 91 S.Ct. at 645. In order to meet the standard of trustworthiness, the statements must have been given voluntarily. *Mincey v. Arizona,* 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978); *Oregon v. Hass,* 420 U.S. 714, 722–723, 95 S.Ct. 1215, 1220–1221, 43 L.Ed.2d 570 (1975); *State v. Trujillo,* 93 N.M. 728, 730–31, 605 P.2d 236, 238–39 (Ct.App.1979), *aff'd on other grounds,* 93 N.M. 724, 605 P.2d 232 (1980). While due process of law ensures the defendant the right at some stage to object, to have a fair hearing on the issue of voluntariness, and to invoke a ruling by the trial court, it does not compel the court to conduct an evidentiary hearing in every case. *See State v. Trujillo,* 93 N.M. at 731, 605 P.2d at 239; *State v. Gallegos,* 92 N.M. 336, 340, 587 P.2d 1347, 1351 (Ct.App.1978); *see also Jackson v. Denno,* 378 U.S. 368, 376–77, 84 S.Ct. 1774, 1780–1781, 12 L.Ed.2d 908 (1964). *Compare Wainwright v. Sykes,* 433 U.S. 72, 86, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977) (if defendant does not object, *Jackson v. Denno* hearing is not required prior to admission in case in chief) *with Mincey v. Arizona,* 437 U.S. at 397 and n. 12, 98 S.Ct. at 2416 and n. 12 (*Jackson v. Denno* hearing conducted prior to impeachment use).

The State here argues that defendant was not entitled to such a hearing because he failed to raise the issue of voluntariness at trial. The record is unclear and, because we have already determined that defendant's conviction must be reversed, we need not resolve this factual dispute. On retrial, if defendant properly raises the issue of voluntariness, the district court shall conduct an appropriate hearing. *See State v. Word,* 80 N.M. 377, 379–80, 456 P.2d 210, 212–13 (Ct.App.1969); *see also* SCRA 1986, 5–601 (pretrial motions). If the district court is satisfied that the statement was given voluntarily, it may be used for impeachment purposes.

IV. Admissibility of Evidence of Defendant's Unauthorized Departure from Juvenile Detention Facility.

Before defendant testified, defense counsel made a motion in limine asking the district court to forbid the State from cross-examining defendant regarding his unauthorized departure from a juvenile detention facility in Colorado six weeks before the events leading to the conviction he now appeals. The district court ruled that defendant would subject himself to cross-examination regarding the Colorado incident if he elected to testify, and when defendant took the witness stand, he was cross-examined on this matter. On appeal, defendant contends he was denied his right to a fair trial by the erroneous admission of evidence of his prior acts.

Evidence admissible for one purpose is not to be excluded because it is inadmissible for another purpose. *State v. Wyman,* 96 N.M. 558, 560, 632 P.2d 1196, 1198 (Ct.App.1981). Even if evidence of prior juvenile adjudications is inadmissible under SCRA 1986, Rule 11–609(C) for the purpose of attacking the credibility of a witness, evidence of prior crimes and wrongs may be admissible under SCRA 1986, Rule 11–404(B) for other purposes, such as proof of motive, if it is probative of a material element at issue. *Cf. State v. McGhee,* 103

N.M. 100, 104, 703 P.2d 877, 881 (1985) (material element requirement).

The admission of evidence rests within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *Id.* Although a specific intention or motive to kill is not an element of depraved mind murder, *State v. Johnson,* 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct.App.), *cert. quashed,* 103 N.M. 344, 707 P.2d 552 (1985), we believe that the district court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *Cf. State v. Omar-Muhammad,* 102 N.M. at 278, 694 P.2d at 926 (elements of offense). Furthermore, the record indicates that the district court here exercised its discretion carefully in determining that the probative value of this evidence was not substantially outweighed by its possible prejudicial effect. *See State v. McGhee,* 103 N.M. at 105, 703 P.2d at 882; SCRA 1986, 11–403. We cannot say that the district court abused its discretion in determining that evidence of defendant's unauthorized departure from the Colorado juvenile detention facility was admissible in accordance with Rules 11–404(B) and 11–403.

V. Prosecutorial Misconduct in Closing Argument.

During closing argument, the prosecutor referred to defendant's "heedless and reckless disregard of human life" and stated that, "by doing an act of callous indifference, he caused the death of Allen Gates Cross." The defense made no objection to these statements during argument but, after the jury had retired, moved the district court to admonish the jury that the terms used by the prosecutor did not define a "depraved mind." The district court denied the motion. On appeal, defendant contends that he was denied his right to a fair trial by the prosecutor's attempts to instruct on the law.

The prosecutor is entitled to a reasonable measure of latitude in his closing remarks to the jury, and the district court has wide discretion in controlling closing arguments. *State v. Ruffino,* 94 N.M. 500, 503, 612 P.2d 1311, 1314 (1980). We believe that the prosecution remained within the bounds of proper argument to the jury. Moreover, even if we believed that the prosecutor's closing argument improperly invaded the province of the court by instructing on the law, *see State v. Payne,* 96 N.M. 347, 352, 630 P.2d 299, 304 (Ct.App. 1981), *overruled on other grounds, Buzbee v. Donnelly,* 96 N.M. 692, 634 P.2d 1244 (1981), we could not say that the prosecutor's use of several adjectives of his choice so influenced a jury correctly instructed on the law by the district court as to have deprived defendant of a fair and impartial trial. *Cf. State v. Taylor,* 104 N.M. 88, 95, 717 P.2d 64, 71 (Ct.App.), *cert. denied,* 103 N.M. 798, 715 P.2d 71 (1986) (single remark referring to facts outside the evidence); *State v. Vallejos,* 98 N.M. 798, 801, 653 P.2d 174, 177 (Ct.App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982) (jury properly instructed on the law).

In conclusion, we hold that the district court erred in refusing to instruct the jury on, first, vehicular homicide by reckless driving and, second, vehicular homicide while under the influence of drugs, because each is a lesser degree of felonious homicide and a lesser included offense of the crime with which defendant was charged, first degree depraved mind murder, and because the evidence could have supported a conviction for either vehicular homicide offense. Defendant's conviction therefore must be reversed.

We further hold that the district court was authorized to admit, for purposes of impeachment, a voluntary, in-custody statement elicited from defendant in violation of the requirements of *Miranda.* Without deciding whether due process of law required an evidentiary hearing in this case, we hold that the defendant is entitled to a fair hearing and a ruling by the trial court if he properly raises the issue of voluntariness. We hold that the district court did not err

in admitting evidence of defendant's unauthorized departure from a juvenile detention facility for the purpose of proving a material issue under Rule 11–404(B), even though that evidence might not be admissible for impeachment purposes under Rule 11–609(C). Finally, we hold that defendant's right to a fair trial was not denied by the prosecutor's choice of adjectives in his closing argument.

For the foregoing reasons, the judgment and sentence of the district court is reversed, and this case is remanded for a new trial.

IT IS SO ORDERED.

SCARBOROUGH, C.J., and WALTERS, J., concur.

737 P.2d 1174

Mary G. ZENGERLE, Plaintiff-Appellee,

v.

CITY OF SOCORRO and Mission Insurance Company, Defendants-Appellants.

No. 8877.

Court of Appeals of New Mexico.

Sept. 25, 1986.

Certiorari Quashed June 1, 1987.

Howard R. Thomas, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, for defendants-appellants.

Catherine Gordon, Duhigg, Cronin & Spring, Albuquerque, for plaintiff-appellee.

OPINION

BIVINS, Judge.

In this worker's compensation case, defendants appeal from a judgment awarding

plaintiff total disability and related benefits, claiming as error the trial court's refusal to find plaintiff's claim barred by the statute providing time limitations for filing a claim. This appeal presents the question of when does it, or when should it, become reasonably apparent to a worker, who suffers from a gradually developing job-related stomach ulcer, that she has a compensable injury on account of which she is entitled to compensation. The trial court found that such occurred when plaintiff became totally disabled and could no longer work, more than eight years following the onset of her symptoms. Under the circumstances of this case, we agree and affirm. Three additional issues hinge on the time limitation question, and may be disposed of summarily.

We first summarize the trial court's findings of fact. Plaintiff worked for the City of Socorro (City) from 1972 through September 23, 1983, when she resigned on her doctor's advice that, because of her medical condition, she could no longer work. This medical condition, a stomach ulcer caused by work-related stress, first manifested itself in March of 1975 when plaintiff was admitted to the hospital for diagnosis and treatment. Following this hospitalization, plaintiff returned to her job as a cashier at the same rate of pay and same duties with no disability. Plaintiff continued under her doctor's care as needed until November 1976 when she again was hospitalized for an acute attack of stomach pain. Plaintiff's doctor diagnosed a bleeding ulcer and removed a portion of her stomach. Plaintiff returned to her job as a cashier in January 1977, again with the same duties and rate of pay and with no disability.

On April 18, 1981, plaintiff was admitted to the hospital because she was vomiting blood. Based on her doctor's advice, plaintiff requested reassignment to a job with less stress. She told her employers at this time she would have to retire because of the stress of her job. Following her hospitalization, plaintiff returned to work for the City as an account secretary, a job "ostensibly with less stress." From this point until her resignation in 1983, plaintiff's condition worsened. The stress of her employment accelerated and aggravated the ulcer which eventually resulted in plaintiff's inability to work in 1983.

From the onset of her complaints in 1975 until she resigned, plaintiff knew her gastrointestinal problems were work-related. Her doctors so advised her. Plaintiff was temporarily totally disabled for six weeks in 1975, six weeks in 1976 and three weeks in 1977 on account of her ulcer. She also incurred medical expenses. At no time prior to her resignation in September 1983 did plaintiff file a claim for worker's compensation benefits. None were paid. Plaintiff utilized sick leave and vacation time for all or a part of her absences, and used the City's group health insurance to pay her medical expenses.

The trial court found that plaintiff suffered an accidental injury in the form of a stomach ulcer which arose out of and in the course of her employment with the City, and that this accidental injury totally disabled plaintiff in September 1983. Plaintiff filed this action on March 20, 1984.

NMSA 1978, Section 52-1-31(A) provides in relevant part:

> If an employer or his insurer fails or refuses to pay a workman any installment of compensation to which the workman is entitled * * * it is the duty of the workman insisting on the payment of compensation to file a claim therefor as provided in the Workmen's Compensation Act, not later than one year after the failure or refusal of the employer or insurer to pay compensation. This one year period of limitations shall be tolled during the time a workman remains employed by the employer by whom he was employed at the time of such accidental injury, not to exceed a period of one year. If the workman fails * * * to file a claim for compensation within the time required by this section, his claim for compensation, all his right to the recovery of compensation and the bringing of any legal proceeding for the recovery of compensation are forever barred.

The statutory period begins to run "[a]s soon as it becomes reasonably apparent, or

should become reasonably apparent to a workman that he has an injury on account of which he is entitlted to compensation and the employer fails or refuses to make payment he has a right to file a claim and the statute begins to run from that date." *Noland v. Young Drilling Co.*, 79 N.M. 444, 447, 444 P.2d 771, 774 (Ct.App.1968). *See also ABF Freight System v. Montano*, 99 N.M. 259, 657 P.2d 115 (1982).

The precise question presented in this appeal is when did it become reasonably apparent to plaintiff that she had an injury on account of which she was entitled to compensation? We know from the unchallenged findings that plaintiff knew at all times that her ulcer was related to the stress of her job; that the condition fluctuated symptomatically from 1975 to 1981 and worsened after that date; that plaintiff missed time from work while recovering from episodes in 1975, 1976–77 and 1981; and that the employer and its insurer never paid any compensation or other benefits.

Defendants first claim it should have been reasonably apparent to plaintiff that she had a compensable claim when she was temporarily totally disabled in 1975, 1976 and 1977, and when she incurred medical expenses from 1975 forward, and neither the City nor its compensation insurer paid temporary disability or medical expenses. We disagree. The statute of limitations does not apply to medical expenses, and medical expenses may be claimed even though the right to claim installment payments of compensation may be barred. *Nasci v. Frank Paxton Lumber Co.*, 69 N.M. 412, 367 P.2d 913 (1961).

Does the failure to pay temporary disability trigger the running of the statute? A worker is entitled to compensation when he or she becomes disabled within the meaning of the Act. *See Cardenas v. United Nuclear Homestake Partners* 97 N.M. 46, 636 P.2d 317 (Ct.App.1981); *Lamont v. New Mexico Military Institute*, 92 N.M. 804, 595 P.2d 774 (Ct.App.1979). NMSA 1978, Section 52–1–24 defines total disability as:

> [A] condition whereby a workman, by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity and previous work experience.

The definition for partial disability differs only in that the worker need be "unable to some percentage-extent" to perform work. NMSA 1978, § 52–1–25. *See Medina v. Zia Co.*, 88 N.M. 615, 544 P.2d 1180 (Ct. App.1975).

The fact that plaintiff may have been entitled to some compensation for temporary disability in 1975, 1976 and 1977 should not necessarily bar her recovery in the present case for permanent disability. Although the statutory scheme defines the same period of limitations for partial and total disability, it makes little sense to use the same limitations period for temporary and permanent disability. Partial and total disability are not two concepts, but two segments of one disability continuum. *Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974). *See also Noland v. Young Drilling Co.* In contrast, temporary and permanent disability are two concepts. Temporary disability lasts for a limited time only and ceases when the condition becomes static or stationary. *See Lane v. Levi Strauss & Co.*, 92 N.M. 504, 590 P.2d 652 (Ct.App.1979). Permanent disability does not last for a limited time only.

This position is bolstered by *Cordova v. City of Albuquerque*, 71 N.M. 491, 379 P.2d 781 (1962), where the court stated that a return to previous employment and payment of regular wages for the performance of usual duties, absent any suspicious circumstances, relieves the employer of the duty to make compensation payments. Therefore, the court reasoned, the employee's obligation to file a suit during such a period is suspended and the statute of limitations is tolled. The court affirmed the trial court's judgment which awarded the worker thirty-five percent disability, even though he had returned to work subse-

quent to his injury and was discharged six months later because he was unable to do heavy manual labor. Applying *Cordova v. City of Albuquerque* to the present case, because plaintiff returned to her previous employment after her temporary disabilities in 1975, 1976 and 1977, defendants were relieved from their obligation to pay her compensation after those periods.

Defendants next argue that, at the very least, plaintiff became aware she had a compensable claim in 1981 when, following a two-day hospitalization, she requested and obtained a reassignment from cashier to a less stressful job.

We have already said that a worker is entitled to compensation when he or she becomes disabled. Two tests are involved in the definition of total or partial disability: the inability, either wholly or partially, to (1) perform the usual tasks of the work the worker was doing at the time of the injury, and (2) to perform any work for which the worker is fitted. §§ 52–1–24 and –25; *Medina v. Zia Co.* The first test was met in April 1981 when, following brief hospitalization, plaintiff was unable to return to work as a cashier.

The second test was not met, however, until September 1983 when, because of the ulcer, plaintiff could no longer work and, on the advice of her doctor, resigned her position with the City. After reciting plaintiff's return to work in April 1981 as an account secretary, the trial court found: "Plaintiff worked as an Account Secretary, *with no disability,* until September 1983. During this time Plaintiff was under doctor's care and was taking medication to control her stomach problems." (Emphasis added.)

In a footnote in their brief-in-chief, defendants state that they are challenging the above-quoted finding and other findings made by the trial court as unsupported by substantial evidence. If defendants' challenge goes to the sufficiency of the evidence, it will be disregarded because they do not provide this court with a resume of all facts relevant to the issue with transcript references. *See* NMSA 1978, Crim., Child.Ct., Dom.Rel. & W/C App.R. 501(a)(3) and (4) (Cum.Supp.1985); *City of Farmington v. Sandoval,* 90 N.M. 246, 561 P.2d 945 (Ct.App.1977). While characterized as an attack on the evidence, we understand defendants' real challenge goes to the legal effect of all findings. Defendants appear to be challenging the legal conclusions drawn from the findings as made. Our analysis answers this challenge.

If plaintiff was not partially disabled after reassignment to the position of account secretary, then the trial court's finding that she suffered an accidental injury on or about September 23, 1983, which totally disabled her from working as of that date, supports a conclusion that the claim was timely filed.

All we know from the findings is that plaintiff worked as an account secretary without disability until September 1983; that during that time she was under a doctor's care and taking medication to control her stomach problems; that her condition worsened; and that the continued stress accelerated and aggravated the ulcer which eventually resulted in her total disability in 1983.

Notwithstanding the gradual deterioration of her condition, there is no indication that the position of account secretary did not approximate that of cashier, nor is there any showing that plaintiff could not perform all the duties of that position. *Cf. Anaya v. New Mexico Steel Erectors, Inc.,* 94 N.M. 370, 610 P.2d 1199 (1980); *Amos v. Gilbert Western Corp.,* 103 N.M. 631, 711 P.2d 908 (Ct.App.1985).

A number of cases discuss when a partial disability triggers the running of the statute of limitations. In *ABF Freight System v. Montano,* plaintiff, following hospitalization, returned to the same job. The supreme court reversed this court and affirmed the trial court's finding that plaintiff's claim was barred by Section 52–1–31. In that case, the statute was triggered by a disability evidenced by plaintiff working with pain, by a reduction of his activities, by his requesting others to assist him in his duties, by his seeking medical attention, and by his application of home remedies to

relieve pain and disability. *See also Romero v. American Furniture Co.*, 86 N.M. 661, 526 P.2d 803 (Ct.App.1974) (dismissal upheld where it was reasonably apparent to the worker that he had some restriction of motion but failed to file within the time limitation); *Bowers v. Wayne Lovelady Dodge, Inc.*, 80 N.M. 475, 457 P.2d 994 (Ct.App.1969) (statute commenced to run after plaintiff returned to work but at times was unable to stand by himself, at other times he had to lay down, had convulsions and abnormal behavior, and was assigned a helper); *Cordova v. Union Baking Co.*, 80 N.M. 241, 453 P.2d 761 (Ct.App. 1969) (summary judgment for defendant upheld where plaintiff required assistance of co-workers with heavy lifting).

We observe a common thread running through cases such as *ABF Freight System, Romero, Bowers* and *Cordova.* In each case, the worker either returned to a job with less strenuous duties or was unable to perform the duties without assistance, or was unable to perform because of some limitation, such as disabling pain or limitation of motion, or absence from work. In the present case, we have no evidence of a reduction in duties, the need for assistance, absence from work or proof that plaintiff worked with any limitation or disabling pain, although we might assume some pain from the nature of the injury. *See Gomez v. Hausman Corp.*, 83 N.M. 400, 492 P.2d 1263 (Ct.App.1971) (nondisabling pain does not constitute a compensable claim). While it may appear incredulous that plaintiff, with a deteriorating condition aggravated and accelerated by the stress of her work and while under a doctor's care and taking medication, could perform without any of the indicia of disability until her final day of work when she became totally disabled, we have been shown no evidence that this did not happen. Failure to comply with the rule that the substance of all relevant facts, with transcript references, be stated in the brief will result in the trial court's findings being left undisturbed. *Giovannini v. Turrietta*, 76 N.M. 344, 414 P.2d 855 (1966). A reviewing court will not search the record to find facts with which to overturn the lower court's findings. *Totah Drilling Co. v. Abraham*, 64 N.M. 380, 328 P.2d 1083 (1958).

For this court to reverse, we would have to hold as a matter of law that returning to a position which apparently approximated plaintiff's work as a cashier without either apparent disabling pain, or reduction of activities, or the need of assistance, or missing time from work, or functioning below a normal level constitutes a disablement. We do not believe the Workmen's Compensation Act or the cases construing it require that result. Therefore, we hold the trial court correctly found that disability commenced in September 1983 and, accordingly, plaintiff's action was within the time limitation.

If the reassignment to a position "ostensibly with less stress" amounted to an acknowledgment of a partial disability, we might reach a different result; however, without the benefit of facts as to the nature of the job or what it entails, we are constrained to accept the trial court's finding that plaintiff worked "with no disability" until she resigned.

In reaching this result, we have not overlooked *Lent v. Employment Security Commission*, 99 N.M. 407, 658 P.2d 1134 (Ct.App.1982), in which we held that the limitation period did not begin anew when plaintiff became totally disabled where the period had previously commenced running for partial disability. We reaffirm, as stated in *Lent* and *Noland*, the principle that the running of the statute may not be delayed until a more serious disability is ascertainable. That is not the situation here. Since there was no partial disability, plaintiff did not forestall filing until a partial disability became total. Rather, she suffered from a progressive condition which did not become compensable until she was totally disabled.

Defendants claim error in the trial court's refusal to grant them summary judgment. In *Pena v. New Mexico Highway Department*, 100 N.M. 408, 671 P.2d 656 (Ct.App.1983), this court held that a determination of the timeliness of filing a

claim may be decided as a question of law only if under the undisputed facts there is no room for a reasonable difference of opinion. Here, the trial court had to determine from the evidence when a compensable claim arose, clearly a question of fact.

Defendants' last two points involve what rate of pay should have been used, and whether plaintiff was entitled to attorney fees below. In view of our disposition of the time limitation issue, it is clear that the trial court correctly used the 1983 rate of pay to determine the compensation rate, and that the trial court did not err in awarding attorney fees to plaintiff.

We affirm the judgment and allow plaintiff $2,000 attorney fees for her success on appeal in preserving her award.

IT IS SO ORDERED.

HENDLEY, C.J., and FRUMAN, J., concur.

737 P.2d 1180

STATE of New Mexico, ex rel. Hal STRATTON, Attorney General, Plaintiff-Appellant,

v.

GURLEY MOTOR COMPANY, a New Mexico Corporation, Defendant-Appellee.

No. 8604.

Court of Appeals of New Mexico.

April 23, 1987.

Certiorari Denied June 1, 1987.

Hal Stratton, Atty. Gen., Wayne H. Bladh, Frank D. Weissbarth, Asst. Attys. Gen., Santa Fe, for plaintiff-appellant.

Mark F. Sheridan, Anne B. Hemenway, Montgomery & Andrews, P.A., Santa Fe, for defendant-appellee.

OPINION

DONNELLY, Chief Judge.

The state appeals from a judgment dismissing with prejudice its complaint for injunctive relief, restitution and civil penalties. Three issues are presented on appeal: (1) whether the state was barred from bringing suit against defendant Gurley Motor Company for alleged payment of illegal insurance premium rebates and deceptive trade practices under the Unfair Practices Act (UPA); (2) whether the Unfair Insurance Practices Act (UIPA) precludes the state from bringing suit against defendants based upon alleged misrepresentations; and (3) whether defendants are immune from suit herein under an exemption contained in the Unfair Practices Act. Reversed and remanded.

The state, on the relation of the attorney general, brought suit in November 1983, against defendants Gurley Motor Company, a corporation, Lloyds of the Southwest insurance company, and eight other individuals. The complaint filed by the state alleged that defendants had violated the New Mexico Unfair Practices Act, NMSA 1978, Sections 57–12–1 to –16, by paying illegal insurance premium rebates from Lloyds to defendant Gurley Motor Company. The state also contended defendants had engaged in other deceptive practices. The state sought injunctive relief, civil penalties, and the payment of restitution to consumers alleged to have been injured by the unlawful practices.

After suit was filed, the district court permitted ten other individuals to intervene in the action as additional party plaintiffs. Intervenors have not appealed from the judgment of dismissal.

Defendants moved to dismiss the complaint under SCRA 1986, Rule 1–012(B)(6) for failure to state a claim upon which relief may be granted. The motion for dismissal was based upon two grounds: (1) defendants asserted that their alleged conduct was governed exclusively by the Unfair Insurance Practices Act, NMSA 1978, Sections 59–11–9 to –22; and (2) that even if the Unfair Practices Act did apply to the

conduct of defendants, Section 57-12-7 of the UPA exempted their conduct from liability.

Following a hearing on defendants' motion, the trial court granted the motion to dismiss. The state has abandoned its appeal to all defendants except Gurley Motor Company.

I. EXCLUSIVITY OF UNFAIR INSURANCE PRACTICES ACT

At the hearing on the motion to dismiss, the state contended that between August 1978 and May 1981, defendant Gurley Motors solicited insurance sales and referred customers to Lloyds for insurance on vehicles sold by Gurley. During this period, Lloyds paid Gurley a commission out of premiums that customers paid to Lloyds for motor vehicle insurance. The state asserted that Lloyds and Gurley Motors knew that Gurley was neither a licensed insurance agent, broker nor solicitor at the time Gurley received the rebates. The state also asserted that neither Gurley nor Lloyds disclosed to customers that Gurley received a substantial rebate out of insurance premiums; that Gurley and Lloyds falsely stated to customers that the premium for the insurance policies was in consideration for insurance services—when a portion included an illegal payment to Gurley; and that Gurley and Lloyd made false or misleading statements and failed to disclose material information to customers concerning their common ownership and the insurance premium and commission payments, which tended to deceive customers.

The trial court ruled that the complaint did not state a claim under the Unfair Practices Act because Gurley's conduct was governed exclusively by the provisions of the Unfair Insurance Practices Act. In so ruling, the trial court determined that the UIPA constituted specific legislation that controlled over the general legislation of the UPA.

The New Mexico Legislature enacted a comprehensive Unfair Practices Act, Sections 57-12-1 to -16, in 1967. This Act prohibits unconscionable and unfair or deceptive trade practices. § 57-12-3. The Unfair Insurance Practices Act was enacted in 1973 and also prohibits certain unfair methods of competition and unfair or deceptive acts or practices in the business of insurance.[1] §§ 59-11-12 and -13. Defendant contends that the UIPA supersedes the provisions of the UPA because the statutes apply to the same subject matter and irreconcilable conflicts exist within their respective applications. We jointly discuss the state's first and second points raised on appeal.

The rule that a specific statute controls over a general statute dealing with the same subject matter applies only when the two statutes apply to the same conduct. *See State v. Ross,* 104 N.M. 23, 715 P.2d 471 (Ct.App.1986) (two statutes must proscribe the same act in order for the specific offense to prevail over the more general crime). In order for a specific statute to prevail over the general, there must exist conflicting statutory provisions, *State v. Gabaldon,* 92 N.M. 230, 585 P.2d 1352 (Ct. App.1978), such that a necessary repugnancy cannot possibly be harmonized. *State v. Blevins,* 40 N.M. 367, 60 P.2d 208 (1936). Absent an irreconcilable conflict, a specific statute prevails over the general statute only upon a clearly expressed legislative intention to repeal. *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). On the other hand, where there is no clear intention, a specific statute will not be controlled or nullified by a general one. *Id.* It is the duty of the courts to regard each statute as effective whenever they are capable of co-existence. *Id.*

(A) *Unconscionable Trade Practice Claim*

The state contends that defendant's practice of soliciting insurance sales and receiving commission payments without a

1. Following the filing of this action, the 1984 legislature enacted a comprehensive New Mexico Insurance Code, NMSA 1978, Sections 59A-1-1 to 59A-53-17, which repealed the former UIPA and replaced it with Trade Practices and Frauds, Sections 59A-16-1 to -30, effective January 1, 1985.

license for that solicitation and receipt is an unconscionable trade practice under Section 57–12–2(D) that is not expressly prohibited by the UIPA. *See* § 59–11–13. To the extent this unconscionable trade practices claim pertains to the receipt of commission payments, we note that Section 59–11–13(H) of the UIPA does define as an unfair or deceptive act or practice the

> [P]aying or allowing, or giving or offering to pay, allow or give as inducement to [life or accident and health] insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration, inducement or anything of value whatsoever which is not specified in the contract.

Although this provision relates to the subject matter of the state's claims, we discern no conflict insofar as this section concerns rebates not specified in the contract for insurance other than for a motor vehicle. The state's complaint alleged that commissions were paid out of premiums paid for insurance covering motor vehicles.

The purpose of the UIPA as it existed when this action was initiated, as declared in Section 59–11–10, was to regulate trade practices in the business of insurance by defining all trade practices that violate the Act. This regulatory purpose is not furthered by reading into the UIPA a grant of immunity from suit under the Unfair Practices Act for conduct not specifically mentioned in the UIPA as the statute existed at the time this action was initiated. *Cf. Patterson v. Globe Am. Casualty Co.,* 101 N.M. 541, 685 P.2d 396 (Ct.App.1984) (even though the UIPA did not provide a private right of action against an insurer, the court expressly noted that it did not exclude private actions against insurers from sources other than the Act). Although we recognize that each statute possesses different enforcement methods and penalty provisions, we do not consider these differences to rise to the level of an irreconcilable conflict.

(B) *Unfair or Deceptive Trade Practices Claim*

The state also contends that the UIPA does not preclude its UPA unfair or deceptive trade practices claim based on defendant's alleged misrepresentations, even though it concedes that both statutes apply to the same alleged conduct. The most significant difference between these statutes regarding this claim lies in their respective remedies.

The UPA authorizes the attorney general to pursue injunctive relief and restitution to injured persons, in addition to actions for civil penalties for willful violations of the Act. The UPA also authorizes private actions for actual or statutory damages, injunctive relief, and attorneys fees.

The Unfair Insurance Practices Act authorizes the superintendent of insurance to issue cease and desist orders, to suspend or revoke the licenses of insurance companies, to seek injunctive relief in order to preclude improper trade practices, and to initiate actions for imposition of civil penalties for violations of the UIPA.[2] The UIPA, however, does not give the superintendent authority to seek damages or restitution in actions brought by him.

Our examination of the UPA and the UIPA indicates that the legislature did not intend to preclude claims by the state under other laws for misrepresentations or alleged improper conduct relating to insurance activities. Instead of conflicting, each Act's remedial scheme functions to achieve different but complimentary results: the UIPA remedies regulate the insurance industry primarily through administrative enforcement, whereas the remedies under the UPA have distinct compensatory elements, providing relief to the injured person, as opposed to policing the industry.

We determine that the legislature, in enacting the UIPA, did not intend to make the UIPA the exclusive remedy under state law for conduct prohibited in that Act. For example, a private plaintiff may pursue the remedies contained under Section 57–12–10

2. Sections 59A–15–1 to –13 of the 1984 enactment (Insurance Code) also govern unauthorized insurance practices, including representing or aiding unauthorized insurers.

for unfair or deceptive trade practices, notwithstanding the statutory authority investing the superintendent of insurance with broad administrative powers under the Insurance Code. *See Ray v. United Family Life Ins. Co.*, 430 F.Supp. 1353 (W.D.N.C.1977); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C.App. 180, 268 S.E.2d 271 (1980); *see also Fox v. Indus. Casualty Ins. Co.*, 98 Ill.App.3d 543, 54 Ill.Dec. 89, 424 N.E.2d 839 (1981).

II. APPLICABILITY OF UNFAIR PRACTICES ACT

Defendant argues that under Section 57–12–7 of the UPA, its conduct was exempted from the sanctions and relief provided in the UPA. Section 57–12–7 declares that, "Nothing in the Unfair Practices Act * * * shall apply to actions or transactions permitted under laws administered by a regulatory body of the state of New Mexico or the United States."

Defendant contends the language of Section 57–12–7 places the responsibility for regulating the complained-of conduct under the superintendent of insurance, even though defendant was not a licensed insurance agent, and exempts defendant from the provisions of the Unfair Practices Act. In support of their arguments, defendant also contends the alleged illegal rebates between Lloyds and Gurley Motors were subject to regulation under the Insurance Holding Company Act, NMSA 1978, Sections 59–7–1 to –33.

Defendant contends that Lloyds is an insurer within the meaning of the Insurance Holding Company Act and that Gurley Motors is an affiliate; hence, Lloyds and Gurley Motors were exempt from regulation under the Unfair Practices Act.

We disagree that defendant Gurley was exempt from action by the state under the Unfair Practices Act by reason of the exemption contained in Section 57–12–7. The language of the exemption statute only applies to activities that are permitted under other laws, not activities that are not even implicitly authorized under other regulatory licensing laws. We construe the language "permitted under laws administered by a regulatory body" in Section 57–12–7 to require more than the mere existence of a regulatory body in order for the exemption to apply. At a minimum, the regulatory body must actually administer the regulatory laws with respect to the party claiming the exemption, thereby exercising at least the modicum of oversight that the exempting language indicates is required. In effect, this means the regulatory body must render permission to engage in the business of the transaction through licensing, registration or some similar manifestation of "permitting" the business activity. Until the party complies with the requisite licensing or registration procedure, the regulatory body cannot be deemed to have authorized, or implicitly permitted, any transactions in the area subject to regulation.

Other jurisdictions are in accord with this reasoning. *See, e.g., State v. Piedmont Funding Corp.*, 119 R.I. 695, 699–700, 382 A.2d 819, 822 (1978); *State ex rel. McLeod v. Rhoades*, 275 S.C. 104, 267 S.E.2d 539 (1980) (citing and quoting *State v. Piedmont Funding Corp.* with approval). In *Piedmont*, the Rhode Island Supreme Court reviewed whether the trial court's dismissal of the state's complaint alleging various deceptive trade practices in sales of insurance and investment programs was proper under an exemption provision nearly identical to that on review here and observed:

> In order to sell insurance policies or mutual funds in Rhode Island, the seller must first obtain permission or register with the proper regulatory agency. The sale of insurance is permitted only under the authority of the office of the insurance commissioner * * *. After the seller obtains permission or registers to engage in the activity of selling insurance or mutual funds in Rhode Island, he is subject to monitoring the regulation by the appropriate regulatory agency or officer. Therefore, in the case at bar, [when a seller has obtained permission through registering or licensing under the Act] because the conduct at issue was clearly subject to the control of gov-

> ernmental agencies on both the state and federal level, it is within the exemption provision and not subject to the mandates of the Act. [Citation omitted.]

The dismissal by the trial court in *Piedmont* was affirmed, however, because defendant proved that the sale of insurance and mutual funds was regulated by the insurance commissioner and SEC respectively, and that failure to comply with the respective rules and regulations would result in revocation of the license to sell insurance or mutual funds.

Similarly, in *Allen v. American Land Research,* 95 Wash.2d 841, 631 P.2d 930 (1981) (en banc), the state supreme court reviewed whether an exemption provision, similar to ours, applied in an action against real estate brokers under the Washington Consumer Protection Act for alleged fraud in land sales because defendants were regulated under the Washington Brokers Act.

The court noted that:

> [A]n agency must do more than merely monitor the business practices of those who are in the area; the entry into that area must also be controlled. *State v. Reader's Digest Ass'n,* 81 Wash.2d 259, 501 P.2d 290 (1972). The Brokers Act clearly controls entry into the occupation of selling real estate. The provisions of that act cover licensing of brokers, and require brokers and salespersons to conform to certain standards and code of conduct in order to maintain those licenses. But for those who are not licensed, the Brokers Act obviously does not act as a regulatory agency.

Id. at 846, 631 P.2d at 933–34; *see also Ferguson v. United Ins. Co. of America,* 163 Ga.App. 282, 293 S.E.2d 736 (1982) (summary judgment in favor of defendant was correctly granted under Fair Business Practices Act where insurance transactions were regulated by Insurance Code in that no insurer could transact insurance except as authorized by certificate of authority from insurance commissioner).

We do not interpret Section 57–12–7 to exempt from the application of the provisions of the Unfair Practices Act (as the law existed at the time of the filing of this action), unlicensed individuals or entities who are engaged in activities that are not permitted by state or federal regulatory bodies.[3] Similarly, Gurley Motors was not immune from suit under the Unfair Practices Act as an affiliate of Lloyds. Defendant Gurley Motors was organized as a separate legal entity, and under the allegations of the complaint filed herein was not authorized to solicit orders for insurance or to receive insurance commission rebates.

The attorney general is specifically charged with responsibility for enforcing the Unfair Practices Act. *See* §§ 57–12–8; –15. Because the Unfair Practices Act constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent. *Albuquerque Hilton Inn v. Haley,* 90 N.M. 510, 565 P.2d 1027 (1977). *Cf. Mutz v. Municipal Boundary Comm'n,* 101 N.M. 694, 688 P.2d 12 (1984).

The alleged activities of the defendant, which are the subject of the state's complaint herein, were not authorized transactions permitted under the insurance laws of this state; hence, they were not exempted from actions or relief sought under the Unfair Practices Act.

We have considered the other arguments raised by appellee on appeal and consider them to be without merit.

The trial court's order dismissing the state's complaint is reversed and the cause remanded for trial on the merits.

IT IS SO ORDERED.

ALARID and APODACA, JJ., concur.

3. The new Insurance Code, under Section 59A–16–17, expressly prohibits the payment of rebates from vehicle or title insurers to non-licensed agents, provides for supervision of insurance trade practices and acts by the superintendent of insurance under Section 59A–16–1, provides for criminal penalties and the issuance of cease and desist orders, Sections 59A–16–27, –29, and provides for a private cause of action under Section 59A–16–30.